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391	Jangi Singh v. Ganga Singh	..	10 O. L. J. 393; (1924) A. I. R. (O.) 115.
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398	Harji Mal v. Devi Ditta Mal	..	4 L. 364; (1924) A. I. R. (L) 107.
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402	Saw Hla Aung v. Ma Ma Nyo	..	1 R. 555; (1924) A. I. R. (R.) 165.
403	Linton Molesworth & Co. v. Jagganath Supakar		1 P. L. R. 377; (1924) A. I. R. (Pat) 226.
408	Ramanathan Chetty v. Ramanathan Chetty	..	11 L. B. R. 446; (1923) A. I. R. (R.) 22.
409	Gobind Das v. Rupkishore	..	4 L. 367; 6 L. L. J. 25; (1924) A. I. R. (L.) 65.
412	Sha Bulakhidas v. Shah Ganpatram	..	(1923) A. I. R. (B) 281.
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419	Pan Bu v. Emperor	..	11 L. B. R. 412; (1923) A. I. R. (R.) 81; 25 Cr. L. J. 371.
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422	Thirumala Reddi, *In re*	..	46 M. L. J. 40; (1924) M. W. N. 141; 19 L. W. 292; 25 Cr. L. J. 374; 47 M. 396.
423	Jassu Ram v. Emperor	..	4 L. 246; (1923) A. I. R. (L.) 622; 25 Cr. L. J. 375.
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434	Hari Chand v. Aya Ram	..	4 L. L. J. 321; (1922) A. I. R. (L.) 403; 25 Cr. L. J. 386.
434	Lal Singh v. Emperor	..	(1923) A. I. R. (L.) 512; 25 Cr. L. J. 386.
435	Bikarama Prasad v. Emperor	..	(1922) A. I. R. (A.) 292; 25 Cr. L. J. 387.
436	Emperor v. Mormaduke Peikthall	..	(1923) A. I. R. (B.) 242; 25 Cr. L. J. 388.
439	Sheo Ambar v. Emperor	..	9 O. & A. L. R. 836; 25 Cr. L. J. 391.
443	Sher Singh v. Emperor	..	(1923) A. I. R. (L.) 508; 25 Cr. L. J. 395.
444	P. Kattyora Thevan, *In re*	..	19 L. W. 211; 46 M. L. J. 311; (1924) M. W. N. 238; 25 Cr. L. J. 396.
446	Ghulam v. Emperor	..	4 L. 399; (1923) A. I. R. (L.) 509; 25 Cr. L. J. 398.
447	Alia v. Emperor	..	(1923) A. I. R. (L.) 513; 25 Cr. L. J. 399.
448	Abdul Rashid Khan v. Nisar Muhammad Khan	..	45 A. 691; (1924) A. I. R. (A.) 143; 21 A. L. J. 622; 25 Cr. L. J. 400.
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450	Sarada Prasanna Roy v. Uma Kanta Hazari	..	37 C. L. J. 233; (1923) A. I. R. (C.) 485; 50 C. 370.
463	Ramachandra v. Narayanrao	..	(1923) A. I. R. (B.) 296.
464	Devi Prasad v. Jagannadharaju	..	46 M. L. J. 12; (1924) M. W. N. 125; 33 M. L. T. 243; (1924) A. I. R. (M.) 281.
471	Shams-ud-din v. Devi Das	..	(1923) A. I. R. (L.) 505.
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476	Chanbasappa Mallappa v. Malkappa Lingappa	..	(1923) A. I. R (B) 368.
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477	Shidappa v. Santawa	..	(1923) A. I. R. (B) 302.
478	Radhakishan v. Khushiram	..	(1923) A. I. R (L.) 506.
479	Pandurang Wasudeo Chate v. Basappa *alias* Shiddappa Ganiger	..	
481	Narayana Menon, *In re*	..	(1923) A. I. R. (B.) 364.
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490	Mahtab Din v. Emperor	..	(1923) A. I. R. (L.) 516; 25 Cr. L. J. 403.
492	Ram Ratan Kaur v. Tarak Nath Bhattacharji	..	25 Cr. L. J. 410.
495	Allah Bakhsh v. Emperor	..	(1922) A. I. R (Pat) 249; 25 Cr. L. J. 412.
497	Thana Zalaji Shet Marwadi v. Hop Dhana Jawhrji	..	25 Cr. L. J. 415.
500	Bhagjogni v. Sakhi Mahton	..	(1923) A. I. R. (B.) 268.
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502	Krishnalal Chunilal v. Dhirajlal Navnitlal	..	20 A. L. J. 358; (1922) A. I. R. (A.) 327. 44 A. 516.
504	Venkatarama Aiyar v. A. V. Rangiyan Chetty	..	(1923) A. I. R. (B.) 359.
506	Kashinath Gyanoba Kikle v. Ganesh Sitaram Kulkarni	..	46 M. L. J. 258; 19 L. W. 381; (1924) M. W. N. 344; (1924) A. I. R. (M) 449.
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517	Ram Sahai v. Angnoo	..	(1922) A. I. R. (A.) 496.
518	Kirpa v. Chinti	..	(1923) A. I. R. (L.) 530.
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521	Keshav Narayan v. Ramchandra Ganesh	..	(1922) A. I. R. (B.) 156.
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523	Fitz-Holmes v. Bank of Upper India	..	(1923) A. I. R. (L.) 548; 4 L. 258; 5 L. L. J. 438.
527	Sarju Prasad v. Gajadhar Lal	..	(1922) A. I. R. (A.) 497.
529	Corporation of Calcutta v. Bijoy Kumar Addy	..	27 C. W. N. 787; 50 C. 813; 38 C. L. J. 360; (1924) A. I. R. (C) 334.
532	Ram Kishan v. Raushan	..	(1923) A. I. R. (L.) 551.
534	Mohadeb Kudu v. Benode Lal Patra	..	(1922) A. I. R. (C.) 181.
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538	Shera Khatun v. Muhammad Ali Shah	..	(1923) A. I. R. (L.) 559.
539	Fateh Mahammad Chaudhri v. Sita Chaudhrain	..	(1922) A. I. R. (A.) 278.
541	Muhammad Din v. Zeb-un-nissa	..	3 L. 215; (1922) A. I R. (L.) 390.
542	Sundara Ramanujam Naidu v. Sivalingam Pillai	..	18 L. W. 333; 45 M. L. J. 431; (1924) A. I. R. (M) 360; 47 M. 150.
547	Arunachela Goundan v. Swaminatha Aiyar	..	19 L. W. 27; (1924) M. W. N. 144; 46 M. L. J. 240.
548	Saremal Punamchand v. Kapur Chand Runamchand	..	25 Bom. L. R. 1093; 48 B. 176; (1924) A. I. R. (B. 260.
551	Monmatha Kumar Ray v. Jasada Lal Podder	..	28 C. W. N. 300.
553	Badri Prasad v. Murli Dhar	..	9 O. & A. L. R. 846.
553	Secretary of State for India v. Ghulam Rasul Khan		4 L. L. J. 79; (1922) A. I. R. (L.) 323.
556	Afsar Khan v. Shabu Mondal	..	(1922) A. I. R. (C.) 148.
558	Durga Charan Mitra v. Rajendra Narain	..	36 C L. J. 467; (1923) A. I. R. (C.) 57.
561	Shiv Gir v. Khazan Gir	..	3 L. 369; (1922) A. I. R. (L.) 451.
562	Ramchandra Madhavrao v. Trimbak Shridhar	..	25 Bom. L. R 1074; (1924) A. I. R. (B.) 152.
564	Jobeda Khatun v. Tulsi Charan Das	..	36 C. L. J. 472; (1923) A. I. R. (C) 82.
568	Najavath Alli v. Mujafar Alli	..	45 M. L J. 791; 18 L. W. 887.
572	Bishambar Nath v. Muhammad Ubaid Ullah Khan	..	21 A. L. J. 503; 45 A. 581; (1923) A. I. R. (A.) 586.
576	Mohesh Chandra Missra v. Nistarini Dasya	..	27 C W. N. 449; (1923) A. I. R. (C.) 382.
580	Sinnam Chetty v. Alagiri Aiyar	..	18 L. W. 545; 45 M. L. J. 516; 46 M. 852; (1924) A. I. R (M.) 438.
585	Ram Singh v. Waryam Singh	..	5 L. L. J. 459; (1924) A I. R. (L.) 251.
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588	Thi Raj v. Kheausi	..	22 P. W. R. 1923.
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600	Daulat Bai v. Emperor	..	(1923) A. I. R. (L.) 537; 25 Cr. L. J 424.
602	Barhati v. Emperor	..	(1923) A. I. R. (L.) 539; 25 Cr. L. J. 426.
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606	Sher v. Emperor	..	5 L. L. J 377; (1924) A. I. R. (L.) 110; 25 Cr. L J. 430.
607	Ambika Singh v. Emperor	..	1 Pat. 212; (1922) A. I. R. (Pat.) 498; 25 Cr. L. J. 431.
609	Kundan Lal v. Makundi Kunwar	..	45 A. 571; (1924) A. I. R. (A.) 150.
611	Savitri Thakurain v. Secretary of State for India		4 P. L T. 538; 2 Pat. 879; (1924) A. I. R. (Pat.) 27.
616	Sundar Das v. Collector of Gujrat	..	3 L. 349; (1923) A. I. R. (L.) 14.
618	Bikram Singh v. Suraj Bakhsh Singh	..	26 O. C. 295; (1924) A. I. R (O.) 125.
619	Haridasi Debi v. Gopeshwar Pyne	..	27 C. W. N. 646; (1923) A. I. R. (C.) 569.
620	Gulsher Khan v. Ramswarup	..	19 N. L. R. 150; (1924) A. I. R (N.) 42.

621	Secretary, Board of Revenue (Incom-tax), Madras v. Ripon Press and Sugar Mills Co., Ltd.	..	44 M. L. J. 523; 17 L. W. 584; (1923) M. W. N. 321. 32 M. L. T. 306; (1923) A. I. R. (M.) 574; 46 M. 706.
623	Rebeiro v. Jacob	..	27 C. W. N. 569; (1923) A. I. R. (C.) 553
628	Yezzu Mallayya v. Talluri Punnamma	..	46 M L. J. 291; 19 L. W. 430.
630	Jokhu v. Deokinandan Pandey	..	(1923) A. I. R. (A.) 489.
631	Paramasiva Thevar v. Pulukarupppa Thevar	..	18 L. W. 780; 33 M. L. T. 137; 45 M. L. J. 329; (1924) M. W. N. 27; (1924) A. I. R. (M.) 137.
638	Chitto v. Ganga Sahai	..	(1923) A. I. R. (A.) 527.
640	Ganpatrao v. Laxmichand	..	6 N. L. J. 239; (1924) A. I. R. (N.) 1.
654	Wilkinson v. Wilkinson	..	25 Bom L. R. 945; (1923) A. I. R. (B.) 321; 47 B. 843.
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694	Baldeo Misir v. Ramlagan Shukul	..	21 A. L. J 648; (1924) A. I. R. (A.) 82; 45 A. 709.
695	Behari'al v. Kalka	..	25 O. C. 282; (1923) A. I R. (O.) 45.
697	Jagat Singh v. Achhaibar Singh	..	26 O C 191; (1922) A. I. R. (O.) 15.
699	Amba'ai Sarabhai, *In re*	..	25 Bom. L R. 1225; (1924) A. I. R. (B.) 182.
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702	Nagava Guriingaya v. Collector of Belgaum	..	25 Bom. L. R. 1232; (1924) A. I. R. (B.) 157.
705	Chitu v. Charan Singh	..	(1923) A. I. R; (A.) 563.
707	Saudamini Dassya v. Secretary of State for India		38 C. L. J. 47; 50 C. 822; (1924) A. I. R. (C.) 197.
718	Narayan Singh v. Sita Deli	..	(1923) Pat. 290; (1924) A. I. R. (Pat) 69; 2 P. L. R. 159.
721	Jang Bahadur v. Emperor	..	25 Cr. L. J. 433.
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727	Emperor v. Moulabux	..	25 Cr. L. J. 439.
728	Hira Lal v. Emperor	..	25 Cr. L. J. 440.
730	Sesha Aiyar v. Venkatasubba Chetty	..	19 L. W. 201; (1924) M. W. N. 268; 25 Cr. L. J. 442; (1924) A. I. R. (M.) 487.
733	Sarju v. Jai Raj Kuar	..	9 O. & A. L. R. 118; 25 Cr. L. J. 445.
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736	Emperor v. Mahomed Panjal	..	25 Cr. L. J. 448.
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749	Sidh Gopal v. Bihari Lal	..	26 O. C. 196; (1924) A. I. R. (O.) 48.
749	Keshavlal Punjalal v. Collector of Ahmedabad	..	25 Bom. L. R. 1240; 48 B. 75; (1924) A. I. R. (B.) 228.
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755	Mirza Mahomed v. Official Assignee	..	18 L. W. 277; (1923) A. I. R. (P. C.) 146 P. C.
756	Kashi Rai v. Kali Kurri	..	(1923) A. I R. (A.) 554.
758	Peddi Veerayya v. Kokumanu Tirupatirayudu	..	(1923) M. W. N. 679; (1924) A. I. R. (M.) 177.
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762	Ahad Shah v. Ayshan Begum	..	(1923) A. I. R. (L.) 564.
764	Afagan Sahib v. Abdul Majid Khan	..	19 L. W. 164; (1924) M. W. N. 265; (1924) A. I. R. (M.) 512.

764	Sita Ram-Ram Dhan v. Benarsi Das-Puran Chand	(1923) A. I. R. (L.) 565.
765	Venkatakuttumba Rao v. Ventappayya ..	46 M. L. J. 119; (1924) M. W. N. 137; 19 L. W. 298; (1924) A. I. R. (M.) 483.
766	Sithamalli Subbayyer v. Ramanathan Chettiar ..	19 L. W. 355; 46 M. L. J. 350; (1924) M. W. N. 340.
768	Kandhi v. Husain Bibi ..	(1923) A. I. R. (O.) 158; 26 O. C. 352; 10 O. L. J. 611.
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774	Nirode Nath v. Amullya Dhone ..	27 C. W. N. 466; (1923) A. I. R. (C.) 582.
776	Jhanda Singh v. Muhammad Anwar Khan ..	(1923) A. I. R. (O.) 160.
777	Pir Pacha Saheb v. Mohammed Ruhimuddin ..	19 L. W. 174; 46 M. L. J. 215; (1924) M. W. N. 217 (1924) A. I. R. (M.) 491.
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783	Bhupendra Nath Mukherjee v. Monohar Mukherjee	28 C. W. N. 86; (1924) A. I. R. (C.) 456.
787	Nurse v. Rustomji Dorabji ..	19 L. W. 397; 46 M. L. J. 353; (1924) M. W. N. 382.
790	Rajendra Kumar v. Brojendra Kumar ..	37 C. L. J. 191; (1923) A. I. R. (C.) 501.
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845	Rung Lal Kalooram v. Kedar Nath ..	27 C. W. N. 513.
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851	Jagdishwar Narayan v. Muhammad Haziq Hussain	(1924) Pat. 142.
862	Kali Din v. Madho ..	(1923) A. I. R. (A.) 169.
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866	Abdulla v. M. V. R. S. Firm ..	2 Bur. L. J. 229; (1924) A. I. R. (R.) 153.
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PATNA HIGH COURT.

FIRST CIVIL APPEAL NO. 155 OF 1920.

March, 21, 1923.

Present:—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Foster.

BHAGWAN LAL—DEFENDANT No. 8 —APPELLANT

versus

RAJENDRA PRASAD SAHI AND OTHERS —PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 64, O. XXI, r. 63—Transfer of Property Act (IV of 1882), s. 53—Specific Relief Act (I of 1877), s. 42—Execution of decree—Attachment—Alienation during attachment, validity of—Fraudulent transfer—Colourable transaction—Claim proceedings—Title suit, nature of—Declaration.

Section 64 of the Civil Procedure Code contemplates a claim which remains enforceable and not one which might have been enforceable under an attachment which has since come to an end. [p. 4, col. 2; p. 5, col. 1.]

An alienation by the judgment-debtor during the pendency of an attachment which subsequently comes to an end, cannot be avoided by a person whose claim arose under a subsequent attachment. [p. 4, col. 2; p. 5, col. 1.]

Section 53 o the Transfer of Property Act contemplates a transfer of property binding as between the parties to it, but one which is voidable in the circumstances laid down in the section. [p. 9, col. 1.]

If, however, the transaction is merely colourable and not meant to be acted upon between the parties there is no transfer at all, but merely a fraudulent attempt to avoid a liability. [p. 5, col. 1.]

A suit brought under O. XXI, r. 63 of the Civil Procedure Code is a special remedy granted in special circumstances and is not governed by the proviso to section 42 of the Specific Relief Act. [p. 10, col. 1.]

Appeal from a decision of the Subordinate Judge, Second Court, Patna, dated the 10th April 1920.

Messrs. *N. C. Sinha* and *R. T. N. Sahai*, for the Appellant.

Mr. *S. N. Roy*, for the Respondent.

JUDGMENT.

Miller, C. J.—In this case, certain property belonging to Narayan Prasad Singh and other members of his family, who are the first seven defendants in the suit, was attached and sold in execution of a decree in favour of Bhagwan Lal Hajam, the defendant No. 8. The plaintiffs claimed that at the time of the attachment and sale they had a subsisting mortgage upon the property, and petitioned the Court that the sale should be made subject to their mortgage. Their application was dismissed and the property was sold free from the encumbrance of their mortgage. They consequently instituted the present proceedings praying that the properties sold at the execution sale and purchased by Bhagwan Lal Hajam, the decre-holder, should be declared subject to the encumbrance of their mortgage.

The Trial Court found in favour of the plaintiffs and granted them the relief claimed. The defendant, Bhagwan Lal, the purchaser, has appealed from that decision.

Rajendra Prasad Sahi and others, the plaintiffs in the suit, are members of a joint family residing at Phatra in the Muzaffarpur District where they carry on business as *Zemindars* and moneylenders. The defendants Nos. 1 to 7 Narayan Prasad Singh and other members of his family, who may conveniently

be referred to as the Singh defendants, are *Zemindars* and cultivators residing at Jilanichak in the Patna District where at one time they owned considerable property. Bhagwan Lal Hajam, the defendant No. 8, who is the appellant before us, resides at Mahendru in Patna City. He belongs to the barber caste, but also does some business in money lending.

In the year 1892, the father of the first defendant, Narayan Prasad Singh, executed a mortgage in favour of Bhagwan Lal's father, hypothecating certain property other than that which is the subject-matter of the present suit, to secure an advance of Rs. 1,000 carrying compound interest at 2 per cent. per mensem with quartely rests. Ten years latter, in January 1902, a suit was instituated against the Singh defendants to enforce the mortgage. A decree was obtained and in execution thereof the mortgaged property was brought to sale in August 1903 and purchased by the decree holder. The decree passed in that suit was appealed from by the Singh defendants, but their appeal was dismissed by the High Court in May 1904.

The sale proceeds of the mortgaged property sold in execution proved insufficient to satisfy the decretal amount and interest which had rapidly accumulated at the high rate stipulated in the bond by the time the property was sold in execution. The mortgagee accordingly applied for, and on the 15th December 1906 obtained, a personal decree against the mortgagors for the unsatisfied balance amounting, at that time, to over Rs. 17,000. About three years later, towards the end of 1909, Bhagwan Lal, his father having died, first began to make efforts to execute this decree. After three unsuccessful attempts a fourth execution case was filed and registered on the 1st June 1914. It was numbered 201 of 1914 and certain properties belonging to the Singh defendants (the judgment-debtors) were attached in that execution proceeding in June and July 1914. The properties so attached form the subject-matter of the dispute in this case. They were subsequently sold in execution and purchased by Bhagwan Lal under circumstances presently to be stated, and after certain events had happened which are material in considering the questions for determination. The plaintiffs claimed title to these properties under a mortgage executed by the Singh defendants in their favour on the 9th March 1915. In the meantime, namely, on the 24th February 1915, Bhagwan Lal had filed a fresh application for execution praying that the Execution Case No. 201 of 1914, then pending, might be dismissed and that the new execution case might be considered as being in continuation of it. The application was heard the same day and the following order was passed:—"Fresh execution petition filed. Let this case be dismissed. The attachment made to continue. The petition filed to-day to be taken as in continuation of this case, so no fresh notice under O. XXI, r, 66 would be necessary." The new execution case was also registered on the 24th February 1915 as No. 51 of 1915 and on the same day an order was passed therein as follows, "Attachment and notice under O. XXI, r. 66 need not be issued as ordered in Execution Case No. 201 of 1914. Issue sale proclamation fixing 19th April 1915 for sale at 6 A. M."

On the 9th March 1915, as already stated, the Singh defendants granted a mortgage of certain properties, including those which had been attached, to Rajendra Prasad Sahi, the first plaintiff in this suit, to secure an advance of Rs. 25,000 repayable within two years and carrying compound interest at 1 per cent. per month with yearly rests. In May following, Bhagwan Lal, for reasons which are not material, found himself unable to continue with his execution against the properties attached, and on the 17th May 1915, the Execution Case No. 51 of that year was dismissed for default, and the attachment accordingly came to an end.

On the 16 September 1916, Bhagwan Lal filed a fresh execution proceeding, the case being numbered 181 of 1916. In March 1917 the same properties were again attached and a sale proclamation was duly issued. The plaintiff, Rajendra Prasad Sahi, subsequently, in June 1917, applied under O. XXI, r. 62 that the

sale should be ordered to take place subject to his mortgage of the 9th March 1915. His application was heard together with the applications of certain other objectors and was dismissed on the 18th June 1917. The only reason assigned by the learned Subordinate Judge for dismissing the application was that there was nothing to shew the *bona fide* character of the mortgage, and that it looked strange that at that stage these persons should have come forward to put an obstruction in the way of the decree-holder. The properties were accordingly sold in execution of Bhagwan Lal's decree on the following day and purchased by him for Rs. 14,000.

The plaintiffs have accordingly preferred this suit under the provisions of O. XXI. r. 63 claiming a declaration that the sale of the properties to Bhagwan Lal in Execution Case 181 of 1916 was subject to the encumbrance of their mortgage of the 9th March 1915.

The Singh defendants filed a written statement alleging that they had never denied the plaintiffs mortgage bond of the 9th March 1915, and that, as the suit was not for recovery of the bond money, they were improperly made defendants, and that no cause of action had accrued against them. Bhagwan Lal also filed a written statement impugning the *bona fides* and the validity of the plaintiffs' mortgage bond on the ground that it was a collusive transaction between the plaintiffs and the Singh defendants and was fraudulent and without consideration and that it was merely a false and colourable transaction. He further pleaded that the suit was barred by the proviso to section 42 of the Specific Relief Act; that it was executed for the purpose of defrauding him as a creditor in contravention of the provisions of section 53 of the Transfer of Property Act, and further, that it contravened the provisions of section 59 of the Transfer of Property Act and was on that account illegal and invalid.

The Singh defendants did not appear at the trial and have not been represented in this appeal. On behalf of the appellant, it was argued in the first place that the plaintiffs' mortgage bond had not been proved according to law, as provided by section 68 of the Indian Evidence Act, and could not, therefore, be used in evidence, and, further, that even if that section had been complied with, the evidence of the attesting witnesses called to prove execution was unreliable and contradictory and should not be accepted. The execution of the bond was attested by 6 witnesses. In the translation of the bond filed on the record, they purport to have attested on the admission of the executants but the words used and translated as "on the admission of the executants" are "*Mukhate mukrin*" which might be more idiomatically rendered as "At the request of the executants". Two of the attesting witnesses, Ram Lal Mahton and Nath Sahay, were called at the trial on behalf of the plaintiffs. The former says he was a witness to the bond, and that the executants signed in his presence and he verified the signatures of himself and some of the other witnesses who, he said, were present. In cross-examination he stated that he went away after attesting the bond, and that two or three persons had already attested the bond before he went there, but that two of them, namely, Narain Mahton and Nem Narain Singh attested the bond after he went there. In the next sentence he says "No other witness attested on that bond before me". This was relied upon as contradicting his previous statement that two or three persons had already attested the bond before he went there but the words "before me" are ambiguous and they may well be a literal translation of the Hindi expression which means "In my presence. Later on, when further questioned he states that "Narain Mahton signed in my presence on the bond and after I signed it" and adds that "Nem Narain Singh had affixed his signature in my absence on that bond". This last statement would appear to be in conflict with what he had said before, namely, that Nem Narain Singh attested the bond after he went there. It must be remembered, however, that the witness was giving evidence of events which

had happened five years earlier, and it may be that his recollection of the names of the witnesses, who actually signed in his presence was somewhat confused, or it may be that he was not very clear on the question put to him in cross-examination and even assuming that Nem Narain Singh signed in his absence, the nett result of his evidence would be that he and one other witness at least, Narain Mahton, were present when the bond was executed and appended their signatures as witnesses. The other attesting witness Nath Sahay, who was called at the trial, merely stated that he was a witness to the bond and proved his signature on it. He does not appear to have been asked any questions in cross examination in reference to this part of his evidence. It would, perhaps, have been better, had the learned Subordinate Judge himself endeavoured to clear up the apparent discrepancy in the first witness's evidence. The learned Judge accepted the evidence of these witnesses as sufficient to prove the execution of the bond and I do not consider that the criticism of their evidence is weighty enough to induce us to discard it as unreliable.

It was next contended that the mortgage o the 9th March 1915 granted in favour of the first plaintiff, having been granted at a time when the property was under attachment, was void as against all claims enforceable under the attachment by reason of the provisions of section 64 of the Civil Procedure Code. In answer to this argument, the respondents contended that there was no valid attachment in operation when the mortgage was executed and, secondly, even if there was a valid attachment at that time, it came to an end on the 17th May 1915 when Execution Case No. 51 of 1915 was dismissed for default. In support of their first answer on this point, the respondents contended that the attachment made in June and July 1914 in Execution Case No. 201 of 1914 came to an end on the 24th February 1915 when that execution case was dismissed, and that no proper attachment was made in the succeeding Execution Case No. 51 of 1915 which was registered on the same day. It was argued that the dismissal of the earlier execution case was a dismissal for default and that under the provisions of O. XXI, r. 57 of the Civil Procedure Code the attachment thereupon ceased and although the attachment was ordered to continue no proper notices of attachment were served and no further attachment was in fact made, and that it was not competent to the Court to effect a valid attachment in this manner. There is much to be said in support of this contention, but it is not necessary to decide the point as the subsequent Execution Case No. 51 of 1915 was itself dismissed for default on the 17th May that year, and the foundation upon which the appellants claim to have priority over the mortgage, disappeared as from that date. It is not upon the attachment which at that date terminated that their title under the subsequent sale is based. The claim of the appellants is enforceable, within the meaning of section 64, not under the attachment in Execution Case No. 51 of 1915 or the earlier execution case, but under the attachment made in Execution Case No. 181 of 1916 which was not instituted until after the respondents' mortgage had come into operation. It was contended on behalf of the appellants that the mortgage was void within the meaning of section 64 of the Civil Procedure Code against their present claim, because it was a claim which might have been enforced under the earlier attachment which came into operation before the mortgage. In my opinion, this is not the meaning of section 64 which reads as follows:—

"Where an attachment has been made, any private transfer or delivery of the property attached, or any interest therein, and any payment to the judgment-debtor of any debt, dividend or other monies, contrary to such attachment, shall be void as against all claims enforceable under the attachment".

If the claim ceases to be enforceable under an attachment relied upon as avoiding the alienation it seems obvius that there is no longer any claim enforceable thereunder and the section

contemplates a claim which remains enforceable and not one which might have been enforced under an attachment which has since come to an end. The appellants' claim, in the present instance, is no longer enforceable at all, except under the attachment made in Execution Case No. 181 of 1916 which came into operation after the mortgage. The attachment contemplated in the section is that under which the claim is enforceable but the appellants' argument demands that the words "All claims enforceable under the attachment should be read as "All claims of the attaching creditor enforceable under that or any subsequent attachment." I cannot read the section as including claims which have ceased to be enforceable under the attachment contemplated, and upon this point the appeal fails.

It was next contended that the mortgage was made with intent to defraud or to defeat or delay the appellants as creditors within the meaning of section 53 of the Transfer of Property Act and, further, that the mortgage transaction was a merely colourable transaction not meant to be acted upon between the parties to it. The two points raise separate considerations. Section 53 of the Transfer of Property Act seems to contemplate a transfer of property binding as between the parties to it but one which is voidable in the circumstances there contemplated. If, however, the transaction is merely colourable and not meant to be acted upon between the parties there is clearly no transfer at all and in a case like the present it would be merely a fraudulent attempt on the part of the respondents to avoid liability. The only argument urged before us in support of this part of the case was that the mortgage was merely a sham transaction engineered by the Singh defendants with the acquiescence of the plaintiffs, with the object of defeating the execution of the appellants' decree. The mortgage-bond of the 9th March 1915 is to secure a loan of Rs, 25,000. It recites that the mortgagors, under four previous bonds executed by them in the years 1904 and 1906 are indebted to the amount of Rs, 20,645 which the mortgagees undertake to discharge, retaining that sum for the purpose. The balance of Rs. 4,355 was stated in the mortgage to be necessary for payment of Government revenue, performance of the marriage of Babu Ram Ghulam Prasad Singh, a member of the mortgagors' family and meeting the expenses in connection with law suits. That the earlier bonds executed in 1904 and 1906 existed has been amply proved. It is also proved that these were discharged by the mortgagees and the bonds returned to them not long after the execution of the mortgage in 1915 except in one instance in which payment was postponed until December 1917. The appellants contend that even the earlier bonds of 1904 and 1906 were merely colourable transactions made with their relatives or tenants in order to protect their property from the possible claims of creditors in the future and especially the claim of the appellants. They point out that it was not until after the appellants' mortgage decree had been confirmed by the High Court in May 1904 that the Singh defendants began to alienate their property or create charges thereon. Had the appellants been able to shew that the Singh defendants in 1904, for the first time, suddenly began to create charges upon their property, without any apparent reason for their doing so, except that they were largely indebted to the appellants, we might, perhaps, be entitled to regard those transactions with a certain amount of suspicion; but it is clearly proved that ever since the year 1881 this family had been in financial difficulties and frequently borrowing and mortgaging their property as security for the loans. It is unnecessary to refer to these earlier transactions in detail, but they were numerous and frequent. and I am not prepared to hold that there was anything unusual in the fact that further liabilities were incurred in 1904 and 1906 or that any suspicion could attach to those transactions upon the ground suggested.

One matter however, is strongly relied upon by the appellants, and it must be admitted that it is a matter which entitles the Court to scrutinise the con-

duct of the Singh defendants with the greatest suspicion. I have already said that these defendants are shewn to have embarked upon a course of borrowing since the year 1881. In 1904, in order to discharge some of their more pressing debts and save their property from forced sales in execution, they sold certain portions thereof for Rs. 38,000, by a sale-deed, dated the 9th October that year, to one Dhiraj Mahto with whom they had, on previous occasions, had money lending transactions. Out of the purchase price, Rs. 933 were paid in cash, the balance being retained by the purchaser to pay off the creditors and free the property from encumbrance. A representation appears to have been made by the vendors that the creditors were willing to remit a portion of their claims for interest and the sum retained by the purchaser was arrived at on this basis. There was also some undertaking to reimburse the purchaser for any excess payments he might have to make to free the purchased property from charges and encumbrances. Dhiraj Mahto got his name recorded in the Land Registration Department as proprietor, but he found difficulty with the creditors with regard to the matter of interest. He further found certain charges and encumbrances which had not been disclosed. It also appears that the vendors got their names recorded in the survey and settlement operations, which took place shortly afterwards, with respect to some of the properties covered by the sale-deed, and various disputes arose between them and Dhiraj Mahto over possession of the lands. He, in fact, soon discovered that in purchasing the property he had also acquired a fruitful crop of litigation. Many suits and proceedings both civil and criminal ensued. These culminated in 1914 when, after Dhiraj Mahto's death, his family brought a suit against the Singh defendants for a declaration of their title to the purchased property and for confirmation of possession. In that suit, the defendants raised many pleas and endeavoured in every way they could to preserve their property. Amongst other things, they pleaded that the sale-deed of 1904 was a *farzi* transaction made with Dhiraj, who, they alleged, was their servant, with the object of defeating the claims of creditors. This fact is strongly relied upon as proof that the Singh defendants were unscrupulous and unprincipled in their dealings with their creditors, and that the present mortgage transaction of 1915 was only another instance of their dishonest conduct. I am quite prepared to concede that the Singh defendants, whether the plea then raised be true or false, stand self-confessed either as persons whose word is not to be trusted or whose conduct is shewn to have been tainted with dishonesty, but this does not prove that the plaintiffs were either so lacking in a sense of honesty as to lend themselves to a palpably fraudulent transaction or so foolish as to trust those who were admittedly not to be trusted. For it is abundantly proved that the plaintiffs in fact discharged the debts to pay off which their mortgage transaction was effected.

The suit of 1914 brought by Dhiraj Mahto's descendants was decided by the Additional Subordinate Judge of Patna in 1916 in a long and careful judgment in which the whole of the previous dealings of the Singh family with their property were discussed. The learned Judge found that the sale-deed of 1904, in favour of Dhiraj Mahto, was a valid and *bona fide* document executed for consideration, and that Dhiraj Mahto, so far from being a servant and creature of the Singh family, who lent himself to a *farzi* transaction to save their property, had no connection with the family except as a creditor, and had in fact discharged the debts out of the consideration money. The plaintiffs in that suit, however, did not recover the whole of the property claimed as it was proved that in one of the many disputes, which arose between the parties, after the sale, Dhiraj Mahto had, by way of compromise in 1909, reconveyed some of the properties claimed to one Parshidh Narayan Singh, the nominee of the Singh defendants, in consideration of Rs. 10,000, no doubt less than their value. This compromise was disputed by Dhiraj Mahto's heirs, but the point was decided against them. It will be

observed that in that case, just as in the present, transaction which turned out to be perfectly valid was challenged as a *farzi* transaction. The plea, however, put forward in the previous case by the defendants themselves did not avail the defendants. In the present case, the plea is put forward by one of their creditors against another and it is not supported by the Singh defendants. I do not think the fact that the Singh defendants, on a previous occasion, endeavoured to protect themselves under a false plea, which even if true did them no credit, is sufficient in itself to lead to the conclusion that the present transaction was one of a fraudulent nature. That the Singh defendants were in want of a certain amount of cash for paying revenue and to meet other expenses is hardly surprising, and it is proved that the marriage of Ram Ghulam, which was one of the reasons for requiring cash, actually took place. It is also shewn that they had to meet expenses of litigation. With regard to the balance of over Rs. 20,000 this was required to pay off four creditors named in the bond.

Rs. 375 were due to Nemdhari Mahto under a usufructuary mortgage of 3 *bighas* of land in *Mauza* Chirayia Dayal granted in 1904. Nemdhari was called as a witness, and proved payment to him by the plaintiffs in June 1915. The receipt is endorsed on the bond, which was delivered up to the plaintiffs on payment. It was produced by them in evidence.

Rs. 14,000 were due to Jagdam Prasad Singh under a mortgage granted in July 1904 over a 4 pies share in *Mauza* Akbarpur to secure a loan of Rs. 1,300. The rate of interest was high, 2 per cent. per month compound with quarterly rests, as in the case of the appellant's mortgage. This improvident family do not seem to have been very particular as to the rate of interest at which they borrowed. Jagdam, the mortgagee was dead, but his brother Janki Prasad Singh was called and proved that the bond was paid off by the plaintiffs in December 1917. The bond was produced by the plaintiffs with the discharge endorsed thereon. The greater part appears from the recitals to have been borrowed to discharge previous loans and the balance Rs. 375 for household expenses. He was, in no way, related to the Singh defendants, and there seems no reason why the transaction with him should be regarded with suspicion. It is urged that if the transaction was genuine he would have sued on the bond before it was actually paid. He says, he did not do so because the defendants generally paid out of Court. His evidence, as to the payment of the bond, is corroborated by Jadu Singh, another witness, who was present at the time.

Rs. 3,270 were due under a mortgage granted to Harikishen Mahton in February 1906 over a 4 pies *malguzari milkiat* interest in *Mauza* Akbarpur to secure a loan of Rs. 1,500. The interest was in this case 2 per cent. per month simple interest. The sum was taken to discharge a previous loan of Rs. 1,200 which with interest had amounted to Rs. 1,380 and the balance was taken in cash. The plaintiffs proved payment of this bond to Harikishen in April 1915 through their servant Nath Sahai. The bond was produced with the endorsement thereon.

The last bond was a mortgage, dated the 19th April 1906, of shares in 5 villages in favour of Sham Keshwar Prasad Singh to secure a loan of Rs. 600 carrying compound interest at Rs. 2-8-0 per cent. per month with half yearly rests. The amount due was Rs. 3,000. The money was borrowed to provide for the *dwiragawan* of a sister of Narayan Prosad Singh. Badri Singh, a son of the mortgagee, proved the transaction and the subsequent payment by the plaintiffs. The bond was produced shewing the discharge endorsed thereon.

The plaintiff Rajendra Prasad was also called and supported generally the case put forward by him.

There is no evidence on the part of the appellant to discredit this evidence except a statement by him that he was told by the defendants' *karpardaz* that he had committed such a fraud that there would be difficulty in finding the truth, and that another man named Khedu told him that all the deeds to which I have referred were fraudulent. He admits he made no enquiries from the creditors whose

claims were discharged and he did not call either of the two persons named. The learned Judge did not place any reliance upon this part of his evidence. He thought it highly improbable that if the *kirpardaz* was responsible for a fraud intended to decieve the appellant he would disclose it to his victim. I think the learned Judge rightly appreciated the value of this evidence.

We have been urged, however, to treat the mortgage in favour of the Singh defendants (?) as a collusive instrument on the ground that there are many suspicious circumstances which amount almost to proof of fraud. It is asked why should the Singh defendants be anxious to pay off Nemdhari and the other creditors who had not pressed thei claims when the appellant had a decree for Rs. 17,000 carrying high interest in addition to what he had already recovered by sale of the mortgaged property. I confess I can see nothing surprising in the defendants' conduct. They could hardly be expected to have any tender feelings towards the appellant. who had already done very well out of his loan of Rs. 1,000 carrying high interest. What the total amount due to him was when he sold the mortgaged property in 1903 has not been disclosed, nor does it appear in evidence what the mortgaged property fetched. We do know, however, that after giving credit for the sale proceeds he still had an unsatisfied claim of over Rs. 17,000. That the defendants should endeavour to discharge the debts due to their other creditors by a mortgage of their remaining property before the appellant could get a lien upon it is only human nature. Moreover, the sum advanced was probably a better bargain for them than if the property had been attached and sold in execution. If, however, the transaction was a genuine one, the mortgage cannot be impugned as they had a right to prefer one creditor to another.

It is next urged that the sum advanced, namely, Rs. 25,000 was much more than the value of the property, which indicates that the transaction was a sham. In support of this, it is pointed out that the appellant himself, in his last execution case purchased the, same property or the greater portion of it for Rs. 14,000. This argument has little force when it is remembered that the appellant purchased at an auction sale in execution of his own decree, and the property purchased at that sale was valued by the Court at Rs. 21,980 based upon a road cess return, which is not the best class of evidence. whereas the property mortgaged included in addition a 2-annas share in two other villages, the value of which, although not proved, may have been considerable. Moreover, if the mortgage transaction was merely colourable it is difficult to see why the consideration should have been placed at an unreasonable figure. It may also be pointed out that the sale to the appellant in execution was challenged by the judgment-debtors and the case went on appeal to the High Court where the appellant compromised and agreed to give up 2 out of the 5 villages purchased. It may, therefore, be assumed that he was satisfied with his bargain in getting 3 only of the villages for Rs. 14,000.

The next matters called to our attention are that the mortgaged properties or most of them were, at the time of the mortgage of the 9th March 1915, the subject of a claim by the heirs of Dhiraj Mahto in the suit, to which reference has already been made, and which was not decided until the following year, and, further, that the bulk of the mortgaged properties were in fact then under attachment by the appellant himself in the Execution No. 51 of 1915 which had not, at that time, been dismissed for default. No doubt, if the plaintiffs had full knowledge of these claims and believed them to be formidable it would be a matter of surprise to find them advancing money on so precarious a security. But every one, including the appellant himself who had attached the properties, appears to have been aware that those claimed by Dhiraj Mahto's heirs, in their suit then pending, in so far as they are identical with those in the mortgage, had been reconveyed by Dhiraj in 1909 under the compromise already mentioned and belonged to the Singh defendants who were in fact in possession. The appellant himself had no doubt as to the defendants' right to them. Rajendra Prasad

Sahai, the *kurta* of the plaintiffs' family, would appear to have left the business transactions in the hands of his agent Nath Sahai. They both gave evidence at the trial. The former had very little knowledge of the material facts, but was advised by his agent. Nath Sahai made enquiries when the negotiations for the mortgage began some 4 or 5 months before the date of the mortgage. He ascertained that the villages to be mortgaged had been reconveyed by Dhiraj Mahto to Parsidh Narayan and that the defendants were in possession. He went to the villages and saw the village papers and the revenue and the cess receipts. He also saw the sale-deed in Parsidh Narayan's favour. He also enquired at the Collectorate and ascertained that there was no attachment on those villages in the Collector's books. It is argued that this cannot be true, but in the absence of any evidence as to what the Collector's books would shew, there is no reason why the evidence should not be accepted. It will be remembered that the execution case, in which the attachment was first made, was dismissed on the 24th February 1915, and no fresh notices were sent to the Collector. There seems no reason why after that date any notice of attachment should be found at the Collectorate, and it would be dangerous to reject the evidence of Nath Sahai on mere suspicion when the appellant himself could have put the matter beyond doubt by calling the Collector to produce his books.

A few other matters of minor importance, or which are not substantiated by the evidence, were also relied upon by the appellant in argument on this part of the case. It is pointed out that the plaintiff Rajendra Prasad Sahi and the defendant Narain Prasad Singh are relations and, therefore, likely to assist each other in a collusive transaction. It is true that they are connected by marriage. Rajendra's mother and Narain Prasad's wife are sisters, but their husbands belong to entirely different families which live in different parts of the province many miles apart. It is sufficient to say that it would be in the highest degree dangerous to treat with suspicion business transactions between relations even more nearly connected than the parties in the present case or to found any presumption of *mala fides* upon such slender grounds. It is also said that two of the properties mortgaged to Sham Keshwar in 1906 had already been transferred to Dhiraj Mahto in 1904, but the interest mortgaged was a share in the *malikhan*, *milkiat* interest of the two villages, in the one case 4 annas odd, in the other case 2-annas odd, whereas the property sold to Dhiraj was 8 annas share in each of the same two villages. There is nothing to shew that the shares were the same or even that the interest was the same and no cross-examination was directed to the point. Again with regard to Akbarpur, a 4 pies share in which was mortgaged to Harikishen Mahto in 1909, to which reference has been made, it is pointed out that one Nathuni Sahu had purchased a 9 pies share in this village from the Singh defendants in execution proceedings in 1903 and, as they had no interest left, the mortgage to Harikishen must have been a bogus transaction made in order to create a fictitious debt for future purposes, but there is nothing to shew that this was their only interest remaining in that village. In fact what evidence there is points the other way as it appears from the judgment in Dhiraj Mahto's case that the family had an 8 annas share in Akbarpur still in their possession in 1906.

On the whole although there are circumstances which give rise to a certain amount of suspicion, they are not, in my opinion, of sufficient weight to entitle us to discard the whole of the evidence as to the payment of the debts to the defendants' creditors out of the mortgage money retained for that purpose by the plaintiffs. If these creditors were paid off it may be said to conclude the matter, and for the reasons already given, I am not prepared to differ from the conclusions of fact arrived at by the learned Judge who saw the witnesses and accepted their evidence.

The last point taken before us was that the suit being one for a declaration only, no relief should be granted as the plaintiffs had not sought to enforce their mortgage and the proviso to section 42 of the Specific Relief Act was a bar to

such a claim. This point was not seriously pressed and the short answer to it is that a suit brought under O. XXI, r. 63 of the Civil Procedure Code is a special remedy granted in special circumstances and is not governed by the proviso to section 42 of the Specific Relief Act.

In my opinion this appeal should be dismissed with costs.

Foster, J.—I agree.

Appeal dismissed.

Z. K.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1 3, 164 AND 165 OF 1921.

March 24, 1923.

Present:—Mr. Justice Rankin and Mr. Justice Buckland.

TIN KARI BOSE AND OTHERS—DEFENDANTS—APPELLANTS

versus

NOGENDRA PROSAD BASU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 148—Civil Procedure Code (Act V of 1908), s. 9, O. I, r. 3—Rent suit—Summary procedure—Question of title—Issues, failure to frame—Irregularity—Joinder of claims—Money had and received to plaintiff's use.

There is no rigid rule of law to the effect that in a rent suit properly so called and filed under the provisions of section 148 of the Bengal Tenancy Act a question of title may not be determined if it arises. [p. 10, col. 2.]

The procedure prescribed by section 148 of the Bengal Tenancy Act is not a special jurisdiction but a summary procedure. [p. 11, col. 1.]

Where no issues are framed, but all the points arising in the case are dealt with in the judgment and there has been no prejudice to the parties, the irregularity, if any, is covered by section 99 of the Civil Procedure Code. [p. 11, col. 2.]

A claim for money had and received to the plaintiff's use may be joined to a claim for rent and may properly be tried under section 148 of the Bengal Tenancy Act. [p. 10, col. 1.]

Appeal against the decrees of the Subordinate Judge, Howrah, dated the 29th of September 1920, confirming those of the Munsif Third Court at that place, dated the 22nd of September 1919.

Babu *Nogendra Nath Ghose*, for the Appellants.

Dr. *Jadu Nath Kanjilal*, for the Respondents.

JUDGMENT.

IN S. A. NO. 163 OF 1921.

Rankin, J.—This is an appeal by certain co-sharer defendants who were impleaded together with the tenants in a rent-suit. The plaintiffs' claim to have a two annas share in the landlord's interest. The appellants contend that the whole interest belonged to them. A claim was made against the tenants for a two annas share of certain rent in arrear and an alternative claim was made against the present defendant-appellants that the plaintiffs' share of certain rent which had been received by the appellants from the tenants should be paid over to the plaintiffs. A decree has been given both against the tenant and against the defendant appellants.

On this appeal, it has been contended that a serious question of title was raised as between the plaintiffs on the one hand and the appellants on the other and treating the case as a rent suit the trial Judge did not formally settle issues that would determine the question of title, but proceeded in the manner prescribed in section 148 Bengal Tenancy Act. A further question has arisen in the course of the argument. The claim against the present appellants was not a claim for rent at all. It was a claim for money had and received to the plaintiff's use. The question arises if such a claim as that may be joined with a claim for rent and can be tried properly by the procedure prescribed in section 148 Bengal Tenancy Act.

Taking the first point first, I am of opinion that it is quite plain that there is no rigid rule of law to the effect that in a rent suit properly so called and filed under the provisions of section 148, a question of title may not be determined if it arises. In the present case, although

formal issues were not framed, the judgment of the learned Judge is an extremely lucid and careful judgment; and I am quite satisfied that so far as regards the claim for rent, upon which claim the present appellants may be *pro forma* defendants, there has been nothing in the way of miscarriage of justice. It was suggested as a possibility, though I am satisfied that it is a possibility entirely in the air, that if issues had been framed the appellants might have had a better chance of producing evidence. I see no reason to think that the appellants had in fact any evidence that they did not adduce and they had ample opportunity in many stages of the case for taking that point if there was anything in it.

So far as this is a suit regarding the claim for a share of rent, I see no substance in this appeal. The suit, however, as I have said, was not merely a suit for rent but there was coupled with it a claim in the alternative, upon which the present appellants were not *pro forma* defendants but were contesting defendants, a claim that they should disgorge to the plaintiffs their share of the rent which had been paid to these defendants in full. Now a question arises, when a claim, which is not for rent, is included in a suit which is tried under section 148, whether there is any lack of jurisdiction on the part of the Trial Judge to deal with the claim. An analogy has been suggested in argument of the case where the Judge has purported, under the Small Cause Jurisdiction to try a case which apart from that jurisdiction he might have been quite competent to try. In my judgment there is this distinction between provisions as regards the Small Cause Courts and the provisions of section 148 regarding rent suit that in the former case this Court has always regarded the matter as one of jurisdiction, special jurisdiction which is given by the provisions of the Small Cause Courts Act. In the case of section 148 Bengal Tenancy Act, I am satisfied that the view, which has been consistently adopted by this Court, is that the prescribed procedure is not a special jurisdiction but a summary procedure. If I can find that, as regards the cause of action for money had and received, there was any indication that the present appellants had been prejudiced by the fact that issues were not formally framed in advance, it would, I think, become my duty not to allow the decree made against the present appellants to stand; but I think that this case is a case which is amply covered by section 99 Civil Procedure Code. I cannot find that in the present case any thing has been done that is not in conformity with the provisions of the Civil Procedure Code and except that the present appellants are able to show that issues were not formally framed. Having considered carefully the manner in which the case was tried by the trial Court, I am of opinion that no prejudice has been shown or can be presumed in the circumstances of the present case by reason of that fact.

For these reasons it appears to me that this appeal must be dismissed with costs. This judgment will govern the other two appeals (Second Appeals Nos. 164 and 65 of 1921).

Buckland, J.—Before we part with this case, I desire to say something about *Iswar Dalin* v. *Girindra Kumar Nag* (1) which was cited in argument by the learned Vakil for the respondent whose contention it may superficially appear to support. In that case the question considered was one of misjoinder. The point which has been argued here seems to have arisen but was treated as one of jurisdiction, for I observe from the report that it was contended that the plaintiffs could not get a decree for recovery of their share of the rent against co-sharer landlords in a suit framed under section 148 Bengal Tenancy Act. The judgment, however, proceeded upon the former question, for the learned Judges observed as follows: "It is contended that the prayer for this relief could not be joined to the prayer for the recovery of rent against the principal defendants; but in our opinion O. I, r. 3, Code of Civil Procedure provides for the joinder of such claims; and it is a well established practice to join such claims." The point to which my learned brother has addresed himself

(1) 48 Ind. Cas. 726.

was not argued or considered; and though possibly it might have been taken in that case, it by no means follows that it would have affected the result. It seems to me, therefore, that that case is distinguishable and is not an authority for the proposition advanced by the learned Vakil for the respondent. I agree with the judgment delivered by my learned brother for the reasons stated by him.

Z, K.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 76 OF 1921.

AND

CIVIL REVISION PETITION NO. 619 OF 1921.

March 21, 1923.

Present :—Justice Sir Francis Oldfield, KT., Justice Devadoss.

REPAKA MAMILLAYYA AND OTHERS—APPELLANTS

versus

ADDEPALLI VENKATARATNAM—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 151—Execution of decree—Sale, injunction staying—Sale held in contravention of injunction, validity of—Abuse of process of Court—Inherent power of Court to set aside sale.

During the progress of a Court sale, the sons of the judgment-debtor filed a suit for partition of the property in the same Court and obtained an *interim* injunction staying the sale. Subsequently on the same day the judgment-debtor applied to the Court for adjournment of the sale which was refused; and the sale was directed to be proceeded with notwithstanding the prior order of the Court staying the sale. The sale was held and confirmed. On an application by the judgment-debtor to set aside the sale:

Held, that though the act of the Court in conducting the sale in disregard of its own prior injunction was not in contravention of any definite provision of law, the procedure must be held to have resulted in an abuse of the process of the Court and the sale must be set aside in exercise of the inherent powers of the Court under section 151 of the Civil Procedure Code. [p. 13, col. 2.]

A legal act done in breach of an injunction will not ordinarily be invalidated on that account and the only consequence of contempt of an injunction is the penalty which the Court is competent to impose. It is, however, different where the proceedings are prosecuted in the Court which issued the injunction and the result is to actually deprive its own injunction of effect. [p. 13, col. 2.]

Appeal against, and petition under section 115 of Act V of 1908 and section 107 of the Government of India Act to revise, an order of the Court of the Subordinate Judge, Kistna, at Ellore, in Appeal Suit No. 393 of 1920, preferred against an order of the Court of the Principal District Munsif, Narasapur, in Execution Appeal No. 251 of 1920, in Original Suit No. 289 of 1917.

Mr. *Varadachariar*, for the Appellant.

Messrs. *C. Rama Rao* and *V. Suryanarayana*, for the Respondents.

JUDGMENT.—This appeal and the revision petition are against an order of the lower Appellate Court setting aside a Court sale. We shall confirm that order with reference to our powers under section 151, Civil Procedure Code; and it is, therefore, necessary to state fully the facts which justify our taking that exceptional course.

During the progress of the Court sale in question the sons of the judgment-debtor, here respondent, filed a suit for partition of the property and obtained an *interim* injunction staying the sale. That injunction is not before us; but it is not alleged that it was not in the ordinary form. After the injunction had been granted, an attempt seems to have been made to serve it on the decree-holder; but he had left the Court, although (as appears) his Vakil was still there and took part in the proceedings next to be referred to.

Those proceedings consisted in an application by the judgment-debtor for the adjournment of the sale on the ground that "the bidders had come and gone away thinking that the auction would not take place." The application was heard at once in the presence of the decree-holder's Vakil. The judgment-debtor, who was not the party who had obtained the injunction, did not rely on it directly in the first instance, but simply referred to the departure of bidders. Tha District Munsif rejected this application for adjournment; and his rejection of it is the irregularity or, as the lower

Appellate Court has held, the illegality relied on as a ground for setting aside the sale, which was later in the day completed.

The District Munsif first rejected the allegation that the bidders had gone away, thinking that the auction would not take place, on the rather unconvincing ground that, although some of the bidders might have gone, there were still three persons who were willing-to bid; and it may be observed that two of those persons are said to have been *gumastahs* of the two decree-holders, who had obtained rateable distribution of the sale proceeds and eventuallly purchased the property. But there follows the remarkable portion of the District Munsif's order, which we extract *verbatim*. "The petitioner says that some injunction has been said to have been passed, and that most of the other bidders have consequently gone away. A copy of the injunction has not been served admittedly on the decree-holder and it is said that the said injunction has been passed only half to one hour ago; and no authority is shown as to how the Executing Court can take any notice of an alleged injunction said to have been passed in an injunction suit short while ago." It is clear from this that the existence of an *interim* injunction was relied on by the judgment-debtor, although it is not explicity referred to in his application. It is further, it must be at once observed, not suggested that the injunction having been passed was ever withdrawn. It is possible that, as the District Munsif, who in the first instance dealt with the present petition had held, the injunction was granted on insufficient grounds and the partition suit was simply a device to frustrate recovery by the decree-holders, who were supporting the sale. But that was immaterial. When the District Munsif had granted the injunction and so long as it stood, he had no duty but to give effect to it. The reason stated in the halting words we have quoted from his order for not doing so was that he did not know of its existence, and it is, we recognize, easily possible for a Court to forget the details of orders passed, however recently, in the press of business. But we can see no reason, and none is suggested, why a Court cannot and should not verify an allegation, such as was in question in this case, by reference, which could easily have been made, to papers which had been disposed of, in the words of the order before us "only half to one hour ago." We can only conclude that the District Munsif deliberately shut his eyes to or at least perversely refused to ascertain what he had done.

This having been the District Munsif's disposal of the application for adjournment, we have to decide whether there was any contravention of the law, constituting an illegality, on which the sale can be set aside. There is no doubt that, as the authorities relied on before us show, a legal act, done in breach of an injunction, will not ordinarily be invalidated on that account and that the only consequence of contempt of an injunction is the penalty which the Court is competent to impose. But it is not suggested that any of those authorities relates to the case of proceedings actually being prosecuted in the Court, the prosecution of which under the Court's authority actually deprives its injunction of effect. Such a result we cannot acquiesce in, and we do not think that the law compels us to do so. It is no doubt true that the District Munsif's conduct in the present case was not, so far as we have been shown, in contravention of any definite provision of law. On the other hand there is the fact that his action resulted, in what must be described in the words of section 151, as an abuse of the process of his Court; and we, therefore, hold that we are entitled to use, as the lower Appellate Court was entitled to use, the inherent power recognised in that section to prevent the consequences which such abuse entailed.

It remains only to refer to the excuse which the lower Appallate Court has charitably suggested for the District Munsif's act. That excuse is that the *interim* injunction was obtained without bringing to the notice of the Court full details regarding the sale and that, when the application was made for adjournment, the District Munsif was "naturally put out seeing that the petitioner himself set up his own sons to get the order passed without bringing all the facts to his notice." First, that is not the reason, which the District Munsif himself has given; and secondly, even if it had been the reason, it was useless, since, so long as the injunction stood, it was not

open to the District Munsif to deprive it of effect, whatever his second thoughts as to the propriety of its issue.

Taking this view we confirm the lower Appellate Court's order and dismiss the appeal with costs. Civil revision petition is dismissed.

V. N. V.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 18 OF 1922.

May 11, 1923.

Present:—Mr. Justice Das and Mr. Justice Kulwant Sahay.

SADHO SARAN RAI AND OTHERS—DEFENDANTS—APPELLANTS

versus

ANANT RAI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151—Compromise—Consent-decree—Court induced to sign by fraud—Inherent power to set aside decree.

Where a Court is induced to sign a compromise decree on the fraudulent representation of one of the parties, that all the parties have consented to it, it has inherent power to set aside the decree on being apprised of the true facts. [p. 17, col. 2.]

Case-law discussed.

Appeal from an order of the Subordinate Judge, First Court, Arrah, dated the 14th January 1922.

Messrs. *Jayaswal, Nawal Kishor Prasad* and *S. M. Mullick*, for the Appellants.

Messrs. *C. C. Das* and *Mahabir Prasad*, for the Respondents.

JUDGMENT.

Das, J.—This is an appeal against an order of the learned Subordinate Judge of Arrah by which he set aside a consent-decree. The suit in which the consent-decree was passed was instituted by the respondents against the appellants for partition of joint family properties. The properties sought to be partitioned were set forth in the several Schedules annexed to the plaint. On the 3rd January 1921 a petition of compromise was filed in the Court. The petition alleged that "all the properties sought to be partitioned have been partitioned and under the said partition the properties are in possession and occupation of the parties in equal halves." It set out the properties in Schedule A and declared that the parties were and shall be in separate possession of their respective shares. The schedule annexed to the petition deals with an insignificant portion of the properties enumerated in the schedules to the plaint. It does not, for instance, deal with the *milkiat* properties, and in regard to the bond debts due to the joint family, while it awards about Rs. 12,000 to the defendants, it gives less than Rs. 6,000 to the plaintiffs. There are important alterations in the schedule which attracted the suspicion of the Court when it was called upon to pass a decree in terms of the compromise. For instance, the whole of the money due from Sathan Choubey, Hargun Rai and Baijnath Rai seemed to have been allotted in the first instance to the plaintiffs but at the time when the compromise petition was actually filed in Court it was noticed that the figures standing against those persons had been tampered with and that only half the amount due from them was allotted to the plaintiffs and the other half was allotted to the defendants. As I have said, the alterations made in the schedule attracted the suspicion of the Court which called upon the plaintiffs' Pleader Babu Inder Deo Sahay to initial the alterations. I cannot help thinking that the learned Subordinate Judge should have done well to call upon the plaintiff personally to appear before him and to say whether he had consented to those alterations which were obviously to his detriment, but that course was not adopted and the learned Subordinate Judge was apparently satisfied with the initials of the learned Pleader for the plaintiffs and he passed a decree in terms of the settlement. The plaintiffs' case is that the compromise actually filed was not the compromise which he signed. His evidence is to the effect that the compromise petition was copied "in six leaves" and that the schedule contained all the family properties sought to be partitioned and that after signing the petition he made it over to Sadho

SADHO SARAN RAI *v.* ANANT RAI.

Saran, one of the defendants, for the purpose of being filed in Court. He makes the definite case in his evidence that only the first page and the last page of the compromise petition were retained and that the intervening pages were extracted and were not filed in Court and that alterations were made in the last page without his knowledge but to his detriment. He definitely states that Babu Indra Deo Sahay was not his Pleader and that he did not remember which Pleader had signed the compromise petition for him and that he did not himself take the petition to any Pleader for signature, and that he left it entirely to Sadho Saran relying upon Sadho Saran's honesty in the matter.

Upon the evidence I have no doubt that a gross fraud has been perpetrated not only upon the plaintiffs but upon the Court itself The petition definitely states that all the properties sought to be partitioned had been partitioned and that the specifications were given in Schedule A to the petition. Now the properties sought to be partitioned are given in different schedules annexed to the plaint. As I have said before, Schedule A of the petition of compromise comprises only a very insignificant portion of the properties sought to be partitioned. Mr. Jayaswal contends before us that in their written statement the defendants disputed the correctness of the properties set out in the schedule and that their case in the written statement was that most of the properties sought to be partitioned were not joint family properties at all. That may be so, but where the partition definitely states that all the properties sought to be partitioned have been partitioned I must assume that the meaning of the petition is that the properties sought to be partitioned in the suit by the plaintiffs have been partitioned. There is no indication in the compromise petition that the plaintiffs had recognized the justice of the defendants claim that most of the properties sought to be partitioned by him were not joint family properties and that they could not be partitioned. In my opinion it is sufficient to refer to the Schedule A annexed to the petition of compromise and to compare it with the properties set out in the schedules to the plaint to hold that the plaintiff's position in this respect is unassailable. It was then argued that the compromise petition bore the signature of the plaintiff's Pleader and that it must be assumed that the Pleader had authority to settle the case on the terms mentioned in the petition of compromise. The plaintiffs, however, deny that Babu Indra Deo Sahay is their Pleader. The evidence of Projit Rai on this point is as follows:—"Indra Deo Sahai was not my Pleader. I do not remember which Pleader had signed the *sulehnama* petition for me. I have not taken that petition to any Pleader for signing it. Sadho Saran had done so on my behalf." Babu Indra Deo Sahay has been examined as a witness on behalf of the defendants-appellants. His evidence is that he signed the *sulehnama* petition on behalf and at the request of the plaintiffs. He says that he had enquired from his client that he had compromised and he was satisfied that the plaintiffs had compromised the suit on the terms contained in the petition of compromise as filed by him. In cross-examination he admits that he was not the Pleader in the case and that the "party" went to him only when the compromise was to be filed in Court. He also admits that he cannot recognize the different persons that had gone to him, although his impression is that it was Anant Rai, plaintiff No. 1 who saw him in connection with the compromise petition. He adds, however, that he did not know Anant Rai before. He says that the person who saw him told him that he was Anant Rai and he was apparently satisfied with that and signed the compromise petition. The evidence of the Pleader, therefore, does not establish that the plaintiffs or any of them engaged him to file the petition of compromise on behalf of the plaintiffs. If indeed any of the plaintiffs were known to him at the time when he was engaged on their behalf it would be impossible to accept the evidence of Projit Rai that the plaintiffs did not engage Babu India Deo Sahay as their Pleader in the case. The *vakalat-*

nama itself strongly supports the case of the plaintiffs. We have carefully examined the *vakalatnama* and it is a matter of grave suspicion that, though Babu Indra Deo Sahay actually appeared on behalf of the plaintiffs in the matter of the compromise, his name does not appear in the printed list of Pleaders appearing in the *vakalatnama*. It was very strongly contended before us that there is an admission in the petition of the plaintiffs that Indra Deo Sahay was their Pleader in the matter. I have read the petition very carefully and I am unable to agree that there is any admission to that effect. No doubt it is not alleged in the petition that Babu Indra Deo Sahay was not their Pleader, but it is distinctly stated that it was defendant No. 1 who obtained the signature of the Pleaders of the parties on the petition. There may be an admission by implication; but there is no clear and definite admission that Babu Indra Deo Sahay was the Pleader of the plaintiffs. If the defendants intended to make any point of such admission by implication contained in the petition filed by the plaintiffs they should have cross-examined Projit Rai on this point. The attention of Projit Rai was not drawn to the alleged admission contained in the petition, and, in the absence of any explanation of Projit Rai, I am not disposed to attach much importance to the alleged admission contained in the petition. The evidence is clear and definite that the name of Indra Deo Sahay does not appear in the printed list of Vakils in the *vakalatnama* and that Babu Indra Deo Sahay was not the regular Pleader of the plaintiffs but was only engaged for filing the compromise petition. Indra Deo Sahay admits that he did not know the plaintiffs but that he accepted the word of the person who actually saw him and thought that he was acting on behalf of the plaintiffs. I have no doubt whatever that a gross and deliberate fraud has been practised upon the Court and that the Court was pursuaded to sign a decree to which the plaintiffs had never consented, and that upon the representation made to the Court that the plaintiffs had consented to it.

The question then arises whether the Court had power to set aside the compromise decree either in review or in the exercise of its inherent power. There is a long list of cases of the Calcutta High Court, of the Bombay High Court and of the Madras High Court in which it has been broadly laid down that a Court has inherent power to correct its own proceedings when it is satisfied that in passing a particular order it was misled by one of the parties. It was urged before us on behalf of the defendants-appellants that the only remedy is by suit and that once the decree has been signed there is no jurisdiction in the Court to set it aside on the ground of fraud. A distinction has been drawn in the cases of the Indian Courts between a fraud practised upon a party and a fraud practised upon the Court. It has been laid down that where the question is whether there was a consent in fact, there is power in the Court to investigate the matter in a properly constituted application and to set aside the decree if it is satisfied that a party never in fact consented to it but that the Court was induced to pass the decree on the fraudulent representation made to it that the party had consented to it, but that where there is a consent in fact, that is to say, where the parties have filed a compromise petition and they admit that they have filed it but one of the parties alleges that his consent was procured by fraud, the Court cannot investigate the matter either in review or in the exercise of its inherent power, and that the only remedy of the party is to institute a suit to set aside the decree on the ground of fraud. In other words, the factum of the consent can be investigated in summary proceedings, but the reality of the consent cannot be so investigated. In *Hakim Gir* v. *Basdeo Sahi* (1) it was held by Mookerjee and Caspersz, JJ., that where an order is obtained from the Court on the allegation that both parties had assented to it and it is asserted by one of the parties that he never consented to the order in question, it is open to

(1) 10 Ind. Cas. 894; 17 C. W. N. 632; 15 C. L. J. 408.

the Court to review the order and re-call it. In the case of *Peary Choudhury* v. *Sonsory Dass* (2) it was held by Chatterjea and Greaves, JJ., that it is the inherent power of every Court to correct its own proceedings when it has been misled and that it has complete jurisdiction to re-call the order on being apprised of the true facts. In *Basangouda Hanmantgouda* v. *Churchigirigouda* (3) the facts were that in the course of a suit a compromise was presented which was signed by the defendants' Pleader who was not especially authorised in that behalf. The Court passed a decree in terms of the compromise. The defendant then applied to set aside the decree on the ground that he did not engage the Pleader and that he never authorised the Pleader to compromise the suit. The Court set aside the decree and set down the suit for hearing. On appeal it was argued in the High Court that there was no section in the Code which entitled the party to ask the Court to re-open the suit and set aside the decree in a summary manner. Chandavarkar, J., in upholding the contention of the respondent said as follows:—"What the defendant says is that there was a suit against him, and that the suit was declared to have ended by reason of a decree passed with his consent. He never consented, and the result has been that there has been fraud committed upon the Court. The Court was pursuaded to sign a decree to which the defendant had never consented, and that upon the representation that he had consented to it. Therefore, once the Court is asked to go back upon its own procedure, it is not a question whether there is any section in the Civil Procedure Code to warrant the action of the Court amending its proceedings. It is an inherent power of every Court to correct its own proceedings where it has been misled." A similar view has been taken in the Madras High Court. See *Vilakathala Raman* v. *Vayalil Pachu* (4). These decisions, though not binding on this Court, are entitled to the greatest respect, and we have been referred to no decision which lays down a contrary rule in cases where it is asserted by a party, not that the consent was obtained from him by fraud, but that there was no consent in fact on his part. As I have said before, a distinction has been made in the Indian Courts between the cases where a party comes to Court and complains that he never consented to the order at all and the cases where a party comes to Court and admits that he did consent to the order but complains that his consent was obtained by fraud. In the one case the fraud is upon the party; in the other case, the fraud is upon the Court; and it is well established, so far as the Indian Courts are concerned, that the Court has inherent jurisdiction to set aside the order when it is apprised of the fact that it was induced to sign the decree on a fraudulent representation of facts made to it.

In my opinion the order passed by the Court below is right and I would dismiss this appeal with costs.

Kulwant Sahay, J.—I agree.

Z. K.

Appeal dismissed.

(2) 27 Ind. Cas. 628; 19 C. W. N. 419.
(3) 5 Ind. Cas. 968; 34 B. 408; 12 Bom. L. R. 223.
(4) 25 Ind. Cas. 213; 27 M. L. J. 172.

BOMBAY HIGH COURT.

FIRST CIVIL APPEALS NOS. 56 AND 67 OF 1919.

September 16, 1921.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Shah.

DATTATRAYA BHIMRAO SABNIS—DEFENDANT NO. 1—APPELLANT

versus

GANGABAI GANESHBHAT AND ANOTHER—PLAINTIFF—DEFENDANT NO. 3—RESPONDENTS.

Hindu Law—Adoption by widow—Adopted son, whether can inherit property of adoptive mother's ancestors—Succession—Bandhus, *rules relating*

DATTATRAYA BHIMRAO SABNIS *v.* GANGABAI GANESHBHAT.

to—Males and females—Rule applicable—Son's daughter's son v. sister's daughter—Balambhatti, value of.

Under the Hindu Law an adopted son takes the place of a natural son, and is entitled to inherit the property of his adoptive mother's ancestors. [p. 21, cols. 1 & 2.]

It may be that where an adoption by a Hindu widow has the effect of divesting any estate vested in a third person, it might not be valid: but it does not follow that where it has no such effect the adoption is necessarily valid. [p. 19, col. 2.]

Where the daughter-in-law of the last Hindu male holder succeeds him as a *gotraja sapinda*, in the absence of any nearer heir, she cannot make an adoption to her husband so as to affect the devolution of the estate inherited by her as a *gotraja sapinda*. [p. 20, col. 1.]

The list of *bandhus* given in the text of the Mitakshara is merely illustrative and not exhaustive; nor does it indicate anything more than this that the *atma bandhus* are to be preferred to the *pitri bandhus* and that the *pitri bandhus* are to be preferred to the *matri bandhus*. Subject to this, propinquity to the propositus is practically the sole test of preference between *bandhus*. [p. 20, col. 2.]

Among *bandhus* of the same class, however, and of the same degree of nearness to the propositus in the same branch, the males are preferred to the females, and it is doubtful whether the preference of the males over the females can be carried further. [p. 22, col. 2.]

It is a recognised way of determining the nearness of relationship to see how far each is removed from the propositus, and in the absence of any other consideration justifying a differential treatment that would be the only means of determining it. [p. 24, col. 1.]

In the case of *bandhus* equally removed from the propositus, however, one in the direct line of descent should be preferred to one in a collateral line. [p. 24, col. 1.]

A son's daughter's son is a preferential heir as being a nearer *bandhu* than a sister's daughter, though they are both equally removed from the propositus. [p. 24, cols. 1 & 2.]

Though the Balambhatti is useful as aiding the interpretation of the Mitakshara the views propounded therein cannot be accepted without due caution and examination; for instance, the position assigned to the sister's daughter in the Balambhatti cannot be properly accepted. [p. 25, col. 1.]

First appeal against the decision of the First Class Subordinate Judge, Dharwar.

Mr. *Nilkant Atmaram*, for the Appellant.

Mr. *Coyajee* (with him Mr. *R. A. Jahagirdar*), for Respondent No. 1 in F. A. No. 56 of 1919.

Mr. *Coyajee* (with him Mr. *R. A. Jahagirdar*, for the Appellant.

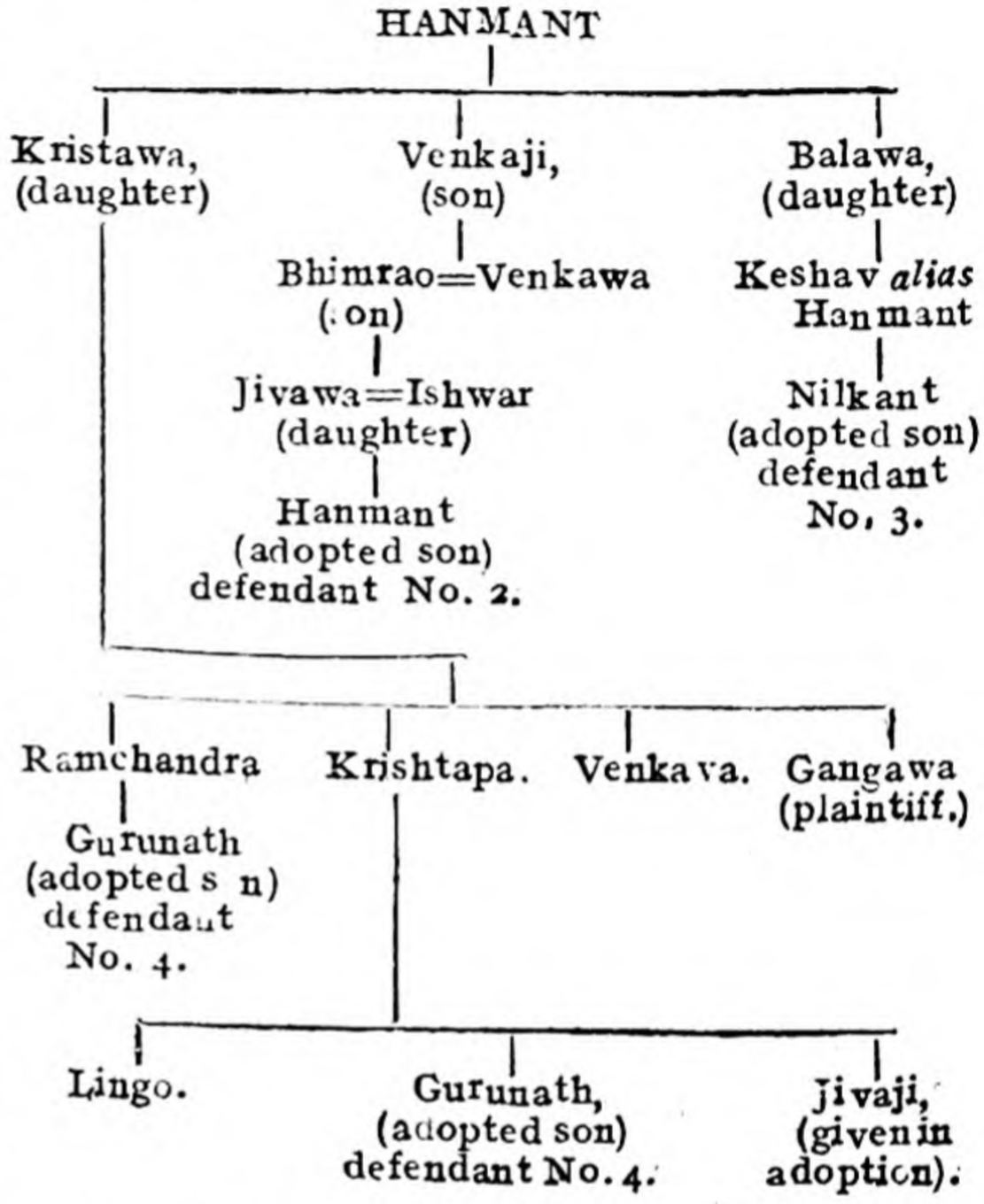
Mr. *Nilkant Atmaram*, for the Respondent No. 1.

Mr. *A. G. Desai*, for Respondent No. 2 in F. A. 67 of 1919.

JUDGMENT.

Shah, J.—Several questions of fact and law arise in these appeals.

The following genealogical table indicates the relationship of the parties subject of course to their contentions as to certain facts:—



Gangawa, who claims to be the daughter of Kristawa, is the plaintiff in this case.

Defendant No. 1, Dattatraya, not shown in the above table, claims to have been adopted by Venkawa, the widow of Bhimrao.

Defendant No. 2 claims to be the adopted son of Jivawa, the daughter of Bhimrao.

Defendant No. 3 is the adopted grandson of Balawa.

Defendant No. 4 is the adopted son of Ramchandra, son of Kristawa.

The last male owner of the property in suit was Venkaji. Bhimrao, son of Venkaji, predeceased Venkaji, leaving a widow Venkawa, and a daughter Jivawa. He died in union with Venkaji. Venkaji died in 1880, and his widowed daughter-in-law Venkawa got the property; whether she got it as an heir or under the Will said to have been made by Venkaji in her favour is a matter to be considered. Venkawa died on the 26th December 1907.

The present suit was filed by Gangawa to recover possession of the property mentioned in the plaint with mesne profits. She claimed to be the heir of Venkaji as his sister's daughter. She claimed on the footing that Venkaji was the last male owner and that the inheritance was to be traced to him. She alleged that the adoption of defendant No. 1 did not take place in fact and that even if it took place it was invalid, that defendant No. 2 was not adopted by Jivawa, that he had no title to the property, which was said to have been wrongfully retained by him, and that defendants Nos. 3 and 4, who claimed to be entitled to the property, had no title to it.

Defendant No. 1 contended that he was validly adopted by Venkawa, that the plaintiff was not the daughter of Venkaji's sister Kristawa as aleged by her and that in any case defendants Nos. 2, 3 and 4 were nearer heirs to Venkaji than the plaintiff and that as he had settled with them he was entitled to retain the property as against the plaintiff. He further contended that certain property was the property of Venkawa and that at least so far as that property was concerned the plaintiff had no right to it

Defendant No. 2 claimed to be the nearest heir of Venkaji as well as of Venkawa as the adopted son of Jivawa, and maintained that he was entitled to the whole property. He repudiated the settlement referred to by defendant No 1

Defendant No 3 claimed to be a nearer heir as the sister's son's son than the plaintiff and repudiated the settlement relied upon by defendant No. 1.

Defendant No. 4 claimed to be a nearer heir than the plaintiff on the same ground as defendant No 3 but admitted having relinquished his rights in favour of defendant No. 1 and conceded that the defendant No. 1 was the real owner of the property.

The Trial Court held that the plaintiff was the daughter of Kristawa, sister of Venkaji, that the adoption of defendant No. 2 by Jivawa was proved, that the adoption of defendant No. 1 by Venkawa was neither proved nor valid, that the Will of Venkaji set up by defendant No. 1 was not proved, that the plaintiff was a nearer heir than defendants Nos. 3 and 4 and that the plaintiff and defendant No. 2 were equally removed from the last male holder and that, therefore, they were equally entitled to the property. Accordingly a decree for partition was passed in favour of the plaintiff. As regards the land which was alleged to have been acquired by Venkawa on her own account, it was found that it was not shown to be her *stridhan*, and it was held that in any case the property would go to the plaintiff and defendant No. 2.

Both the plaintiff and defendant No. 1 have preferred separate appeals to this Court: and practically all the points which were contested in the lower Court arise for our decision here.

[Here, after dealing with the questions of fact and considering the evidence, his Lordship proceeded:—]

Strictly speaking the question of the validity of the adoption of defendant No. 1 does not arise. But in view of the argument on the question it seems to me to be desirable to decide that question. And in any case its validity if established could afford an additional ground for ignoring the adoption. The Will of Venkaji not having been proved, no question of his consent to an adoption by Venkawa could arise, the only consent suggested being that contained in the Will.

According to the decision of this Court in *Lakshmibai* v. *Vishnu Vasudev* (1) the consent of the father-in-law would be operative only during his lifetime. So the consent such as is contained in the Will, even if proved, would not avail defendant No. 1.

It is urged, however that Venkawa by adopting defendant No. 1 did not divest any estate vested in a third person, that the adoption had only the effect of divesting the estate vested in her, and that on that ground the adoption is valid. According to the decision of this Court that is not a conclusive test of the power to adopt. It may be that where the adoption has the effect of divesting any estate vested in a third person it might not be valid: but it does not follow that where it has no such effect the adoption is necessarily valid.

(1) 29 B. 410; 7 Bom. L. R. 436.

That view has been accepted in *Ramkrishna* v *Shamrao* (2). The *ratio decidendi* of this case has been approved by the Privy Council in *Madana Mohana Ananga Bheema Deo* v. *Purushothama Ananga Bheema Deo* (3). It has been applied by this Court in *Datto Govind Kulkarni* v. *Pandurang Vinayak* (4), specifically to the case of a widow succeeding as a *gotraja sapinda* of the last male owner under the rule established by *Lallubhai Bapubhai* v. *Mankuvar bai* (5) and approved by the Privy Council in *Lallubhai* v. *Cassibhai* (6), in consequence of the absence of nearer heirs. In the present case the daughter-in-law succeeded as a *gotraja sapinda* of the last male owner in the absence of any nearer heir, see *Vithaldas* v. *Jeshubai* (7). It is clear that Venkawa could not adopt to her husband so as to affect the devolution of the estate inherited by her as a *gotraja sapinda*.

I may add that in the argument it has not been suggested that Venkawa could have adopted to her deceased husband during her father-in-law's lifetime without his consent and that her power to adopt remained unaffected even after her father-in-law's death, in spite of her having inherited the estate, from her father-in-law: and in view of the decisions in *Ramji* v. *Ghamau* (8) and *Vithoba* v. *Bapu* (9) such a suggestion could not be made. The recent decision of the Privy Council in *Yadao* v. *Namdeo* (10) was not referred to in the argument, and its effect upon the view accepted by the Full Bench in *Ramji* v. *Ghamau* (8) may require to be considered hereafter. In the present case, however, the daughter-in-law inherited the property of her father-in-law and the question of her power to adopt thereafter stands on a different footing. The principle underlying the rulings in *Ramkrishna* v. *Shamrao* (2) and *Datto Govind Kulkarni* v. *Pandurang Vinayak* (4) is not in any way affected by the observations in *Yadao* v. *Namdeo* (10). I think, therefore, that the adoption of defendant No. 1 by Venkawa would not be valid.

It follows from these findings that defendant No. 1 has no title to the property in his own right.

It remains to consider the rights of the plaintiff, the defendant No. 2 and de endants Nos. 3 and 4 to this property. I may mention here that we are not concerned in this suit w th the effect of the settlement said to have been effected by defendant No. 1 with defendants Nos 3 and 4 and with defednant No. 2. Their rights *inter se* need not be considered here.

All these relations are undoubtedly *bandhus*: they are all within the limits specified in the Mitakshara beyond which the blood relationship cannot exist. A translation of the relevant passage is given in *Ramchandra* v. *Vinayak* (11). They are all *atma bandhus*. None of them is specifically mentioned in the Mitakshara or the *Mayuaha*: and the only test to determine the heirship is propinquity to the propositus. This is clear from the Mitakshara (see Mitakshara, Ch. II, sec. VI—Stokes' Hindu Law Books, pp. 448 and 449). Whatever doubt there may have been at one time it is now accepted that the list of *bandhus* given in the text is merely illustrative and not exhaustive; nor does the list necessarily indicate anything more than this that the *atma bandhus* are to be preferred to the *pitri bandhus* and that the *pitri bandhus* are to be preferred to the *matri bandhus*. It has been held by this Court in *Mohandas* v. *Krishnabai* (12) and *Parot Bapalal* v. *Mehta Harilal* (13)

(2) 26 B. 526; 4 Bom. L. R. 315.
(3) 46 Ind. Cas. 481; 45 I. A. 156; 20 Bom. L. R. 1041; 35 M. L. J. 138; 5 P. L. W. 179; 8 L. W. 167; 16 A. L. J. 725; (1918) M. W. N. 621; 24 M. L. T. 231; 28 C. L. J. 403; 41 M. 855; 23 C. W. N. 177 (P. C.).
(4) 32 B. 499; 10 Bom. L. R. 692.
(5) 2 B. 388; 1 Ind. Dec. (N. S.) 682 (F. B.).
(6) 7 I. A. 212; 5 B. 110; 4 Sar. P. C. J. 164; 3 Suth. P. C. J. 795; 4 Ind. Jur. 533; 3 Shome L. R. 245; 7 C. L. R. 445; 3 Ind. Dec. (N. S.) 75 (P. C.).
(7) 4 B. 219; 2 Ind. Dec. (N. S.) 653.
(8) 6 B. 498; 6 Ind. Jur. 587; 3 Ind. Dec. (N. S.) 787 (F. B.).
(9) 15 B. 110; 8 Ind. Dec. (N. S.) 75.
(10) 64 Ind. Cas. 536; 48 I. A. 513; 17 N. L. R. 145; 30 M. L. T. 53; 26 C. W. N. 393; 42 M. L. J. 219; 15 L. W. 565; 20 A. L. J. 481; 24 Bom. L. R. 609; 49 C. 1; (1922) A. I. R. (P. C.) 216 (P. C.).
(11) 25 Ind. Cas. 290; 41 I. A. 290; 16 Bom. L. R. 863; 18 C. W. N. 1154; 27 M. L. J. 333; 1 L. W. 831; 10 N. L. R. 112; 16 M. L. T. 447; (1914) M. W. N. 835; 12 A. L. J. 1281; 20 C. L. J. 573; 42 C. 384 (P. C.).
(12) 5 B. 597; 3 Ind. Dec. (N. S.) 393.
(13) 19 B. 631; 10 Ind. Dec. (N. S.) 421.

that propinquity is practically the sole test, and indeed, in the first case, the Court preferred an obviously nearer *atma bandhu*, not mentioned in the Mitakshara, to an *atma bandhu* specifically mentioned therein. The recent judgments of the Privy Council in *Adit Narayan Singh* v *Mahabir Prasad Tiwari* (14) and *Vedachela Mudaliar* v. *Subramania Mudaliar* (15) (not yet reported) place this point beyond controversy. The difficulty arises in the application of the test of propinquity I may also add here that the test of religious efficacy or the right to offer oblations is regu ated by somewhat different considerations, and it does not necessa rily afford any safe guide or useful assistance in determining the nearness of blood relationship in the case of distant relations such as we have in the present case

It is strictly necessary to apply the test of propinquity, as best we can to the specific relationships we have in this case. Be ore dealing with this question, it will be convenient to deal with two general arguments that have been advanced in this case. It is contended on behalf of the plaintiff that defendant No. 2 is an adopted son, and cannot take the place of a natural son, so far as his right to inherit the property of his adoptive mother's ancestors is concerned, as it depends upon the blood relationship, and that the fiction by which the adopted son takes his pos tion as a natural son in the fami y of his adoptive father has not been carried so far in this Presidency in any of the reported cases and ought not to be applied to that extent. The second argument urged on behalf of defendant No. 1 is that the plaintiff's suit must fail on the simp e ground that as she is a female she is postponed to all male *bandhus*, however remote, and the recent decisions of this Court in *Balkrishna* v. *Ramkrishna* (16) and *Girimallappa Channappa* v. *Kenchava* (17), have been relied upon in support of this argument.

As regards the first point I do not think that the argument can be accepted. In view of the decisions in *Uma Sunker* v *Kali Komul Mazumdar* (18) approved by the Privy Council in *Kali Komul Mozumdar* v. *Uma Sunker* (19), it is hardly open to the plaintiff to rely upon the earlier decision of the Calcutta High Court in *Morun Moee Debeah* v. *Bejoy Kishto* (20) or of the Madras High Court in *Chinnaramakristna Ayyar* v. *Minatchi Ammal* (21). It may be, as pointed out by Mr. Coyajee, that the point has not been decided by this Court or rather that there is no reported decision on the point; but the observations in *Nagindas* v. *Bachoo Hurkissondass* (22), wherein the relevant passage from the Full Bench decision of the High Court at Calcutta is quoted, are sufficient to render the argument untenable. The criticism of this view in Ghose's Hindu Law, Vol. I, p. 655, (3rd Edition) which purports to be based upon certain texts, has been relied upon by Mr. Coyajee That criticism no doubt desrves to be considered: but it is hardly an open question now at least so far as this Court is concerned. At one stage of the argument I thought that there might be some force in the argument: but having regard to the clear decisions of the Privy Council to which I have referred, I do not think that it is permissible to us to treat it as an arguable point.

(14) 60 Ind. Cas. 251; 48 I. A. 86; 40 M. L. J. 270; (1921) M. W. N. 153; 19 A. L. J. 208; 2 P. L. T. 97; 33 C. L. J. 263; 29 M. L. T. 240; 6 P. L. J. 140; 23 Bom. L. R. 692; 25 C. W. N. 842; 14 L. W. 20 (P. C.).

(15) 64 Ind. Cas. 402; 48 I. A. 349; 44 M. 753; 14 L. W. 402; (1921) M. W. N. 669; 2 P. L. T. 707; 26 C. W. N. 159; 41 M. L. J. 676; 30 M. L. T. 198; 4 U. P. L. R. (P. C.) 13; 24 Bom. L. R. 649; (1922) A. I. R. (P. C.) 23 (P. C.).

(16) 59 Ind. Cas. 771; 45 B. 353; 22 Bom. L. R. 1442.

(17) 61 Ind. Cas. 294; 45 B. 768; 23 Bom. L. R. 213.

(18) 6 C. 256; 7 C. L. J. 145; 3 Ind. Dec. (N. S.) 168.

(19) 10 I. A. 138; 10 C. 232; 13 C. L. R. 379; 7 Ind. Jur. 553; 4 Sar. P. C. J. 458; 5 Ind. Dec. (N. S.) 156 (P. C.).

(20) W. R. F. B. 121.

(21) 7 M. H. C. R. 245.

(22) 32 Ind. Cas 403; 43 I. A. 56 at p. 68; 18 Bom. L. R. 172; 30 M. L. J. 193, 14 A. L. J. 185; 3 L. W. 259; 19 M. L. T. 193; (1916) 1 M. W. N. 258; 23 C. L. J. 395; 20 C. W. N. 702; 40 B. 270 (P. C.)

As regards the other question about ranking all female *bandhus* after the male *bandhus* it seems to me that the two decisions of this Court already referred to proceed upon a somewhat incomplete realisation of the position of the female *bandhus* in this Presidency, and do not give that effect to the test of propinquity, which alone is to be determinative of the right to inherit in the case of distant blood relations. In Madras no doubt all female *bandhus* are postponed in favour of the male *bandhus*. But in this Presidency the position of the female has received a somewhat different treatment. For instance, in the case of the widows of *sagotra sapindas*, in this Presidency, their right is recognised to an extent to which it is not recognised in any other part of India, governed by the Mitakshara Law. That, however, is the case of *sagotra sapindas* and may not be strictly relevant to the present point. The sister is given a place in this Presidency which has not been assigned to her in Madras or elsewhere: no doubt this is due to a large extent to the fact that she is expressly mentioned in the *Vyavahara Mayukha* and even though she is not mentioned in the Mitakshara she has been practically assigned by the decisions of this Court the same place after the grandmother as in the *Vyavahara Mayukha*. But the fact remains that a female in that position occupies such a high place among the heirs. Then the decision in *Saguna* v. *Sadashiv* (23) implies a negation of the general proposition that the female *bandhus* must come in after the male *bandhus*. The questions and answers in West and Buhler's Digest of Hindu Law, pp. 465, 466 (4th Edition.), relating to brother's daughter and sister's daughter do not support the general statement that the female *bandhus* can come in only after all male *bandhus*, without any regard to the nearness of their relationship. In short that view appears to me to be opposed to a fair application of the doctrine of propinquity which has been so far applied in this Presidency without giving any such general preference to the male *bandhus* over the female *bandhus*. I do not say that there is no preference of males over the females at all in determining the rights of the *bandhus*. The extent of the preference is not easy to define and has not been defined. Speaking with some diffidence on a point of this difficulty, I think that except in the two recent rulings, the preference has so far never been stated in this Presidency to go beyond this, that among *bandhus* of the same class, and of the same degree of nearness to the propositus, in the same branch, the males are preferred to females; for instance in the case of sister's son and sister's daughter, the son would be preferred to the daughter. But whether it is proper to go beyond that is a point which, in my opinion, requires consideration. The basis of the rule enunciated in *Rajah Venkata Narasimha Appa Rao Bahaaur* v. *Rajah Surenani Venkata Purushothama Jagannadha Gopala Row Bahadur* (24), may be found in *Lakshmanammal* v. *Tiruvengada Mudali* (25). The view adopted in this decision has never been accepted in this Presidency as regards the relative position of the sister and her son. It is not necessary in this case to discuss the texts referred to in that case. The result of adopting this view about preferring the male *bandhus* to the female *bandhus* generally would be to postpone some of the nearest female *bandhus* in favour of every distant relations. Even the son's daughter, who would be so near to the propositus would be relegated to a very subordinate and distant position among the *bandhus* if she is to be postponed to all males; in competition with her own son, she would be postponed Of course, whether this state of law would be anomalous or not is a matter open to argument; but in this Presidency at any rate it would be considered anomalous. In *Mohandas* v. *Krishnabai* (12) Melvill, J, observed as follows:—

"The plaintiff's mother who is still alive, was a sister of Sunderlal's mother; and it may well be doubted whether the plaintiff would be entitled to succeed in preference to his own mother, through whom he claims"

(23) 26 B. 710; 4 Bom. L. R. 527.

(24) 31 M. 321; 4 M. L. T. 5; 18 M. L. J. 409.
(25) 5 M. 241; 2 Ind. Dec. (N. s.) 169.

This shows how this question has been looked at in this Presidency. No doubt if the rule as to giving preference to the male *bandhus* over female *bandhus* apart from any consideration of propinquity were adopted it would simplify matters considerably. But I am humbly of opinion that that would not be in accordance with the Hindu Law as understood and administered in this Presidency.

Without deciding this question of general preference of the male *bandhus* over the female *bandhus* and without reference to it, we can determine the question as to who is the nearest heir among the *bandhus* in this case. As between the plaintiff and defendants Nos. 3 and 4, I am inclined to take the view that the plaintiff would be the preferential heir. The sister's daughter is nearer to the propositus than the sister's son's son In West and Buhler's Hindu Law, in the questions and answers to which I have already referred, the opinion is expressed that a brother's daughter is to be preferred to the brother's daughter's son, and that the sister's daughter is nearer than sister's daughter's son. That, however, does not exactly meet the present case as the competition is with the sister's son's son. The case of the sister's son is mentioned in the same book at page 462. According to the opinion expressed there the sister's son comes after the sister but before the sister's daughter. It is based upon the old case of *Ichharam* v *Prumanund* (25), and upon the fact that the sister's son is mentined in the Nirnaya Sindhu. That leaves the question of the sister's son's son in relation to the sister's daughter open. If the sister's sons mentioned in the Nirnaya Sindhu can be interpreted as including the sister's sons' son and not the sister's daughter, it may be said that the latter cannot be preferred to the former. But there is no justification for adopting such an interpretation. Applying the test of propinquity it would seem that the sister's daughter would be nearer than the sister's son's son. I do not, however, decide this question as it is not necessary to do so.

As between defendant No. 2 and defendants Nos. 3 and 4 the question presents no difficulty. The defendant No. 2 is nearer by one degree to the propositus and is in the line of descent. He is to be preferred to the defendants Nos. 3 and 4.

As between the plaintiff and defendant No. 2 the question is not easy. In order to appreciate the difficulty it is necessary to bear in mind not only the high position assigned to the sister as an heir in this Presidency but also the reasons for that view. In order to have a clear idea of those reasons the judgments in the following cases may be perused with advantage:—*Vinayak Anandrav* v. *Lakshmibai* (27), *Sakharamsadashiv Adhikari* v. *Sitabai* (28), *Kesserbai* v. *Valab Rooji* (29), *Lakshmi* v. *Dadananaji* (30), *Mulji Purshotum* v. *Cursandas Natha* (31) and *Bhagwan* v. *Warubhai* (32).

Apart from the references to the views expressed in the Commentary known as Balambhati on the Mitakshara with which I shall deal separately as bearing on the point in question, it is clear that the position of the sister is largely due to the fact that the author of the Vyavahara Mayukha has assigned to her a special place, and the ground as stated by him when shorn of all technicalities is propinquity, as the texts of Manu and Brihaspati referred to by him go to show. (See Mandlik's Hindu Law, p. 81) Under the Mitakshara though the sister is not mentioned by *Vijnanesvara*, practically the same position is assigned to her under the decisions of this Court. I may refer to the case of *Rudrapa* v. *Irava* (33), which, like the present case, came from the Dharwar District.

The sister's position being thus established it is clear that in this Presidency she would be preferred to a son's daughter. The son's daughter can come in only as a *bandhu* as the deisions in *Venilal* v. *Parjaram* (34) and *Mulji Purshotum* v. *Cursandas Natha* (31), already referred to on a different

(25) (1822) 2 Bor. 515.

(27) 1 B. H. C. R. 117.
(28) 3 B. 353; 4 Ind. Jur. 81; 2 Ind. Dec. (N. S.) 236.
(29) 4 B. 188; 2 Ind. Dec. (N. S.) 633.
(30) 4 B. 210; 2 Ind. Dec. (N. S.) 647.
(31) 24 B. 563; 2 Bom. L. R. 721; 12 Ind. Dec. (N. S.) 906.
(32) 32 B. 300; 10 Bom. L. R. 389.
(33) 28 B. 82; 5 Bom. L. R. 676.
(34) 20 B. 173; 10 Ind. Dec. (N. S.) 674.

point, would show. I am not concerned with the merits of this position. But undoubtedly a sister is a preferential heir in relation to a son's daughter: and it may be argued that her issues should be preferred to the issues of the son's daughter. On the other hand, it may be urged that whatever the rights of the sister as against the son's daughter may be, the rights of these issues *inter se* should be determined solely with reference to their propinquity, that in the case of *bandhus* equally distant in degrees from the propositus those in the direct line of descent should be preferred to the *bandhus* among the collaterals in the ascending line, and that in the case of *bandhus* equally removed in degrees from the propositus a male may be preferred to a female. There is a third position which has been accepted by the lower Court, *viz.*, that the propinquity must be determined merely with reference to the degrees by which the *bandhus* are removed from the propositus, and that as the sister's daughter and the son's daughter's son are equally distant in that way, they should take the property equally. As regards this last view no doubt it is a recognised way of determining the nearness of relationship to see how far each is removed from the propositus, and in the absence of any other consideration justifying a differential treatment that would be the only means of determining it.

After a careful consideration of the position of the sister I do not think that the fact that she is preferred to the son's daughter as an heir affords any ground for preferring the sister's daughter to the son's daughter's son, though at one time I thought that, other things being equal, perhaps this might afford a ground for preference. But it seems to me that the position of the *bandhus* with whom we are concerned must be considered with reference to the propositus without any regard to the relative rights of their respective mothers. I think, however, that in the case of *bandhus* equally removed from the propositus one in the direct line of descent should be preferred to one in a collateral line. I do not desire to generalise beyond the strict requirements of this case, but the son's daughter's son can be preferred as being a nearer *bandhu* to the sister's daughter though they are both equally removed from the propositus. It is rather strange that there should be no precedent to guide us on a point of this character: at any rate I have not been able to find any, and none is cited to us. But I am satisfied that it affords a safe basis for differentiation between these *bandhus* as to their propinquity.

It is, therefore, not necessary to consider the question whether defendant No. 2 can be preferred to the plaintiff on the ground that he is a male and both being *atma bandhus* equally removed from the propositus. I think that out of all these *bandhus* the defendant No. 2 is the preferential heir.

I may add with reference to the Nirnaya Sindhu that so far as I have been able to ascertain none of the relations that we are concerned with is specifically mentioned as having any preferential right *inter se* to perform the *shraddhas*. The passage relating to the sister's son is to be found in Nirnaya Sindhu, p. 273 (Nirnaya Sagar Press, 2nd Edition). I have already stated my opinion that the expression 'sister's son,' when read in relation to the context, cannot be understood as including the sister's son's sons: while speaking of the Nirnaya Sindhu it may be mentioned that the test of religious efficacy cannot help us in the case of such distant relations as we have in the present case.

As regards the Balambhatti, no doubt if the interpretation put by Balambhatta upon the word "*Bhratarah*" in the well-known text of Yajnavalkya were accepted the sister's daughter would come in not only before all *bandhus* but even before all the *gotraja sapindas*. A translation of the relevant passage has been given at page 306 and the list of heirs according to the scheme adopted in the Balambhatti is stated at page 308 of the report in *Bhagwan* v. *Warubhai* ('32). Though Westropp, C. J. laid stress upon the Balambhatti as supporting the case for the sister in *Sakharamsadashiv Adhikari* v. *Sitabai* (28), Jenkins, C. J. in *Mulji Pursotum* v. *Cursandas Natha* ('31) and Chardavarkar, J. in *Bhagwan* v. *Warubhai* ('32) definitely rejected it as affording a basis for the sister's position in the list of specifically mentioned heirs; and that

view was followed in *Hari Annaji* v. *Vasudev Janardhan* (35).

Apart from these decisions there is another difficulty in following the shceme in the Balambhatti logically. It would not be easy to determine what place would be assigned according to the Balambhatti to the son's daughter's son. For instance in dealing with the position of the daughter's son, as stated in the *Mitakshara*, the author has interpreted the word *dauhitra* (daughter's son) as including *dauhitri* daughter's daughter also; (see Gharpure's edition of Balambhatti, Vyavaharadhyaya, page 207) and he has given her a higher place than the sister and her issues. It may be said that the same author would logically assign a higher place to the son's daughter and probably to her son. I may state that I have not been able to find in the Balambhati any express reference to the son's daughter, or to the son's daughter's son in connection with the relative positions of diherent heirs. So it is possible to argue that the sister's daughter occupies a higher position than the son's daughter's son according to the Balambhatti. The true view about this commentary on the particular point under consideration appears to me to be that the interpretation of the word *bhratarah* disturbs the settled series of heirs under the Mitakshara and it is difficult to base any inference upon that view unless we are prepared to accept the scheme in its entirety. Though this commentary is useful as aiding the interpretation of the Mitakshara the views propounded therein cannot be accepted without due caution and examination. I do not think that the position assigned to the sister's daughter in the Balambhatti can be properly accepted.

In the result I would set aside the decree of the lower Court and dismissed the plaintiff's suit.

Having regard, however, to the various contentions raised by the parties and the findings thereon and to all the circumstances, I would order each party to bear his or her own costs throughout. The plaintiff to pay to the Government the amount which she would have been required to pay as Court-fees in the lower Court if she had not been allowed to sue as a pauper.

Macleod, J.—I agree with the conclusions of my learned brother, but I should like to add a few remarks of my own. Once the questions of fact have been decided there remains the contest between rival *bandhus*. It was first contended that the second defendant could not inherit as a *bandhu* to the relations of his adoptive mother. But apart from the decision in *Uma Sunker* v. *Kali Komul Mozumdar* (18) and *Kali Komul Mozumdar* v. *Uma Sunker* (19), it would seem strange if an adopted son having left his natural family were to be considered as the son of his adoptive father only and not of his adoptive mother. As the second defendant then must be recognized as the son's daughter's son of Venkaji, it follows that the defendant No. 3 as sister's grandson is one more degree remote, and the interesting question whether he would be preferred to the sister's daughter need not be decided. There remains then the plaintiff, sister's daughter, and defendant No. 2, son's daughter's son both *atma bandhus*, three degrees removed from Venkaji. The learned Judge has decreed that they should take the suit property equally. Though some may think that this Court in deciding that all male *bandhus* should be preferred to female *bandhus* without regard to propinquity has gone too far, still there is no authority for the proposition that *bandhus* of different sex but of equal propinquity should take equally. It may be even noted that amongst those relations who have been held to be *bandhus* in decided cases as detailed in Mr. Gharpure's book on Hindu Law at p. 315 there is only one female, the father's sister who, it was held in *Saguna* v. *Sadashiv* (23), should be preferred to the mother's brother, and that decision must now be considered as virtually overruled by the decision of the Privy Council in *Vedachela Mudaliar* v. *Subramania Mudaliar* (15) (not yet reported), as their Lordships have expressed their disapproval of the preference given by the decisions of the Madras High Court to *bandhus* on the father's side to *bandhus* on the mother's side. I think, therefore, the 2nd defendant should be preferred to the plaintiff. But apart from the question of sex there is another very interesting

(35) 23 Ind. Cas. 944; 38 B. 438; 16 Bom. L. R. 283.

question which has not been considered, and which does not seem to have arisen in any reported case. The direct descendants of the propositus through daughters though they are *bandhus* are not cognates. Even if paternal cognates are not to be preferred to maternal cognates it might plausibly be argued that direct descendants should be preferred to both. I for one must regret that the principles with regard to the inheritance of *bandhus* cannot be laid down more definitely, instead of it being left to their being discovered by a process of exhaustion as occasion arises for a decision between rival claimants.

Z. K. *Decree set aside.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2061 OF 1920.

November 23, 1922.

Present:—Mr. Justice Walmsley and Mr. Justice B. B. Ghose.

THE KUSHTIA LOAN OFFICE LIMITED—PLAINTIFF—APPELLANT

versus

ANNADA CHARAN CHAKRAVARTY AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Acquisition of portion of mortgaged property—Compensation, appropriation of, towards payment of unsecured debts—Purchaser of equity of redemption, right of.

Where a portion of a mortgaged property is acquired under the Land Acquisition Act and the compensation money is, under an arrangement arrived at between the mortgagor and the mortgagee, appropriated towards the satisfaction of unsecured debts due from the mortgagor to the mortgagee and not towards a reduction of the mortgage-debt, a subsequent purchaser of the equity of redemption from the mortgagor is bound by the arrangement and cannot debit the amount of the compensation received by the mortgagee from the mortgage-debt. [p. 27, col. 1.]

Appeal against a decree of the District Judge, Nadia, dated the 25th of June 1920, modifying that of the Subordinate Judge of that District, dated the 30th of September 1918.

Dr. *Dwarkanath Mitter* and Babu *Manindranath Roy*, for the Appellants.

Babus *Brojolal Chakravarty* and *Preonath Dutt* for Babu *Hemendra Kumar Das*, for the Respondents.

JUDGMENT.

Ghose, J.—The plaintiffs are the appellants in this case. The suit was brought for enforcing a mortgage executed by the defendants Nos. 1, 2 and 3 in favour of the plaintiff Company, in July 1913. Twenty-four items of property were mortgaged. Out of these, two items were acquired under the Land Acquisition Act in 1915 and the amount of compensation awarded was less than the mortgage-money. The plaintiffs were entitled as mortgagees to take the whole amount of compensation in satisfaction of their mortgage. But the mortgagors were not willing that the entire amount should be taken by the mortgagees in payment of that debt. The plaintiff Company had two unsecured debts due from the mortgagors. What the mortgagors wanted was that the compensation money should be appropriated in full payment of the unsecured debts and a portion of it should be taken by the mortgagees towards part satisfaction of the mortgage-debt. The mortgagees agreed to that and the unsecured debts were paid off with a portion of the compensation money. In 1916, the contesting defendants Nos. 4, 5, 6, 7 and 10 with some other defendants purchased the equity of redemption in some of the mortgaged properties subject to the mortgage and they have been impleaded in this suit as such purchasers. Their objection was that the mortgagees were bound to give credit for the entire amount of the compensation money in reduction of the mortgage-debt. The Court of first instance made a decree in favour of the plaintiffs for the full amount of the mortgage-money due; but, on appeal by the contesting defendants, the lower Appellate Court has varied that decree and directed that the money due on the mortgage should be reduced by allowing credit for the amount that was paid in satisfaction of the unsecured debts due to the mortgagees. This view, in my opinion, is erroneous. A portion of the

property had been acquired under the Land Acquisition Act before the contesting defendants had acquired any interest in the property. Reliance has been placed by the learned Vakil for the respondents on the principle that where the mortgagee receives any money by means or virtue of a security, it must be applied in reductions of the mortgage-debt. But that principle has no application here. Before any third person had acquired any interest in any portion of the mortgaged property, the mortgagees were entitled, if they so desired, to pay the whole amount of the compensation money to the mortgagors. They would thereby have reduced their own security and the interest of no other person would have been affected in any way. What happened in this case practically amounts to this that the mortgagees made over a part of the compensation money to the mortgagors and the mortgagors paid it back to the mortgagees in satisfaction of their unsecured debts. As this happeped before the contesting defendants had acquired any interest in the mortgaged property, they have no right to complain. The mortgagors themselves could not have after entering into the arrangement referred to above claimed that the mortgagees were bound to give credit for the amount in satisfaction of the mortgage debt which they had themselves asked the mortgagees to appropriate in satisfaction of some other debt. The appeal must, therefore, be allowed, the judgment and decree of the lower Appellate Court set aside and those of the First Court restored with costs in all Courts. As the period of redemption fixed by the Court of first instance has expired, that period will be extended by three months from this date.

Walmsley, J.—I agree.

Appeal allowed.

Z.-K.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1299 OF 1921.

March 22, 1923.

Present:—Mr. Justice Rafique and Mr. Justice Lindsay.

Maulvi ZIA-UDDIN—PLAINTIFF—APPELLANT

versus

Maulvi ABUL HASAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Pre-emption— Pre-emptor and vendor equally entitled, rights of—Procedure.

Where in a suit for pre-emption based on the provisions of the Muhammadan Law, the Court finds that the pre-emptor and the vendee stand in the same degree towards the property sold, the property ought to be divided equally between them. [p. 29, col. 1.]

Muhammad Yakub v. *Kanhai Lal*, 64 Ind. Cas. 673; 19 A. L. J. 869; 44 A. 83; (1922) A. I. R. (A.) 157, followed.

Second appeal against a decree of the District Judge, Budaun, dated the 2nd of July 1921.

Messrs. *Iqbal Ahmad* and *Mukhtar Ahmad*, for the Appellant.

Mr. *Ibn Ahmad*, for the Respondents.

JUDGMENT.—It appears that one Moulvi Aziz-ud-din was the proprietor of a grove situate in the city of Budaun. The Moulvi died some time ago leaving him surviving three sons and a daughter by one wife and one son by another wife. The latter was called M. Mohammad Abul Hasan and was in judicial service in Hyderabad. The names of the children, by the first wife, were M. Mohammad Wahab-ud-din, Wahaj-ud-din Zia-ud-din and *Musammat* Afzal-un nissa. Some years ago Afzal-un-nissa sold her share to Abul Hasan. On the 2nd November 1920 Wahab-ud-din sold his share in the grove to Abul Hasan in lieu of Rs. 2,200. Zia-ud-din the own brother of the vendor brought the suit out of which this appeal has arisen against the vendor and the vendee to recover the share sold on the ground of pre-emption. It was alleged in the plaint that after the death of M. Aziz-ud-din, the children by the first wife gave his share to Abul Hasan, the son by the second wife and separated from him. The plaintiff Zia-ud-din was employed in Government service at Aligarh when his brother Wahab-ud-din executed a sale-deed of his share in the grove on the

2nd November 1920 in favour of Abul Hasan. On the 10th November 1920 when Zia-ud-din went home he learnt of the sale. Immediately on coming to know of the sale he made the two demands required by the Muhammadan Law and, as the vendee declined to transfer the share to him the present suit had to be brought. The claim of the plaintiff was based on the allegation that a custom of pre-emption obtained in the city of Budaun under which he as the own brother of the vendor had a preferential right over the vendee. Another basis of the claim was that under the Muhammadan Law apart from any custom the plaintiff being the *shafi Khalit* had a better right of purchase than the vendee. The claim was resisted by the denial of the custom set up in the plaint and the allegation of the plaintiff being *shafi khalit*. It was pleaded for the defence that there had been a partition of the grove among all the children of M. Aziz-ud-din, each of them being in possession of his or her separate share. The plaintiff therefore had no better right to the property in suit than the vendee. The Court of first instance dismissed the claim holding that all the children of M. Aziz-ud-din had divided the grove prior to the disputed sale, that no custom of pre-emption obtained in Budaun, that the plaintiff was not a *shafi khalit*. On appeal the learned District Judge upheld the decree of the First Court.

In second appeal before us the plaintiff challenges the finding of the Court below with regard to the absence of the custom of pre-emption in Budaun and the status of the plaintiff as not being a *shafi khalit*. The finding of the court below with regard to the partition of the grove in question is admitted and indeed it could not be denied as the finding is one of fact. The learned Counsel for the plaintiff-appellant has read to us the paragraph of the *wajib-ul-arz* upon the basis of which he contends that a custom of pre-emption prevails in Budaun. We have duly considered the language of that paragraph and we agree with the Court of first instance that it does not prove the custom set up on behalf of the plaintiff The real dispute in the case is as to the status of the plaintiff as owner of part of the grove, *i. e.* whether he is a *shafi khalit*. The case for him is that the vendee has got either a house or a *bagia* as is marked on the plan to the east of the grove in question. On account of his ownership of the said property he has a right of way over those portions of the grove which have fallen to the lot of the plaintiff and his two brothers. The share of the vendor therefore bears a servitude *i. e.* the liability to be walked over by the vendee. The same servitude is borne by the share of the grove of the plaintiff. In other words the statement is that the vendee is the owner of a dominant tenement while the pre-emptor and the vendor are the owners of two servient tenements. There is therefore a bond of union between the vendor and the plaintiff as both of them are the owners of servient tenements and thus the plaintiff is a *shafi-khalit* and has a superior right to purchase the share of the vendor to the vendee. The obvious reply to this argument is that *qua* the share of the vendor both the pre-emptor and the vendee are owners of dominant tenements for it appears from the plan on the record marked Exhibit A. and the evidence on the record, that in order to get to his portion of the grove, or away from it, the plaintiff has to pass through the share of the grove that belongs to the vendor which was sold on the 2nd November 1920. The vendee has also to pass over the same portion of the grove of the vendor. Thus both the pre-emptor and the vendee are as *qua* the share of the vendor, proprietors of dominant tenements. It is, however, argued that the vendor's share of the grove is a servient tenement *qua* the vendee as proprietor of the property to the east of the grove and the vendee is not an owner of any servient tenement. The plaintiff pre-emptor has a bond of union with the vendor inasmuch as his share and vendor's share are both burdened with the servitude of the right of way in favour of the vendee. The plaintiff pre-emptor has, it is true, an additional right, *viz.* the right of passing over the property sold. He has thus a twofold

right to describe himself as a *shafi khalit*. The vendee on the other hand can base his claim to purchase on one right only, *viz*. that of being the owner of a dominant tenement. We think that the contention is not quite correct. The vendee stands in the same position as the pre-emptor. The vendee purchased the share of Afzal un-nissa some years prior to the disputed sale. The share of Afzal-un-nissa adjoins the share of the vendor on the west side. That portion of the grove which the vendee purchased from Afzal-un-nissa also bears the servitude of the right of way in favour of the plaintiff pre-emptor. The vendee can say that he also is the owner of a servient tenement, *i. e.* his property bears the same burden as the property that has been sold to him and is now in dispute. We thus find that both the plaintiff pre-emptor and the vendee stands in the same degree whether as owners of dominant tenements or as owners of servient tenements in respect of different portions of their properties. The contention for the plaintiff-appellant is that if this Court is of opinion that he and the vendee stand in the same degree, the property in dispute ought to be divided between him and the vendee. We think this contention is correct and is supported by authority *Muhammad Yakub* v. *Kanhai Lal* (1). We therefore allow the appeal, set aside the decrees of the Courts below and decree the claim of the plaintiff-appellant to half the property sold on the 2nd November 1920, on the payment of Rs 110 within two months from the date of the decree of this Court. As to costs parties will bear costs in proportion to failure and success throughout, including fees in this Court on the higher scale. In case the money is not deposited within two months from the date of the decree of this Court the claim of the plaintiff will stand dismissed with costs throughout.

Decree modified.

Z. K.

(1) 64 Ind Cas. 673; 19 A. L. J. 869; 44 A. 83; (1922) A. I. R. (A.) 157.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1894 OF 1921.

March 12, 1923.

Present:—Mr. Justice Walmsley and Mr. Justice B. B. Ghose.

UKILUDDI AKAN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

ASMAT ALI MUNSHI AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Land Revenue Sales Act (XI of 1859), applicability of—Howla *surrendered to Government*—Karsha, *whether can be sold for arrears of rent.*

A *Howladar* holding a *Howla* under Government, *Khasmehal* surrendered the unexpired term of the *Howla* to the Government. There was a *Karsha* in the *Howla*, which fell into arrears and was sold at the instance of Government under the Bengal Land Revenue Sales Act:

Held, (1) that the *Karsha* was liable for the rent payable to the *Howladar*, and the arrangement which the *Howladar* entered into with the Government had not the effect of changing the rent into revenue, thereby rendering the *Karsha* liable to sale under the provisions of the Bengal Land Revenue Sales Act; [p. 30, col. 1.]

(2) that the sale purporting to have been made under the Act was, therefore, without jurisdiction. [p. 30, col. 1.]

Appeal against a decree of the Subordinate Judge, First Court, Bakargunj, dated the 26th of May 1921, affirming that of the Munsif, First Court at Barisal, dated the 24th of January 1921.

Babu *Abinash Chunder Guha*, for the Appellants.

Babus *Gunoda Charan Sen* and *Prosanto Bhushan Gupta*, for the Respondents.

JUDGMENT.

Walmsley, J.—This appeal is preferred by the plaintiffs and it is the result of a sale purporting to be held under the provisions of Act XI (B. C.) of 1859 and Act VII (B. C.) of 1868. The facts briefly stated are that a *Howladar* holding a *Howla* under Government *Khasmehal* regretted his bargain and asked Government to manage the *Howla* during the unexpired term. In the *Howla* there is a *Karsha* and, after the *Howla* had been placed in the hands of the Government by the *Howladar*, the *Karsha* fell into arrears and, to realise the arrears, a sale was held under Act XI of 1859 at the instance of the Government. The plaintiffs sought to have the sale set aside by appealing to the Commissioner; but in-

vain. Consequently, they brought this suit.

I am unable to follow the reasoning of the learned Munsif, adopted by the learned Subordinate Judge and repeated before us on behalf of the respondents that section 3 of Regulation VII of 1822 has anything to do with the matter. The position was that the *Karsha* was liable for the rent payable to the *Howladar*. But I am unable to see that the arrangement which the *Howladar* entered into with the Government had the effect of changing the rent into revenue and thereby rendering the *Karsha* liable to sale under the provisions of Act XI of 1859. Consequently, in my judgment, the sale purporting to be held under Act XI of 1859 was made without jurisdiction and I think the plaintiffs are entitled to have that declaration made as requested, as also a further declaration that their right title and interest on the mortgage have not been affected by the sale; that is to say, the appeal is decreed, with costs in all Courts.

Ghose, J.—I agree.

Appeal allowed.

Z. K.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 3 OF 1922.

June 7, 1923.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Piggott.

RUHUL AMIN—PLAINTIFF—APPELLANT

versus

Lala SHANKAR LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 99, O. III, rr. 1, 2, O. IV, r. 1—Plaintiff, adult, treated as minor—Plaint presented by next friend—Irregularity, whether curable—Jurisdiction of Court to entertain plaint.

A Court has no jurisdiction to entertain a suit except upon a plaint properly presented. [p. 31, col. 2.]

Where the plaintiff in a suit is a major, but he is treated as a minor in the plaint and the plaint is presented on his behalf by a next friend the presentation of the plaint is not valid and the Court has no jurisdiction to entertain the suit. The defect is not one which is curable under section 99 of the Civil Procedure Code. [p. 32, cols. 1 & 2.]

Sheorania v. *Bharat Singh*, 20 A. 90; A. W. N. (1887) 203; 9 Ind. Dec. (N. S.) 417; *Basdeo* v. *John Smidt*, 22 A. 55; A. W. N. (1899) 172; 9 Ind. Dec. (N. S.) 1068, referred to.

Letters Patent Appeal against the judgment of the Hon'ble Mr. Justice Stuart, dated the 6th December 1921.

Mr. *Iqbal Ahmad*, for the Appellant.

Mr. *Damodar Das*, for the Respondents.

JUDGMENT.—The three connected appeals before us arise out of one single suit. This was filed by Ruhul Amin, the appellant before us, as long ago as the 24th of March 1916. The object was to set aside a transfer purporting to have been effected by a sale deed of November 16, 1906, executed by various persons and amongst others by the mother of the plaintiff, who purported to act on behalf of the plaintiff, then a minor, as his natural guardian. There was a long array of defendants including numerous subsequent transferees of the property concerned. In the written statements of at least two of these defendants the point was taken that the plaintiff had attained majority prior to the institution of the suit, and that the plaint purporting to be signed and verified on his behalf by a next friend, namely the father's sister's son of the plaintiff, was not valid in law, and that there had been no valid presentation of the plaint. It is impossible for us to say why the Trial Court ignored these pleadings at the time of the settlement of the issues. Both parties are to blame for not having insisted upon an issue being struck on a pleading of this nature which went to the very root of the case. The plaintiff in particular finding it alleged against him that the suit was not even lawfully before the Court, should have in our opinion taken prompt action. He could either have accepted the plea regarding his majority as true in fact and asked permission to present the plaint formally to the Court himself, after making the trifling amendment which would have been necessary, or if he desired to stand by the allegation of his minority he should have asked for an issue on the point. In the result the Trial Court went into the merits of the case and

decreed a part only, though a substantial part, of the plaintiff's claim.

There were three appeals filed, one by the plaintiff himself, and one by each of two sets of defendants who were dissatisfied with the decision of the Trial Court. The defendants who appealed again made it a ground of objection in the lower Appellate Court that there had been no valid plaint presented to the Trial Court, and that the whole of the proceedings of that Court were vitiated by this defect. The lower Appellate Court entertained this plea. It went into the facts of the case and it found that the plaintiff had actually been born in the year 1890, so that he was over 25 years of age when the plaint was filed on his behalf by his father's sister's son. The learned Additional District Judge upon this state of facts held that there was an incurable defect in the whole of the proceedings in the Trial Court, that the decree of that Court in favour of the plaintiff was a bad decree. He dismissed the plaintiff's appeal, allowed the appeals filed by the two sets of defendants and dismissed the suit.

It is unnecessary to enquire whether the lower Appellate Court could or could not have substituted for the decree of the Trial Court an order returning the plaint to the plaintiff, to be presented again after proper amendment. There is some authority for the adoption of this course in a decision of the Madras High Court, which has been laid before us; but there is no decision of this High Court lending support to such a view of the law. If there was never any valid plaint before the Court, the proper order would seem to be one rejecting the petition tendered as a plaint and leaving it to the plaintiff to take such further action as he might think proper. In the present circumstances, the question hardly arises, because by the time the learned Additional District Judge came to dispose of the appeals before him the period of limitation, even reckoned from the date given in the plaint, had expired.

The suit having thus been dismissed the plaintiff filed three appeals in this Court which were disposed of by a learned Judge of this Court in a single judgment. The learned Judge held that the question of law sought to be raised was concluded, so far as this Court is concerned, by the decision in the case of *Sheorania* v. *Bharat Singh* (1.) He dismissed the appeals accordingly.

Various points have been raised in argument before us. The first was with reference to a later decision of this Court in the case of *Basdeo* v. *John Smidt* (2). There are expressions in the judgment in that case which are inconsistent with some of the principles on which the decision in *Sheorania* v. *Bharat Singh* (1) appears to proceed but the two cases are in their essence quite distinct. In *Basdeo's* case (2) the learned Judges were at pains to point out that there was before the Court a plaint which had been validly presented by an Advocate of the Court, in whose favour there existed a clear presumption that he had authority to present the plaint. This being so, the only question was whether an alleged defect in the matter of signature or verification was or was not curable under the provisions of section 578 of the then Code of Civil Procedure, corresponding with section 99 of the present Code. In the case before us the point taken against the plaintiff essentially was, and is, that his plaint had never been validly presented to the Court. That it had not been so presented seems obvious upon reference made to the provisions of O. IV, r. 1 and O. III, rr. 1 and 2 of the Code of Civil Procedure. A defect of this sort can scarcely be regarded as a defect in or proceeding in a suit within the meaning of section 99 of the Code of Civil Procedure and in any case it is a plea which affects the jurisdiction of the Court. The Trial Court had no jurisdiction to entertain the suit at all, except upon a plaint properly presented; and it ought to have gone into the question of the presentation of the plaint and determined it before it proceeded to try the suit.

The next substantial point argued before us is with reference to a petition, present-

(1) 20 A. 90; A. W. N. (1887) 203; 9 Ind. Dec. (N. S.) 417.
(2) 22 A. 55; A. W. N. (1899) 172; 9 Ind. Dec. (N. S.) 1068.

ed on behalf of the plaintiff to the Trial Court, through Counsel purporting to be duly authorised on his behalf. The date of the presentation of this petition appears to have been the 13th of November 1917, though it is stated as the 13th of April 1917 in the order under appeal. The petition was to the effect that the plaintiff, having now attained majority, desired to prosecute the suit in his own name, and asked the Court to pass the formal orders necessary to enable him to do so. It was within the knowledge of the Trial Court that a certificate of guardianship had at one time been granted by the District Judge in favour of the plaintiff's mother in respect of the person and property of the plaintiff. One of the incidental difficulties in the case is that the plaintiff's age was grossly understated in the application on which this certificate of guardianship was ordered to issue. This, however, does not seem to have any essential bearing on the questions of law before us. What we are now taking note of is the fact that the issue of this certificate of guardianship had been brought to the notice of the Trial Court. When, therefore, that Court received the plaintiff's application to be permitted to prosecute the suit as a major, it passed an order that the plaintiff should produce for the inspection of the Court the certificate of guardianship or a certified copy of the same. The plaintiff took no further action and never produced the paper called for by the Court. The suit, therefore, went on to trial in the Court of first instance in a wholly irregular manner, without this important application on the part of the plaintiff having been formally disposed of either one way or the other. We are far from satisfied with the procedure followed by the learned Subordinate Judge who tried this suit in the first instance. But we are none-the-less satisfied that, a considerable degree of blame attaches to the plaintiff or to his legal adviser in that Court, for not prosecuting his own case with due diligence, and not obtaining proper orders from the Trial Court upon essential points. Under the circumstances we do not think it possible to give the plaintiff any relief at this stage.

It has been suggested to us that the plaintiff's petition of the 13th of November 1917 might be treated as a presentation of the plaint on his behalf by Counsel properly authorised by him. But we are of opinion that under the circumstances it would be stretching the law too far in the plaintiff's favour to take such a view of that proceeding. The presentation of that petition might have had an effect equivalent to a fresh presentation of the plaint, or might have led to some further proceeding or order on the part of the Trial Court, which would have had that effect, if it had been properly followed up by the plaintiff. But as the case stands we are unable to take this view.

The result is that this and the connected appeals fail and we dismiss this appeal with costs including fees on the higher scale

Appeal dismissed.

Z. K.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 303 OF 1921.

February 6, 1923.

Present:—Mr. Justice Jwala Prasad and Mr. Justice Adami.

MR. A. H. FORBES—PLAINTIFF—APPELLANT

versus

HANUMAN BHAGAT AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Lease, construction of—Lease for erecting buildings—Presumption—Permission to erect buildings—Estoppel.

Where a lease granted for the purpose of erecting buildings does not mention any particular term, but the erection of *pucca* buildings is made subject to the permission of the landlord, the inference is that the lease is meant to be of a permanent character and not merely from year

to year. But even if such a lease is to be construed as one from year to year it would be converted into a permanent lease where the lessor actually grants permission to the lessee for the erection of *pucca* buildings. [p. 35, col. 2.]

Case-law discussed.

Appeal from a decision of the Subordinate Judge, Purnea, dated the 3rd September 1920, confirming a decision of the Munsif, Araria, dated the 31st July 1919.

Messrs. *P. K. Sen* and *Chandra Sekhar Banerji*, for Mr. *Lal Mohan Ganguli*, for the Appellant.

Messrs. *C. C. Das* and *N. K. Prasad II*, for the Respondents.

JUDGMENT.

Jwala Prasad, J.—This second appeal arises out of a suit for ejectment. The Courts below have by concurrent findings dismissed the suit. The plaintiff is, therefore, the appellant before us. He is the *Malik* or proprietor of Forbesganj Bazar where the land in suit is situate. It measures 3 *bighas* odd, or 1.32 acres. The land was formerly held by one Gulab Chand under a lease (Exhibit H), dated 1892. The defendant-respondent purchased the rights of Gulab Chand. He also took lease of the land from the plaintiff (Exhibit 8-A) dated 20th *Aghan* 1307 (5th December 1899). The appellant commenced the present action by filing a plaint in the Court of the Munsif of Basantpur on the 22nd of June 1908. In the plaint he stated that the lease to the defendants was from year to year and that they were given no permanent right under the lease and that as the value of land of Forbesganj Bazar had increased and other tenants there under the plaintiff were paying rent at higher rate, the defendants were served with notices to take fresh settlement of the land as their existing rent was rather low, or to quit the same; but the defendants neither took any fresh settlement nor gave up the land. The plaintiff claimed *khas* possession of the land by ejecting the defendants from 1st *Baisakh* 1326 M. S. and also for arrears of rent amounting to Rs. 162-4-3.

The Courts below have given the plaintiff a decree for arrears of rent and this portion of the decree is not under appeal before us.

Therefore, the appeal before us is only against the decree refusing the plaintiff's relief for ejecting the defendants.

The defendants in resisting the plaintiff's claim asserted that the lease granted to them created a *be maiyadi* or permanent tenancy and not one from year to year; that in terms of the lease the defendants have constructed *pucca* buildings on the land at immense cost with the permission of the plaintiff and on payment of the *nazrana* to him and, therefore, the plaintiff is estopped from bringing the suit for ejectment. In the alternative the defendants pleaded that in case they be found liable to be ejected, they be awarded Rs. 32,000, as compensation for the *pucca* buildings erected by them.

Two questions were agitated in the Court below, namely :—

(1) whether the lease in favour of the defendants was a permanent lease in its inception, and

(2) whether the subsequent acts and conduct of the lessor and the lessees converted the lease into a permanent one; and if so, whether the plaintiff lessor is, therefore, estopped from bringing a suit for *khas* possession of the land in suit.

The Court below has decided both the issues against the plaintiff. Mr. Sen on behalf of the appellant impugns the finding of the Court below on both the issues.

Now, the plaintiff's suit will fail if any of the aforesaid issues is decided against him. The first issue depends upon the construction of the document in question. It is conceded that no definite term was fixed in the lease. That in itself will not show either that the lease was of a permanent character or that it was for a term of years. As to whether this indefinite term was intended to be perpetual or permanent depends upon the intention of the parties as gathered from the covenants in the lease. The learned Subordinate Judge has in his judgment summarised the terms. It is not necessary to refer to all of them for the purposes of this

appeal. We may, however, refer to the following terms only :—

(1) The purpose of the lease was to enable the lessee to erect *gola* house and to purchase and sell all sorts of commodities therein or in other words to open his business therein;

(2) The lease was not limited for any definite period but that it was a *be maiyadi* lease or a lease without any term;

(3) That the lessee shall not have the power to construct any *pucca* building without the express and written permission of the lessor and if that stipulation be violated and *pucca* building be raised by the lessee without such permission of the lessor, he, the lessee, shall be liable to be evicted; and

(4) In case the lessee want to erect *pucca* building and to have a *pucca* well or *indra* he shall have to do so according to the advice of the lessor.

Now it is clear from the aforesaid terms that the lease was for the purpose of *gola* business and for building houses. It is also clear that the erection of *pucca* buildings for the business as well as for the purpose of residence was in the contemplation of the parties, with the condition that permission for erecting *pucca* structures will have to be taken from the lessor. Under these circumstances the inference is not unreasonable that the lease in question was meant to be of a permanent character and not from year to year. No doubt, as observed above, a *be maiyadi* lease or a lease without any term may in the circumstances of a particular case be shown not to confer any permanent grant, as was held in the cases relied upon by the learned Counsel on behalf of the appellant *Birdi Prasad* v. *Prosonna Kumar Das* (1), *Mohim Chandra Sirkar* v. *Anil Bandhu Adhicary* (2), *Parshan Kuer* v. *Tulsi Kuer* (3) and *Kailaspati Chowdhury* v. *Muneshwar Chowdhury* (4). The decisions in those cases were applicable to the particular facts decided and the leases concerned. The present case is very near the case reported in *Promada Nath Roy* v. *Srigobind Chowdhry* (5). Upon the facts in the present case and the lease in question we are not prepared to differ from the view of the Court that at its inception the lease was a permanent lease, and not one from year to year.

The respondents are on firmer ground upon Issue No. 2. Now it is undisputed that on the 29th of November 1907 the defendants applied for permission to erect *pucca* buildings on the land in question in terms of clause (3) of the lease and the permission was expressly granted on acceptance of *nazrana* of Rs. 21. The plaintiff has filed *purwangis* issued to the defendants in 1909 (Exhibits 18 and 18-A). These *purwangis* confirm the permission already granted stating that the permanent structures standing on the land were erected with the permission and sanction of the lessor. Now, before the foundation was laid the defendants applied for permission in 1907 and they were given that permission. The *purwangis* referred to above, which were granted two years after, indicate that the buildings had already been completed and the construction thereof was confirmed by the plaintiff. In none of these documents is there any indication of the plaintiff having demanded a higher rent as a condition for the erection of the *pucca* buildings on the land in question; nor is there any suggestion that the erection of such buildings would not confer upon the defendants the right to remain on the land permanently or that the construction of the buildings was to be at the risk of the defendants' liability to be ejected on the ground of the lease being only of a limited duration. The plaintiff in this case did not only acquiesce in the construction of the buildings in question by merely abstaining from interference, but he actually granted permission for erecting the buildings Therefore, even if the lease was of a temporary duration limited by terms, or a lease from year to year reserving the right of re-entry in the lessor,

(1) 14 Ind. Cas. 152; 16 C. W. N. 564.
(2) 1 Ind. Cas. 66; 9 C. L. J. 362; 13 C. W. N. 513; 5 M. L. T. 297.
(3) 39 Ind. Cas. 658; 2 P. L. J. 180; 1 P. L. W. 447; (1918) Pat. 11.
(4) 43 Ind Cas. 965; 3 P. L. I. 576; 4 P. L. W. 109.
(5) 32 C. 648; 9 C. W. N. 463.

I am afraid the plaintiff would have been estopped from claiming the right of *khas* occupation by ejecting the defendants. The lease, even if originally for a limited term, would then have been construed to have been made permanent in the sense that the plaintiff would not have been entitled to re-enter. The original terms of the lease would then have been supplemented by a fresh contract by the conduct of the parties whereby the defendants would have acquired a right of occupation over the land in question. The learned Counsel on behalf of the appellant relies upon the case of *Beni Ram* v. *Kundan Lal* (6). In that case the term of the lease was defined and no express permission for building was given by the lessor. Under those circumstances, the observation of the Lord Chancelior in *Ramsden* v. *Dyson* (7) was applicable to the facts of the case, to the effect that if a tenant builds on the lands which he holds under a term he cannot acquire any right to prevent the lessor from taking any possession of the land and building when the lease determines; he knew the extent of his interest; and it was his folly to expend money upon a title which he knew would or might soon come to an end. On the other hand, Lord Watson in delivering the judgment of their Lordships of the Judicial Committee observed: "In order to raise the equitable estoppel which was enforced against the appellants by both the Appellate Courts below, it was incumbent upon the respondents to show that the conduct of the owner, whether consisting in abstinence from interfering, or in active intervention, was sufficient to justify the legal inference that they had, by plain indication, contracted that the right of tenancy, under which the lessees originally obtained possession of the land, should be changed into a perpetual right of occupation."

In the present case the Courts below have held that the plaintiff in the present case had actually given express permission to the defendants to construct buildings on the land in question and thereby he contracted that the right of tenancy would continue principally so as to confer upon the defendant the right of permanent occupation.

The case of *Ralli* v. *Forbes* (8), decided in this Court, does not seem to help theappellant. In that case the lease was from year to year, whereas in the present case the lease is without any term. On the other hand, the principle laid down in the above case as to the doctrine of estoppel seems to apply to the present case. Upon the circumstances, not very dissimilar to those of the present one, the learned Chief justice applied the doctrine of estoppel against the claim of Mr. Forbes to eject the defendants from the land leased to them.

We agree with the view taken by the Court below on both the issues and dismiss the appeal with costs.

Adami, J.—I agree.

z. k. *Appeal dismissed.*

(6) 21 A. 496; 1 Bom. L. R. 400; 3 C. W. N. 502; 26 I. A. 58; 7 Sar. P. C. J. 523; 9 Ind. Dec. (N. S.) 1022 (P. C.).

(7) (1866) 1 H. L. 129; 12 Jur. (N. S.) 506; 14 W. R. 926; 149 R. R. 543.

(8) 67 Ind. Cas. 744; (1922) Pat. 209; 3 P. L. T. 467; 4 U. P. L. R. (Pat.) 43; (1922) A. I. R. (Pat.) 258; 1 Pat. 717.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 215 OF 1922.

July 24, 1923.

Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

RAM GOVIND PANDE—PLAINTIFF—APPELLANT

versus

PANNA LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Custom—Co-sharer in village—Purchaser of plot in defined share of mahal, *whether co-sharer.*

The purchaser of a plot of land comprised in a definite share in the village which is assessed separately to revenue and which is recorded separately in the *khewat*, is a co-sharer in the village and must be treated as such for the purposes of pre-emption. [p. 36, col. 2]

Safdar Ali v. *Dost Muhammad*; 12 A. 426; A. W. N. (1890) 117; 6 Ind. Dec. (N. S.) 1016 (F. B.), followed.

RAM GOVIND PANDE v. PANNA LAL.

Dakhni Din v. *Rahim-un-nissa*, 16 A. 412; A.W. N. (1894) 134; 8 Ind. Dec. (N. S.) 268; *Ali Husain Khan* v. *Tasadduq Husain Khan*, 2 A. L. J. 612; 28 A. 124; A. W. N. (1905) 219 and *Bidhata Ram* v. *Ram Cheri*, 15 Ind. Cas. 251, referred to.

Second appeal against the decree of the District Judge, Azamgarh, dated 25th November 1921.

Messrs. *P. L. Banerji* and *N. Upadhiya*, for the Appellant.

Dr. *S. N. Sen*, for the Respondents.

JUDGMENT.—The facts of this case may be briefly stated as follows:—On the 17th January 1919 one Panna Lal, who owned a 1 anna 6 pies share, sold a plot comprised in that share, namely, plot No. 177, together with two trees to Sahdeo and others defendants.

On the 20th September 1919 Panna Lal sold his entire 1 anna and 6 pies share to the same persons.

A suit for pre-emption was brought by the plaintiff appellant Ram Govind Pande for the purpose of pre-empting both these sales.

It has been held by both the Courts below that the plaintiff cannot pre-empt the first sale, that is to say, the sale of the isolated plot on the ground that he had notice of the sale and had an opportunity of exercising his right to pre-empt which he refused to avail himself of. It must be taken, therefore, for the purposes of the present decision that the first sale is not liable to pre-emption.

The question, therefore, remains whether the plaintiff is entitled to succeed in his suit for pre-emption so far as it concerns the sale of the 1 anna 6 pies share which, as we have said, was carried out on the 20th September 1919. The finding of the Court below is that the suit must fail on the ground that the vendees had already become co-sharers in the village by reason of their having purchased the Plot No. 177 under the sale-deed executed on the 17th January 1919.

It has been strongly contended here that this purchase did not give the vendees the status of co-sharers in the village (*hissedaran mauza*) to quote the words of the *wajib-ul-arz*.

There is a great deal of case-law in the decisions of this Court regarding the position of persons who have purchased isolated plots of land and the question has arisen time and again for decision whether or not the purchasers of such plots are for the purposes of pre-emption to be deemed co-sharers in the village. The cases fall into different categories which depend upon the nature of the land which is purchased. We have for example cases of purchases of plots of *muafi* land not assessed to revenue. Again we have other cases known as *arazi dari*; cases where sales have been made of certain isolated plots of land which are assessed to revenue but which nevertheless are outside the *mahal*.

And lastly, we have cases like the present where a plot sold is within the *mahal* and forms a portion of a defined share in the village, that is to say, a defined area of land forming part of a definite share assessed to revenue.

This latter class of cases has been dealt with in a series of decisions beginning with the Full Bench decision of the Court in *Safdar Ali* v. *Dost Muhammad* (1). In that case it was held that where a person purchased a plot of land situated within a share in a village he was to be deemed a co-sharer in the village and it was held in the case reported as *Dakhni Din* v. *Rahim un-nissa* (2) that such a person would be treated as a co sharer in the village even though his name did not appear in the revenue papers.

Another case on this point is to be found in *Ali Husain Khan* v. *Tasadduq Husain Khan* (3). That case is, so far as we can see, on the same footing as the case with which we are now concerned. It is not necessary for us to refer to the decisions on the other classes of cases for clearly they would not be applicable in the present instance. Here we are dealing with a plot of land comprised in a 1 anna 6 pies share which is assessed separately to revenue, and which is recorded separately in the *khewat*. That being so, the case falls within the principle laid down in *Ali Husain Khan* v. *Tasadduq Husain Khan* (3). It is true that there have been other decisions of this Court which seem

(1) 12 A. 426; A. W. N. (1890) 117; 6 Ind. Dec. (N. S.) 1016 (F. B.).

(2) 16 A. 412; A. W. N. (1894) 134; 8 Ind. Dec. (N. S.) 268.

(3) 2 A. L. J. 612; 28 A. 124; A. W. N. (1905) 219.

to point in a contrary direction. One of these to which we have been referred is to be found in *Bidhata Ram* v. *Ram Cheri* (4). But there the facts are not fully set out and it is impossible to gather from the language of the report what was the particular nature of the plots in question in that case.

We are satisfied, therefore, with the decision of the Court below in this particular case that the vendees who purchased this plot No. 177 on the 17th January 1919 were entitled to claim the status of *hissedaran muza* and that being so, we hold that the suit of the plaintiff was rightly dismissed. The appeal, therefore, fails and is dismissed with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

(4) 15 Ind. Cas. 251.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 180 OF 1922.

July 4, 1923.

Present :—Mr. Justice Walsh and Mr. Justice Ryves.

TEJA—DEFENDANT—APPELLANT

versus

TIKA RAM—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6—Mortgage suit—Personal decree passed erroneously—Failure to object, effect of.

Where a Court in execution of a decree for sale passed in a mortgage-suit erroneously passes a personal decree under O. XXXIV, r. 6 of the Civil Procedure Code, and the judgment-debtor neither objects to the decree nor appeals against it, he or anyone who stands in his shoes, cannot subsequently go behind the decree and challenge it. [p. 38, col. 1.]

Malkarjun v. *Narhari*, 25 B. 337; 5 C. W. N. 10; 2 Bom. L. R. 927; 27 I. A. 216; 10 M. L. J. 368; 7 Sar. P. C. J. 739 (P. C.), followed.

Darbari Mal v. *Moola Singh*, 56 Ind. Cas. 139; 18 A. L. J. 628; 2 U. P. L. R. (A.) 160; 42 A. 519, distinguished.

Appeal from an order of the Additional Subordinate Judge, Aligarh, dated the 2nd of November 1922.

Mr. *Haribans Sahai*, for the Appellant.

Mr. *Panna Lal*, for the Respondent.

JUDGMENT.—The facts, as now found, under which this appeal arises, are as follows :—

Narhe and Teja were brothers who together formed a joint Hindu family. They owned an ancestral house. On the 4th February 1908, Nanhe mortgaged the whole house to Tika Ram. Tika Ram sued on his mortgage and got a preliminary decree for sale in 1912. Before Tika Ram could get an order for sale under O. XXXIV, r. 5, Teja, the other brother, brought a suit to avoid the mortgage on the ground that Nanhe, as a member of an undivided joint Hindu family, could not make a valid mortgage of the ancestral house without his consent and in the absence of legal necessity, and for a declaration that the house could not be sold under the mortgage-decree. That suit was decreed on January 4th, 1913. Thereupon Tika Ram abandoned his rights under the mortgage, and asked the Court, then seized of the execution proceedings, to pass a decree under O XXXIV, r. 6, and that was done. The effect of that was to give Tika Ram a simple money-decree against Nanhe. It is to be noted here, that Nanhe was a party to these proceedings. He did not contest the application, nor did he appeal from the order passed. It is also to be noted that Tika Ram's suit was brought within six years of the mortgage, and that he was entitled, at the date of his suit, to get a simple money-decree, if the mortgage, on the basis of which he sued, was found to be for any reason invalid. In execution of that decree the right, title and interest of Nanhe in the house in suit was put up for sale and was purchased by Tika Ram, who then brought a suit for partition of half the house on the allegation that Nanhe's right, title and interest in the whole house amounted to half. Teja having failed to set aside the sale in the execution department, filed a counter-suit for a declaration that the auction-sale in favour of Tika Ram was invalid and that he (Tika Ram) was not entitled to partition the house. Both suits were tried together. The Trial Court decreed Teja's suit and dismissed Tika Ram's. Tika Ram appealed. The lower Appellate Court dismissed Teja's suit and remanded Tika Ram's suit to the First Court to carry

out the partition. Teja appeals from that order of remand in this case, and in the connected second appeal which is also before us.

The main contention is that the decree passed under O. XXXIV, r. 6 was a nullity as being beyond the jurisdiction of the Court, and that it therefore conveyed no title to Tika Ram, on the ground that there having been no confirmation of the preliminary decree and no sale under O. XXXIV, r. 5, the Court had no jurisdiction to grant a decree under O. XXXIV, r. 6; and reliance was placed on a recent decision of this Court in the case of *Darbar Mal* v. *Moola Singh* (1). It seems to us that that case has no application here because in that case it was the judgment-debtor who objected to the passing of the decree under O. XXXIV, r. 6. In this case no doubt Nanhe might, if he had been so advised, have raised an objection to the Court passing this decree, or he might have appealed from that decree. But it seems to us that inasmuch as he (Nanhe) has accepted that decree, Teja cannot challenge it. We will assume that it is correct to say that a decree under O. XXXIV r. 6 should only be passed when there has been a sale over, and that the decree in this case under O. XXXIV. r. 6 was erroneous. It seems to us, however, that the well-known Privy Council case of *Malkarjun* v. *Narhari* (2) applies to this case. Here (as there), the Court passed an order which, it may be conceded, it should not have passed, having regard to the provisions of the Code. But it was seized of the execution of the case and it did pass that decree. Whether right or wrong that decree, not having been challenged by Nanhe, the party concerned, it seems to us that he, and any one who stands in his shoes, as we think Tika Ram does in this case, cannot go behind it. So far as the appellant is concerned, he challenges the title of Tika Ram to ask for partition or to stand in any way, so far as he, Teja, is concerned, in the capacity towards him of a co-sharer. But the result of the views expressed in the foregoing observations is that Tika Ram, although in the inception his title was impeachable, has now acquired an absolute title which is good against all the world, and therefore good against Teja.

Teja, in equity, has really no case. If Teja had asked to be joined as a defendant in Tika Ram's suit in 1912, as he could have done, and raised the same defence that he subsequently raised, Tika Ram might have abandoned the mortgage and asked for a simple money-decree against Nanhe as he was entitled to do, (the suit having been brought within six years of the bond), and if so, he probably would have got, as he was entitled to get a simple money-decree against Nanhe. In execution of that decree he could undoubtedly have attached and sold Nanhe's share in the house, and if he purchased it, he would have been entitled to partition the house. We cannot see under the actual circumstances of this case that Teja's interests are damnified. On a partition Teja is only entitled to half the house. Nanhe could have partitioned it, and Nanhe's representatives can do so also. No injustice is done to Teja. The half share of Teja in the house is not imperilled. But Teja cannot be allowed "to pull the chestnuts out of the fire" for Nanhe's benefit.

No doubt it is very inconvenient for Teja that the ancestral house should be partitioned, but to avoid this he has only to pay up the debt due by Nanhe, his brother. The learned Counsel for the respondent says that his client will not press his right to partition the house, if his debt is paid up in full to date. This seems to us to be most natural and satisfactory solution of a litigation, which does not impress us as being particularly honest on Teja's part.

The other points raised, though pressed by Mr. Haribans Sahai with his usual ability and pertinacity, are in our opinion untenable.

We dismiss the appeal with costs including in this Court fees on the higher scale, if the certificate has been filed.

This judgment covers the connected second appeal, which we dismiss with costs.

Z. K. *Appeal dismissed.*

(1) 56 Ind. Cas. 139; 18 A. L. J. 628; 2 U. P. L. R. (A.) 160; 42 A. 519.

(2) 25 B. 337; 5 C. W. N. 10; 2 Bom. L. R. 927; 27 I. A. 216; 10 M. L. J. 368; 7 Sar. P. C. J. 739 (P. C.).

MADRAS HIGH COURT.

REFERRED CASE NO. 19 OF 1922.

August 28, 1923.

Present:—Sir Walter Salis Schwabe, KT., Chief Justice, and Mr. Justice Coutts-Trotter.

THE SECRETARY, BOARD OF REVENUE, LAND REVENUE AND SETTLEMENT (INCOME-TAX)—REFERRING OFFICER

versus

MESSRS. B. MUNISAMI CHETTY & SON —ASSESSEE.

Income Tax Act (VII of 1918), s. 9—Business profits, assessment of—Firm doing dual business —Adjustment of profits and losses—Assessee disputing correctness of assessment—Expenses, deduction of.

Where the business of a firm assessed to Income Tax is carried on in part by engaging in partnership with other firms and the subsidiary business so engaged in is connected with the main business and is a proper employment of the Assessee's capital and labour, for the purpose of assessment of income-tax, the subsidiary business thus carried on can be treated as part of the main business of the firm and loss incurred therein may be set off against profits made in the main business. [p. 39, col. 2.]

Under section 9 clause 2 (*ix*) of the Income Tax Act, the expenditure incurred in employing accountants and lawyers in disputes between the assessees and the Government as to the amount of excess profits duty payable and in arriving at the taxable income is not strictly "for the purpose of earning profits" and is not a legitimate allowance for deduction in arriving at the taxable income of a later year. [p. 40, col. 1.]

Commissioners of Inland Revenue v. *Warness & Co., Ltd.*, (1919) 2 K. B. 444; 89 L. J. K. B. 6; 121 L. T. 125; 35 T. L. R. 436 and *Ward & Co., Ltd.*, v. *Commissioners of Taxes*, (1923) A. C. 145; 92 L. J. P. C. 33; 128 L. T. 436; 39 T. L. R. 90, followed.

Case stated under section 51 (1) of the Income Tax Act of 1918 by the Board of Revenue.

The Government Pleader, for the Referring Officer.

Messrs. *King and Partridge*, for the Assessee.

JUDGMENT.

Schwabe, C. J.—This case is referred under the Income Tax Act by the Board of Revenue for the opinion of the High Court. The question relates to the assessment for income-tax of the firm known as B. Munisami Chetty & Son and there are two distinct points referred.

1. B. Munisami Chetty & Son carry on business in piece-goods, the partners in the firm being B. Damodaram Chetty and P. V. Ramanujam Chetty, Damodaram Chetty having a much larger share. On the facts as now found it is clear that this firm engaged in business with other partners in two other firms, one called the Carnatic Import Co., and the other B. Damodaram Chetty & Co., whose business was of an allied character, in that they dealt in goods similar to those dealt in by Munisami Chetty & Son. B. Munisami Chetty and Son had a much larger share in those two other firms, there being in each case a partner with a small share to encourage him to take a real interest in the management of the business. In the year of assessment B. Munisami Chetty and Son made a profit and the other two firms made a loss. B. Munisami Chetty and Son claim that they are entitled, for the purpose of assessment, to set off their share of the loss in the other two firms against the profits made in their own firm. The Crown contends, on the other hand, that they must be treated separately and must pay income-tax on the profits of their firm; and that the only effect of the loss of the other two firms would be that these firms would not have to pay income-tax. In our judgment, the determination of this question depends upon whether it is a fact that the business of B. Munisami Chetty and Son is being carried on in part by engaging with partners in the other firms. Where the subsidiary business engaged in is connected with the main business and is a proper employment of the Assessee's capital or labour, it is in my judgment for the purpose of assessment to be treated as part of the business of the firm. If the firm in one branch makes a loss, that loss may be set off against the profits made in its head office or other branches. Applying that test to this case, I think it is clear that the contention of the assessee is right and that B. Muniswami Chetty and Son are entitled to have their assessment arrived at by taking into account the loss made by them in the other two firms.

II. They claim also in arriving at their

profits for the tax year 1921-1922 to deduct certain expenditure incurred by them (*a*) in employing accountants and lawyers in the matter of dispute between them and Government as to the amount of excess profit duty payable by them for the year ending March 1920, the year in which the Excess Profits Duty Act applied and (*b*) similar expenses incurred by them in arriving at the income on which income-tax assessment was made or was to be made. These expenses are perfectly proper expenditure by the Company of the Company's money but whether they can be brought into account in arriving at the proper assessment of the income tax must depend upon the construction of section 9 (2) (*ix*) of the Income-Tax Act of 1918 which runs as follows: "Such profits shall be computed after making the following allowances in respect of sums paid, namely, in respect of any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits." In my judgment, these moneys were expended not for the purpose of earning profits at all but for the purpose of, in one case, protecting profits from Government's claim to income-tax and in the other case of getting back from Government the excess profits duty claimed by or paid to the Government in respect of some past period. The words of this rule are much the same as the words of the rule in Schedule D of the Income Tax Act of 1918 in England and of the rule in Income Tax Act current in New Zealand, and there have been cases both in England, and in the Privy Council on appeal from New Zealand, which indicate the view of the English Courts which is to the effect that these and similar words are to be construed strictly, by ascertaining, whether or not the expenditure was for the sole purpose of earning profits. So the amount paid to the Government in the nature of the fine arising out of a matter connected with the business and costs incurred in resisting the imposition of such fine were held in *Commissioners of Inland Revenue* v. *Warness & Co., Ltd.* (1) not to be charges that could be deducted. In *Ward & Co* v *Commissioners of Taxes* (2) their Lordships of the Privy Council held that no deduction could be made for monies spent by a company in printing and distributing literature directed against Prohibition, which expenditure was admitted to be in the interest of the preservation of the assessee's trade We were referred to the Excess Profits Duty Act X of 1910, section 20, and it was suggested that because the amount of the excess profits duty is to be allowed as a deduction in respect of the profits of a business for the purpose of income-tax, therefore the costs of arriving at the excess profits duty must also be so allowed. It is clear on an examination of the section that this has got to be for a specified year and does not apply to any later year nor do I think that apart from that limitation the fact that the excess profits duty is by Statute allowed to be deducted would make the costs of arriving at the excess profits duty also a deduction. If the Statute had desired to make it so, it would have been quite simple to have stated that the excess profits duty and any money expended in arriving at the right amount of excess profits duty shall be a deduction for the purpose of income-tax. The section does not say so and I see no reason why it should be implied.

I have come to the conclusion that on the first point the contention of the Assessee is right and on the second wrong. The first point is the main and the more important point, and I think that the Assessee must have his costs of this reference except in so far as they have been increased by adding a claim on the second point. Costs in this case will be taxed on the original side scale.

I think that it would be desirable at some future time on a suitable occasion with the assistance of the Vakils' Association, if they choose to assist in this matter, to consider the question of the taxation of costs, with a view to framing some rule or establishing some definite practice in such matters.

Coutts-Trotter, J.—Now that we have unambiguous findings, I do not enter-

(1) (1919) 2 K. B. 444; 89 L. J. K. B. 6; 121 L. T. 125; 35 T. L. R. 436.

(2) (1923) A. C. 145; 92 L. J. P. C. 33; 128 L. T. 436; 39 T. L. R. 90.

tain the slightest doubt about the first point which seems to me almost too plain for discussion. Indeed when Mr. Ananthakrishna Aiyar came to develop the argument, it was clear that the only way in which he could contend for the claim made by Government was by arguing that under section 9 (1) of the Income Tax Act of 1918 the profits of any business carried on by him, that is, the Assessee, have to be expanded into profits of any business carried on by him solely so as to exclude any business that he may carry on in conjunction with others. Here we have a Company part of whose business is to hold a share in a separate business. It takes this share in the course of its own business and it receives whatever profit it receives or loses whatever it loses in the course of its own business.

With regard to the second point I feel more doubt. The section occurs in many acts of many countries and Mr Justice Rowlatt, a Judge of great experience and learning in revenue matters, has frankly said that he does not see his way to give a general definition of the true construction of the section, but that he is content to say about each case as it comes along whether in his view it falls within the section. This is to me a difficult case, more difficult than the one which that learned Judge had to deal with. I do not think that the expenses incurred here can be said, in any sense that a plain man would understand, to be correctly described as expenditure incurred for the purpose of earning profits. It seems to me that the expenditure was incurred after the profits had been earned. That appears to be sufficient to take the case out of the section

I agree to the order as to costs.

V. N. V.
N. H. *Order accordingly.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 306 OF 1922.
July 31, 1923.

Present :—Mr. Baker, Officiating J. C.

Chaudhari MANOHARLAL—
DEFENDANT NO. 1—APPELLANT
versus
Musammat AMANO AND ANOTHER—
PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 115—Estoppel—Party signing award in token of assent—Family settlement—Form, defective, effect of.

The signature of a party on an award does not render the award any the more binding on him if it is otherwise invalid. But where a party signs an award in token of acceptance, and his doing so leads the other party to believe that he is not going to contest it, on the strength of which belief the latter allows a pending suit to be dismissed, he is estopped from contesting the validity of the award. [p. 43, col. 2]

Jagannath v. *Rambux*, 6 C. P. L. R. 95, referred to

It has been the policy of Courts of Equity to uphold family settlements even when they are not in legal form. [p. 43, col. 2.]

Mahomed Musa v. *Aghore Kumar*, 28 Ind. Cas 930; 42 C. 801; 17 Bom. L. R. 420; 21 C. L. J. 231; 28 M. L. J. 548; 19 C. W. N. 250; 13 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 258; (1915) M. W. N. 621; 42 I. A. 1 (P. C.), relied on.

Appeal from a decree of the District Judge, Hoshangabad, dated the 6th March 1922, in Civil Appeal No. 31 of 1920.

Mr. *J. Sen*, for the Appellant.

Messrs. *M. Gupta* and *K. K. Gandhe*, for the Respondents.

JUDGMENT.—The points in dispute in the present appeal are comparatively simple, but the litigation out of which the appeal arises has a long and complicated history. It will not be necessary to give the history in full. It will be found in Exhibit D-7, a judgment of a Bench of this Court in Miscellaneous Appeal No. 32 of 1917. There has been a long standing dispute between *Musammat* Draupadi (now deceased) widow of one Khubchand, *Musammal* Amano and Nanhi, widows of Khubchand's predeceased nephew Beharilal, and the appellant Manoharlal, a distant relation of Khubchand, who entered into possession of Khubchand's property after his death in 1910 under a claim of title.

The deceased Khubchand left another widow *Musammat* Dhani who was defend-

ant No. 2, in the original suit, but was discharged and is not a party to this appeal.

The widows at first consented to appellant's taking possession of the property, but subsequently they quarrelled and the result was a bitter and protracted litigation in the Civil, Criminal and Revenue Courts, which has lasted many years and has already been before this Court several times in various forms.

The gist of the whole matter is that the dispute between the parties was referred to private arbitration and on an award being obtained the widows allowed their suit against Manoharlal to be dismissed, without the award being filed in Court or any reference to the provisions of O. XXIII, r. 3, Civil Procedure Code.

An application to file the award was rejected and, after a remand by this Court, it was finally held by a Bench of this Court in Miscellaneous Appeal No. 32 of 1917 that as part of the award was invalid, and this could not be separated from the valid part of the award, the award could not be filed at all. In 1915 the Settlement Officer effected a compromise between the parties, by which the *khudkasht* land was handed over to the appellants. This compromise the widows attacked as being obtained by undue influence, a plea since withdrawn.

The principal question in this appeal is whether the plaintiffs can fall back on the award, but the matter is further complicated by the death of *Musammat* Draupadi, the widow of the last male-holder, *pendente lite*, and the fact that Manoharlal is admittedly reversioner to so much of her husband Khubchand's estate as she was entitled to at her death *vide* this Court's order of 29th June 1921 in Second Appeal No. 435 of 1920.

The suit out of which the present appeal arises is Civil Suit No. 11 of 1917 in the Court of the First Subordinate Judge, Hoshangabad. The plaintiffs (Draupadi, Amano and Nanhi) sued Manoharlal, *Musammat* Dhani and her daughter, on the strength of the award, to recover possession of lands Nos. 169/1 and 368 of the village of Pachlawara, alleging that the lands were in their *patti* and were let by them to tenants, and that the defendant No. 1 (Manoharlal) has wrongfully taken a surrender of these lands from the tenants and has wrongfully received a *patta* in the recent settlement showing these lands to be his *khudkasht*. The defendant No. 1 denied the validity of the award and pleaded that it was superseded by the compromise of 1915 by which the *khudkasht* lands were transferred to him, that the alleged tenants were not tenants of the land, that his signature was obtained on the award by fraud, and that he was the owner of the property under the will of Khubchand.

The First Court held that the award though invalid as an award, was valid as a contract between the parties and the defendant was estopped from contesting it; that the lands in suit were *khudkasht* of Khubchand and the tenants were plaintiffs' tenants, and Manoharlal had no right to take a *razinama* from them, and awarded the plaintiffs' claim as against him. The other defendants were discharged.

On appeal the District Judge reversed the decision, holding that as the award was invalid the plaintiffs cannot rest their title on it and that *Musammat* Draupadi cannot alone claim as widow of the last male-holder, as the co-widow Dhani was not joined as a plaintiff.

On second appeal to this Court my learned predecessor held that the view of the lower Appellate Court, that this Court in Miscellaneous Appeal No. 32 of 1917 had held that the award was invalid and unenforceable, was wrong. The validity of the award as an award was not considered, much less decided. The signatures on the award did not convert it into an instrument of partition, but the stamping of the document and the action taken upon it are important facts in connection with the contention that the defendant Manoharlal is estopped from contesting the validity of the award.

The appeal having been decided on a preliminary point was remanded to the lower Appellate Court for decision on the

merits. After remand the District Judge found that the defendant was estopped from contesting the validity of the award, that the tenants were the tenants of the plaintiff and confirmed the decision of the First Court.

From this decision the present second appeal is preferred, and the questions for decision are first whether the appellant is estopped from contesting the validity of the award. Secondly, if he is not estopped, whether the award is valid between the parties. Thirdly, what is the effect of the death of the plaintiff Draupadi and the vesting of her rights in the appellant?

It is contended on behalf of the appellant that the question of the validity of the award has not been decided and the case must go back again. This, however, will depend on the question of estoppel. As regards estoppel I agree with the lower Appellate Court in holding that the appellant is estopped from contesting the validity of the award.

The award was passed during the pendency of Suit No. 24 of 1913 brought by the widows for possession of the estate. Defendant No. 1 being a reversioner could not succeed to the estate of Khubchand during the lifetime of Khubchand's widows, and his pleas of adoption and an oral Will have been given up. The dispute was referred to arbitration with the consent of both parties and both parties accepted the award. The result was that the widows believing that the defendant No. 1 would abide by the award, allowed the suit to be dismissed. Owing to parts of the award being illegal it was such as could not be filed in Court, but this does not make any difference. The lower Appellate Court has referred to paragraph 1 of the defendant's written statement, the lower Court's decision on Issue No. 1 and the evidence of defendant's witnesses Nos. 1 to 6.

The defendant has admitted that he did not abide by the award. By his submission to the arbitration he led the widows to believe that he would agree to the award, and, therefore, they allowed their suit to be dismissed. They are distinctly in a worse position than they would have been if they had continued with the suit, for as pointed out by the First Court, Draupadi at any rate as the widow of the last male-holder was entitled to the possession of the estate for her lifetime and her husband's reversioner could not come in till her death.

It is true that the fact that defendant No. 1 signed the award does not render it more binding on him, as laid down in *Jagannath* v. *Ramlux* (1) but his signing the award in token of acceptance led the widows to believe that he was not going to contest it, and in these circumstances I am of opinion that the defendant No. 1 is estopped from contesting it.

It is not necessary to consider the validity of the award as an award, as defendant No. 1 is estopped from contesting it. It evidences a family arrangement between the parties behind which the defendant cannot go.

It has always been the policy of Courts of Equity to uphold such family settlements, even when they are not in legal form. I may refer to *Baldeo Singh* v. *Udal Singh* (2) and the numerous cases, both English and Indian, quoted thereunder, as well as the remarks of the Privy Council in *Mahomed Musa* v. *Aghore Kumar* (3).

The award provides that 8 annas should go to the plaintiffs and 8 annas to Manoharlal and *Musammat* Dhani, the proportion allotted to *Musammat* Draupadi being 3 annas and that to *Musammats* Amano and Nanhi 5 annas in the 8 annas *patti* allotted to the widows.

The genealogy and the judgments in the case show that Khubchand and Beharilal were owners and that Beharilal pre-deceased Khubchand who thus became the sole owner. On Khubchand's death therefore his widows Draupadi and Nanhi as widows of the last male-holder were entitled to the whole estate, the widows of Beharilal being only entitled to main-

(1) 6 C. P. L. R. 95.
(2) 58 Ind. Cas. 732; 43 A. 1; 2 U. P. L. R. (A.) 202; 18 A. L. J. 877.
(3) 28 Ind. Cas. 930; 42 C. 801; 17 Bom. L. R. 420; 21 C. L. J. 231; 28 M. L. J. 548; 19 C. W. N. 250; 13 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 258; (1915) M. W. N. 621; 42 I. A. 1 (P. C.).

tenance. This is what would have happened had there been no award, but by the award the widows of Khubchand divested themselves of a portion of their interests in favour of the appellant and the widows of Beharilal and the widows of Khubchand were thus placed in a worse position than they otherwise would have occupied. It has been held by this Court in its order of 29th June 1921, in Second Appeal No. 435 of 1920, that the present appellant Manoharlal is reversioner to so much of Khubchand's estate as Draupadi would have been entitled to at her death. The award however provides that on the death of Draupadi her 3 annas share should come into the possession of *Musammats* Amano and Nanhi, widows of Beharilal, and as the appellant has been held to be estopped from contesting the validity of the award, the 8 annas *patti* given in the award to the widows passes to Amano and Nanhi, the remaining plaintiffs.

With regard to the question at issue in this case, namely, whether the tenants were the tenants of the widows, the Courts below have found on the facts that they were tenants of the lands falling in the widows' *patti* and that the lands were leased to them by the widows. In the award the lands in dispute are not shown as *khudkasht* of either parties. The learned Judge below has relied on the *jamabandi* (Exhibit P-4) which shows that the tenants were the tenants of the plaintiffs.

In these circumstances the decree of the lower Appellate Court must be confirmed and the appeal dismissed with costs.

Appeal dismissed.

Z. K.

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.

July 5, 1921.

Present:—Viscount Haldane, Lord Phillimore, Sir John Edge and Sir Robert Stout.

Maharaja KESHO PRASAD SINGH —DEFENDANT—APPELLANT

versus

SIV SARAN LAL—PLAINTIFF—RESPONDENT.

Construction of document—Agreement to pay pension—Direction to executors to comply with terms of agreement, effect of—Contract, whether created.

A Hindu widow who was holding an impartible estate for life under the Will of her husband appointed the plaintiff manager of the estate under an agreement which provided that on resigning his post the plaintiff would get a certain monthly pension for life. The agreement wound up with the words "The heirs and representatives of me, the executant, and the holders and administrators of the estate should fully comply with the terms of this deed:"

Held, that the concluding words of the agreement were a mere recommendation and did not amount to a contract binding either on the executor or administrator of the executant or on the owner or administrator of the estate to pay the pension. [p. 46, col. 1.]

Appeal from a judgment and decree of Sir Edward Chamier, Kt., C. J. and Mr. Justice Sharfuddin dated the 27th July 1917, reported in 42 Ind. Cas. 122, reversing that of the Subordinate Judge, Second Court at Arrah.

JUDGMENT.—This is an appeal by Maharaja Kesho Prasad Singh against a decree of the High Court of Judicature at Patna. The High Court reversed the decree of the Subordinate Judge of the Second Court at Arrah, which had dismissed the suit with costs. The suit was to recover Rs. 5,445 and the basis of the claim rests on an *ekrarnama* given by Maharani Beni Prasad Kueri, widow of Raj Sri Radha Prasad Singh Bahadur, K.C.I.E., *gaddinashin* and proprietress of Raj Reasat Dumraon (Dumraon estate) in *pergana* Bhojpur, District Shahabad, by caste an Ujjain Chatri and by occupation a *zemindar*.

The Dumraon Raj is impartible and the estate is an important one and of considerable extent. The family of the Maharaja trace their pedigree back for many centuries. The widow before named managed the estate after the death of her husband; it had been devised to her for

the term of her life by the Will of her husband.

A great number of questions was raised before the Subordinate Judge, and no less than seventeen issues were framed. These issues were issues of law and fact. In the High Court these issues were reviewed, and a decree was made for the payment of the principal sum claimed with interest at 6 per cent., per annum, from the end of each month till realization; that the decree was to be executed only against the property of the Maharani in the appellant's hands, which had not been duly administered by him.

According, therefore, to this decree, the liability of the appellant was only as an administrator of the estate of the Maharani. The case has, however, been urged and the respondent has claimed that he is entitled to his claim against the appellant on one of two grounds:—That is to say, either against him as an administrator *de son tort* of the estate of the Maharani or as the owner of the Dumraon estate.

The case of the respondent rests on the *ekrarnama*, and it was contended that this document binds the administrator of the Maharani's estate and also the owner of the Dumraon estate.

The respondent was a Pleader of the Courts, and had, conversations with the Maharani about becoming the manager of the estate. At one or more of the interviews his statement is that she said that if he gave up his practice in Court, and became the manager of the estate, she would see that he should not be the loser by so doing. There is no mention of such a promise in the contract of employment. This was evidenced by the letter sent by the Maharani to the respondent and dated 29th May 1902. It reads as follows (omitting formal portions): "After expressing my desire to meet you I have to say that as Mr. Charles Fox, the manager, has resigned his post, I think it necessary that some competent man should live at my place and help me; so I write to you that you will please live at my place and execute the orders which I may issue to you and will pay you Rs. 1,200 per month as salary.'

The respondent entered on his work as manager, and on June 15, 1906 the *ekrarnama* was executed. The draft of this document was, before signature by the Maharani, seen by the respondent, and he seems to have made no objection to its terms.

After stating that the High Court adopted a translation of the material part of the *ekrarnama* differing from that adopted by the Subordinate Judge which translation was set out, the judgment continues.

The translation adopted by the High Court of this part of the document reads as follows:—"I, therefore, in order to safeguard against the loss which the said Munshi may sustain if perchance he vacates this post for any reason in future, think it just and proper that if in future the said Munshi gives up this service for any reason or he has to resign the service according to his wishes or against his wishes for any other reason and under any circumstances, justifiable or unjustifiable, he the said Munshi shall get Rs. 500 (Rupees five hundred) monthly, which amounts to Rs. 6,000 (Rupees six thousand) annually, as pension for life from the date he resigns the post of manager of Raj Reasat Dumraon, and I hope that by allowing this (torn) if perchance he, according to his desire, reverts to the profession of pleadership, he shall get to some extent compensation for the loss he may sustain for leaving his profession after (?for) a long time, and he will pass his old age in comfort. The heirs and representatives of me, the executant, and the *gaddinashin* and administrators of Raj Reasat Dumraon should fully comply with the (terms of) this deed."

There does not seem to be much difference in the language so far as the creation of a liability on the part of the administrator of the estate of the Maharani is concerned between the two translations. The respondent rests his case on the translation accepted by the High Court. The question, therefore is: Do the words used in the accepted translation show that the Maharani agreed or contracted with the respondent, that after her death, her executor or administrator should pay the pension named?

The *ekrarnama* provides that respondent is to get Rs. 500 monthly, for life,

from the date he resigns his post as manager, and it goes on to say that the Maharani hopes that by allowing this sum, he will pass his old age in comfort; but then comes the next, and important sentence, as to who is to pay this and the words already quoted show that there are two different parties mentioned— ....namely, first, her heirs and representatives and secondly, the owner or administrator of the Raj Dumraon estate, and the *ekrarnama* says that these parties "should fully comply with the terms of this deed." Are these words a binding promise to pay such a pension, or are they only a recommendation by the lady to two different parties to comply with the deed.. ....*i.e.*, to pay the pension. If it had been intended to provide that the pension was to be a right of the respondent to obtain this money, the words are surely insufficient to effect such an intention. In the accepted translation, the words are that they "should fully comply" with the terms of the deed. She did not treat, therefore the *ekrarnama* as an ordinary contract. It has to be noticed that the work which the respondent did was work for the estate, not personal work for the Maharani. Why then should her personal estate be bound to pay a pension to this servant of the estate, namely, the respondent?

Their Lordships are of opinion that the *ekrarnama* is not in terms a contract binding the executor or administrators of the Maharani to pay the pension, nor can it be said that it is a binding contract on the owner or administrators of the Raj Dumraon estate to pay such a pension. Being of this opinion it is unnecessary to consider whether the appellant was ever the administrator of the estate or the other questions raised in the appeal.

Their Lordships are of opinion that the appeal must be allowed with costs, both here and below, and that the decree of the Subordinate Judge dismissing the suit be restored. They agree with the opinion expressed by the Judges of the High Court, that in the Court below a mass of irrelevant matter was introduced, and that two documents specified have been printed that were irrelevant. The cost of printing these documents, (*i. e.*, p. 274 to p. 348 and p. 351 to p. 481 in the printed record) must be borne by the appellant, and the Registrar of the Privy Council should disallow all costs of and incidental to these irrelevant documents when taxing the costs of the appeal incurred in England.

Their Lordships will humbly advise his Majesty accordingly.

Z. K. *Appeal allowed.*

Solicitor for the Appellant—Mr. *E. Dalgado.*

Solicitors for the Respondent—Messrs. *Barrow Rogers* and *Nevil.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 106 OF 1923.

October 8, 1923.

Present:—Mr. Baker, Officiating J. C.

KASHIRAM—DEFENDENT—APPLICANT

versus

BARKYA AND OTHERS—PLAINTIFFS—NON-APPLICANTS

Contract Act (IX of 1872), s. 23—Two documents—One transaction—One document illegal—Illegality whether affects both documents—Civil Procedure Code (Act V of 1908), s. 115—Revision—Cause of action, decree passed without—Illegal exercise of jurisdiction.

If two documents are part and parcel of one single transaction and one of them is tainted with illegality, the other is also tainted with the same illegality and is void. [p. 47, col. 2.]

If a Court passes a decree in a case in which there is no cause of action, it acts in the exercise of its jurisdiction illegally and interference in revision is justified. [p. 48, col. 1.]

A. promised to pay Rs. 300 in consideration of being a partner in a lease of land unauthorised by law and executed a pro-note in favour of a creditor of the lessor. The lease having fallen through, the creditor sued *A.* for recovery of the amount due under the note:

Held, that the note was invalid under law and no cause of action could be based thereupon. [p. 47, col. 2.]

Application for revision of the decree dated the 13th March 1923, in Civil Appeal No. 4 of 1923, decided by the Additional District Judge, Betul.

Mr. *S. B. Gokhale,* for the Applicant.

Mr. *M. Gupta,* for the Non-Applicants.

KASHIRAM *v.* BARKYA.

ORDER.—The facts of this case are somewhat unusual. Girdhari, the separated brother of the applicant Kashiram, had passed two bonds to the non-applicants and on accounts being made Rs. 600 were found due. It was arranged that a fresh advance of Rs. 270 should be made and for a total consideration of Rs. 870 Girdhari should execute a lease of his occupancy land for 20 years to the creditors. The present applicant agreed to pay half the Rs. 270, that is Rs. 135, to his brother and he passed a note to the creditors for Rs. 300, half the amount due by his brother to them. Subsequently, the lease fell through and the creditors, non-applicants, sued Kashiram on this note, the suit being framed as if he had undertaken to pay half his brother's liability. The defendant, however, pleaded that it had been agreed that he was to have a half share in the lease along with the plaintiffs and on that understanding he had executed the note. After some delay the plaintiffs ultimately admitted that it was so. The First Court dismissed the suit, holding that as he lease was void because occupancy land could not be let for more than a year under section 38 of the Tenancy Act, the consideration of the document in suit was illegal and it was accordingly void.

On appeal the additional District Judge, Betul, reversed the decision of the First Court on the ground that the note in suit was a transaction independent of the lease and that the defendant had undertaken to pay the Rs. 300 on behalf of his brother. He therefore awarded the plaintiff's claim. The defendant applies in revision.

The decision of the learned Additional District Judge appears to be based on the plaint and not on the subsequent pleadings. It has been clearly admitted by the plaintiffs that the defendant was liable to half the consideration of the agreement as a co-lessee of the plaintiffs and that the only reason for executing the document was that he joined the plaintiffs in equal rights as a lessee. It has been contended that by these pleadings the plaintiff's Pleader only meant that the defendant agreed to undertake half his brother's liability on condition of his being given a half share in the lease. But a reference to the agreement executed by Girdhari will show that the lease itself was executed in consideration of the full liability of Rs. 870, and there was, therefore, no necessity for the defendant to undertake any part of his separated brother's liability. It is thus clear that the consideration for the document was the fact of defendant being allowed to be a lessee along with plaintiffs.

Both documents are dated the same day and must be treated as one transaction. This being so, it appears to me that there is no consideration whatever for the document executed by the defendant. The lease is illegal and void and the contract is void. The defendant is not, therefore, liable on the note. No authority is necessary for this proposition. However I may refer to *Laxmanlal* v. *Mulshankar* (1) in which it was held that as the sale-deed and rent note, which latter was merely intended to secure interest on the principal sum, were part and parcel of one single transaction, the rent note was tainted with the same illegality which affected the sale-deed and, therefore, also void. This will apply to the present case where the note executed by the defendant was part and parcel of the transaction relating to the illegal lease.

It is contended that the Court has no power to interfere in revision with the finding of the lower Appellate Court. In the present case the lower Appellate Court has disregarded the admissions in the pleadings and the decision of the case is against the pleadings themselves. If it had been stated in the plaint that this note had been executed by defendant in order to make him a partner with the plaintiffs in the lease of occupancy land for 20 years, it would be apparent that the plaintiffs had no cause of action. In a similar case, where the plaintiff had no cause of action, the Allahabad High Court interfered in revision: *cf.* *C. Ross Alston* v. *Pitambar Das* (2) in which at page 523 the learned Chief Justice discussed this question and pointed out that

(1) 32 B. 449; 10 Bom. L. R. 553.
(2) 25 A. 509; A. W. N. (1903) 104 (F. B.).

in that case there was no cause of action and, therefore, the District Judge acted in the exercise of his jurisdiction illegally within the meaning of section 622 of the old Civil Procedure Code, now section 115. I am of opinion that these remarks apply to the present case and this Court has power to interfere.

I, therefore, set aside the decree of the lower Appellate Court and the plaintiffs' suit will be dismissed with costs in all Courts.

S. D.

Decree set aside.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 295 OF 1922.

April 11, 1923.

Present:—Mr. Justice Devadoss.

R. M. P. PERIANAN CHETTY—

PLAINTIFF—PETITIONER

versus

MARIAPPAN ASARI AND OTHERS—

DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 74, 75—Instalment bond—Whole sum due on default—Demand, failure to make, effect of—Waiver—Limitation, commencement of.

Article 75 of Schedule I to the Limitation Act gives an option to the promisee of a note or the obligee of a bond to waive the consequences of a default. Where no option of waiver is given, time begins to run from the date of default. [p. 49, col. 2.]

The Statute of Limitation runs from the time the plaintiff might have brought his action unless he was subject to any disabilities specified in the Statute. [p. 50, col. 2]

Where an instalment bond provides that if there is a default of payment of any one instalment, interest shall be charged for the entire amount remaining due from the date of default without reference to subsequent instalments and that the aggregate principal and interest shall be paid on demand, on the making of a demand, after default has been made in payment of any one instalment, the whole amount becomes due, and time runs from the date of the demand; but if no demand is made, the option given to the plaintiff is gone, and time begins to run in respect of each instalment as it becomes due. [p. 49, col. 2; p. 50, col. 1.]

Ramadh Bibi Ammal v. *Kandasami Pillai*, 51 Ind. Cas. 724; (1919) M. W. N. 82; 25 M. L. T. 154; 9 L. W. 479; and *Seetharamayyar* v. *Munisami Mudaliar*, 50 Ind. Cas. 87; (1919) M. W. N. 185; 37 M. L. J. 613; 9 L. W. 427, distinguished.

Hanmantram Sadhuram Pity v. *Arthur Bowles*, 8 B. 561; 4 Ind. Dec. (N. S.) 750 and *Hemp* v. *Garland*, (1843) 4 Q. B. 519; 12 L. J. Q. B. 134; 7 Jur. 332; 3 G. & D. 402; 62 R. R. 423; 114 E. R. 994, relied on.

C. R. P. No. 139 of 1922, not followed.

Petition under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif, Madura Town, in Small Cause Suit No. 1420 of 1921.

Mr. *D. Ramaswamy Aiyangar*, for the Petitioner.—The plaintiff in the lower Court is the petitioner here. The suit was on an instalment bond. The debt was payable in ten monthly instalments with a further provision that if there was default in the payment of any one instalment the plaintiff could "whenever he desired" demand payment of the whole of the balance then due irrespective of future instalments. My submission is that to such a bond Art. 75 applies. As there is an option reserved to the plaintiff he is entitled to make the demand at any time till the last date after which there can be no right to demand. See *Ramadh Bibi Ammal* v. *Kandasami Pillai* (1) (Spencer and Krishnan, JJ.) The word "on demand" ("Thangal vendumbodhu" has been considered in *Seetharamayyar* v. *Munisami Mudaliar* (2). In that case it was held that the obligee has a right to waive his claim to demand and time does not begin to run unless and until he exercises his option.

Unless the defendant proves that there was an earlier demand I am entitled to sue within 3 years of the date of the last instalment. This is recognised in C. R. P. No. 139 of 1922 a judgment of His Lordship, Mr. Justice Phillips who also held that plaintiff can waive payment by instalment in which case time will run only from the last instalment date.

(1) 51 Ind. Cas. 724; (1919) M. W. N. 82; 25 M. L. T. 154; 9 L. W. 479.

(2) 50 Ind. Cas. 87; (1919) M. W. N. 185; 37 M. L. J. 613; 9 L. W. 427.

PERIANAN CHETTY v. MARIAPPAN ASARI.

See also *Hanmantram Sadhuram Pity* v. *Arthur Bowles* (3). At page 568 the observations are clearly in my favour. Else Arts. 74 and 75 could apply to identical cases. The scope of the two is different and that distinction would have full meaning only according to my contention.

See also *Seetharamayyar* v. *Munisami Mudaliar* (2), *Ramadh Bibi Ammal* v. *Kandasami Pillai* (1) and *Mackenzie* v. *Tiruvengadathan* (4).

JUDGMENT.—This is an application to revise the decree in S. C. S. No. 1420 of 1921 on the file of the District Munsif's Court, Madura Town. The plaintiff brought the suit for Rs. 90 due on an instalment bond dated the 11th September 1917 executed by the first defendant and the father of the defendants Nos. 2 and 3 for Rs. 50 payable in ten monthly instalments of Rs. 5. The District Munsif dismissed the suit in respect of nine-tenths of the claim as being barred by the law of limitation and gave a decree only in respect of the last instalment.

The respondents do not appear here. It is urged that time did not begin to run against the plaintiff till 11th July 1918, the date on which the last instalment fell due by reason of the provision in the bond that the whole amount shall be payable on demand if anyone of the instalments was not paid on the same date, and that Art. 75 of the Limitation Act is applicable to the case, and the suit filed on 4th July 1921 is within time.

Reliance is placed on two decisions reported in *Ramalh Bibi Ammal* v. *Kundasami Pillai* (1) and *Seetharamayyar* v. *Munisami Mudaliar* (2). In the first case the suit was upon an hypothecation bond in which there was a provision that interest should be paid every six months and the principal before a fixed date and in default "we shall pay, whenever you require, the interest accruing due for the days overdue at the aforesaid rate, and the principal amount." The mortgagor committed default in paying interest. Spencer and Krishnan, JJ., held that no demand was made for payment of the principal and, therefore, time did not begin to run from the date of the default of payment of interest. In the second case, Seshagiri Iyer, J., sitting as a Single Judge, made the following observation in regard to a provision in the bond that if there was a default in the payment of any instalment, the whole money would be payable on demand, "I think that the parties deliberately used the expression, because, although there was a liability to pay each of the instalments separately, they intended to make it a condition precedent that a demand should be made if the whole amount is to be asked to be paid at once." It is open to the obligee of a bond to waive his right to claim the whole amount in default of payment of an instalment where the provision is that the whole amount is payable on demand in case of default; time does not begin to run against him unless and until he exercises his option.

In this case the suit was brought nearly three years after the last payment became due. The plaintiff had an option till the last instalment fell due to claim the whole amount including the last instalment. But since the last instalment fell due the option was gone. To uphold the contention of the petitioner would be giving a longer period of limitation than that prescribed in Art. 74 of the Limitation Act. Article 75 is quite clear in its terms. It gives an option to the promisee of a note or the obligee of a bond to waive the consequences of a default. Where no option of waiver is given, time begins to run from the date of default. My attention has been drawn to a recent decision of Phillips, J. in C.R. P. No. 139 of 1922 in which he held that "it is open to plaintiff to waive the payment by instalments and in that case the principal would only be payable on 24th February 1918 and the suit is then within time." With great respect, I am unable to follow the decision. The provision in the bond here is "In the course of suc payment, should there be any default of payment on the due date in any month as aforesaid interest at one pie per rupee per day shall be charged for the entire amount remain-

(3) 8 B. 561; 4 Ind. Dec. (N. S.) 750.
(4) 9 M. 271; 3 Ind. Dec. (N. S.) 585.

ing due from the date of default without reference to the subsequent monthly instalments and the aggregate sum of principal and interest so accruing due shall in cash be paid in lump by us to you on demand without any apportionment of liability being pleaded by us." The option is given here to the obligee to claim the whole amount on default of payment of an instalment without reference to subsequent instalments. Such a provision cannot be held to extend the period of limitation to three years from the date the last instalment fell due. The petitioner's Vakil reled upon *Hanmantram Sadhuram Pity* v. *Arthur Bowles* (3) as supporting his contention. But I do not think it helps him. Birdwood, J., observes at page 568: "The plaintiff could, under the bond, have exercised the option of delaying his demand for payment of the whole sum remaining due under it at any time so long as any monthly instalment remained in respect of which default could be made; and it is not alleged that at the time when demand was made in January 1884 the last instalment had become already overdue for more than a month, and that the whole amount had, therefore, become payable irrespective of any demand; for the making of which, indeed, no opportunity would thereafter have remained. Assuming, therefore, that so late as in January 1884, an instalment was payable,—an assumption which can safely be made, without entering into any exact calculation of the time when the last instalment would become due, inasmuch as 50 monthly payments would be required to clear off the principal debt alone,—I hold that it was only in January 1884 that cause of action was given. The plaint was admitted on the 28th April 1884." In the present case there is no evidence that any demand was made before the last instalment fell due. In paragraph 7 of the plaint the cause of action is said to have arisen on 11th July 1918, the date on which the last instalment fell due. I think the observations of Lord Denman in *Hemp* v. *Garland* (5) are applicable to the present case. "In this case there was default more than six years ago, and upon that the plaintiff might, if he pleased, have signed judgment and issued execution for all that remained due, or he might have maintained his action. If he chose to wait till all the instalments became due, no doubt he might do so. But that which was optional on the part of the plaintiff would not affect the right of the defendant. He might well consider the action as accruing from the time that the plaintiff had a right to maintain it. The Statute of Limitation runs from the time the plaintiff might have brought his action unless he was subject to any disabilities specified in the Statute, and as the plaintiff might have brought his action upon the first default, if he did not, to enter up judgment, we think that the defendant is entitled to the verdict upon the plea of the Statute of Limitation." According to the terms of the bond, on the making of a demand the whole amount becomes due, and time would begin to run from the date of the demand. If no demand is made the option given to the plaintiff is gone, and time begins to run in respect of each instalment as it becomes due. The District Munsif has rightly given a decree in respect of the last instalment which became due within three years of the date of plaint.

The petition is dismissed.

V. N. V. N. H. *Petition dismissed.*

(5) (1843) 4 Q. B. 519; 12 L. J. Q. B. 134; 7 Jur. 302; 3 G. & D. 402; 62 R. R. 423; 114 E. R. 994.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 277 OF 1922.

August 1, 1923.

Present:—Mr. Baker, Officiating J. C.

MULLA FAIZ ALI—DEFENDANT NO. 1—APPELLANT

versus

Musammat HARKUAR AND ANOTHER—PLAINTIFF AND DEFENDANT NO. 2—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI,

MULLA FAIZ ALI v. HARKUAR.

r. 63—*Title suit—Burden of proof—Transfer of Property Act (IV of 1882), s. 53—Fraudulent transfer—Intention to defeat and delay creditors—Hindu Law—Joint family—Gift by undivided co-parceners, validity of.*

Under Hindu Law a gift even of his own share in joint family property by an undivided co-parcener is invalid. [p. 51, col. 2.]

Sobharam v. *Makdu*, 12 C. P. L. R. 63, relied on.

In a suit instituted after the summary rejection of a claim under O. XXI, r. 58 of the Civil Procedure Code, the onus of establishing that the transaction on which the suit is based was entered into in good faith lies on the plaintiff. [p. 51, col. 2.]

Ghunsham Das v. *Uma Pershad*, 50 Ind. Cas. 264; 15 N. L. R. 68; 17 A. L. J. 410; 36 M. L. J. 483; 21 Bom. L. R. 472; 23 C. W. N. 817; (1919) M. W. N. 513; 10 L. W. 511; 1 U. P. L. R. (P. C.) 86 (P. C.), followed.

When a transfer is made gratuitously and the effect of the transfer is to defeat or delay any creditor, the intention on the part of the transferor so to defeat or delay may be presumed. Where the available assets left after the conveyance are not sufficient to pay the debts of the transferor the law will infer an intention to defeat and delay creditors. [p. 52, col. 1.]

Seth Mohanlal v. *Balmukand*, 17 C. P. L. R. 24, followed.

Appeal from a decree of the District Judge, Hoshangabad, in Civil Appeal No. 8 of 1922, dated the 11th April 1922.

Mr. *J. Sen*, for the Appellant.

Mr. *N. G. Bose*, R. B., for Respondent No. 1.

JUDGMENT.—The facts of this case are as follows:—The appellant Mulla Faiz Ali obtained a decree against defendant No. 2 Kaluram and in execution of it attached the property in suit as the property of Kaluram. The plaintiff-respondent, *Musammat* Harkuar, who is Kaluram's sister, filed an objection against the attachment but it was dismissed on the 22nd of January 1921. Thereupon she brought a suit, as required by O. XXI, r. 63, Civil Procedure Code, for a declaration that the property was her own and not liable to attachment. She claimed under a deed of gift, dated the 27th February 1919. The First Court found in the plaintiff's favour and passed a decree that the plaintiff was entitled to get possession, and an appeal by the defendant was dismissed by the District Judge of Hoshangabad. From this decree the present appeal is presented.

The Courts below do not appear to have applied the law correctly. The suit is one for a declaration and not for possession, hence the decree of the First Court for possession was clearly wrong. The plaint is based on a deed of gift by the defendant No. 2 to the plaintiff, dated the 27th February 1919, and the prayer is for a declaration that the land belongs to the plaintiff and not to the defendant No. 2 and is not liable to attachment and sale, and for an injunction against sale. Both the Courts below have found that the land was not the sole property of Kaluram who passed the deed of gift but belonged jointly to him, his father and brothers. They appear to think that the remainder of the family acquiesced in the gift. Now the plaintiff's case is not based on a gift to her by her father and brothers but on a gift by Kaluram alone. A gift even of his own share by an undivided co-parcener has been held to be invalid in *Sobharam* v. *Makdu* (1). However, this point is not of much importance as what the appellant seeks to attach is whatever interest Kaluram has in the property and on the pleadings in this case it is clear that whatever Kaluram had he purported to convey to his sister, the plaintiff. In such a case the only question is whether the transaction was intended to defeat the claims of creditors under section 53 of the Transfer of Property Act, a point which has not been referred to at all by the Courts below.

It has been held by the Privy Council in *Ghunsham Das* v. *Uma Pershad* (2) that in a suit instituted after the summary rejection of the claim under section 278 of the Civil Procedure Code, 1882, (O. XXI, r. 58 of the new Code), the onus of establishing that the transaction on which the suit is based was entered into in good faith lies on the plaintiff. The only evidence which the plaintiff has produced shows that there was a transfer of possession, which was admitted by the *malguzar* to whom she paid rent, and her name is entered in the village record. The fact that the requisites of

(1) 12 C. P. L. R. 63.

(2) 50 Ind. Cas. 264; 15 N. L. R. 68; 17 A. L. J. 410; 36 M. L. J. 483; 21 Bom. L. R. 472; 23 C. W. N. 817; (1919) M. W. N. 513; 10 L. W. 511; 1 U. P. L. R. (P. C.) 86 (P. C.).

a gift were complied with and that the proprietor of the village recognised her claim to the land in suit, does not at all affect the question at issue in the present case.

The appellant applied for an injunction restraining Kaluram from disposing of the property during the pendency of the suit. The injunction was refused on 17th February 1919, and the deed of gift is dated 27th February 1919. It is not disputed that Kaluram had no property other than that which he transferred to the plaintiff, his sister. The case is on all fours with that in *Seth Mohanlal* v. *Balmukand* (3) where it was laid down that where a transfer is made gratuitously and the effect of the transfer is to defeat or delay any creditor, the intention on the part of the transferor so to defeat or delay may be presumed. If the available assets left after the conveyance were not enough to pay the debts of the transferor, then the law would infer an intention to defeat and delay. In the present case when the deed was executed, the appellant was a creditor of the donor. The mere fact that he had not at that time obtained a decree is immaterial: *cf. Ishvar Timappa Hedge* v. *Devar Venkappa Shanbog* (4). The gift had the effect of defeating or delaying him. The plaintiff could only disprove the intention to defeat or delay by showing that over and above the property gifted the donor possessed available assets sufficient for the discharge of his debts. Admittedly he had no other assets and he shortly afterwards became insolvent. In these circumstances the intention to defeat and delay would be presumed, and the transaction is voidable at the option of the appellant who has been so defeated or delayed.

The result is that the appeal must be allowed. The decrees of the lower Courts are set aside and the plaintiff's suit must be dismissed with costs throughout. Respondent No. 2 to bear his own costs.

Appeal allowed.

G. R. D. & Z. K.

(3) 17 C. P. L. R. 24;
(4) 27 B. 146; 5 Bom. L. R. 19.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1595 OF 1920.

May 4, 1922.

Present :—Mr. Justice Lindsay and Mr. Justice Gokul Prasad.

SHEO BALAK AND ANOTHER—APPELLANTS

versus

GAYA PRASAD AND OTHERS—RESPONDENTS.

Evidence Act (I of 1872), s. 35—Entry in deceased chaukidar's *register, whether admissible—Proof that entry was made by deceased.*

An entry in the register of a deceased *chaukidar*, not shown to have been made by the deceased, is not admissible in evidence under section 35 of the Evidence Act.

Jiwan Bakhsh v *Khan Bahadur Khan*, 19 Ind. Cas. 528, followed.

Sampat v. *Gauri Shankar*, 10 Ind. Cas. 713; 14 O. C. 68, referred to.

Second appeal from a decree of the District Judge, Cawnpore, dated the 30th July 1922.

Messrs. *P. L. Banerji* and *Iqbal Ahmad*, for the Appellants.

Messrs. *U. S. Bajpai* and *Damodar Das*, for the Respondents.

JUDGMENT.—The only question raised in this appeal is as to the admissibility in evidence of the register of births and deaths kept by a village *chaukidar*.

The lower Appellate Court has come to the conclusion that it has not been shown that the entry had been made by the *chaukidar* himself, and the *chaukidar* being dead, the entry could not be admitted in evidence under section 35 of Indian Evidence Act. In support of this view the learned Judge has cited the case of *Sampat* v. *Gauri Shankar* (1). That case has not only been consistently followed in that Court but has also met with the approval of this Court in the case of *Jiwan Bakhsh* v. *Khan Bahadur Khan* (2). We are bound to follow this last-mentioned case and no argument has been advanced before us to make us come to a different conclusion. We, therefore, think that the decree of the Court below was correct. This appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 10 Ind. Cas. 713; 14 O. C. 68.
(2) 19 Ind. Cas. 528.

MAUNG LU GALE v. MAUNG LU PO.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 270 OF 1921.

August 8, 1922.

Present:—Mr. Brown, A. J. C.

MAUNG LU GALE AND OTHERS—DEFENDANTS—APPELLANTS

versus

MAUNG LU PO AND OTHERS—PLAINTIFFS—RESPONDENTS.

Buddhist Law, Burmese—Succession—Death of parent—Marriage of surviving parent—Death of latter—Partition, right of—Causes of action, separate—Partition suit—Mesne profits whether can be claimed—Plaint—Mesne profits, amount of, whether must be stated—Civil Procedure Code (Act V of 1908), O. VII, r. 2, applicability of.

So long as a Burman Buddhist husband and wife are alive their property, from whatever source derived, forms one estate, in which all members of the family have an interest, but which is under the control of the husband and wife. If one of the couple dies and the surviving partner marries again, the property is ordinarily treated as the property of the second marriage during the continuance of that marriage, and forms one estate together with property acquired during the second marriage. It is only on the death of the surviving spouse of the first marriage that the manner in which the property is acquired becomes important. [p. 54, col. 1.]

Similarly when, after the death of the common spouse, the surviving widower or widow retains the property still intact and no partition takes place the estate is still one estate only. It is only when the claim to partition is made that the importance of the manner in which the property is acquired arises. [p. 54, col. 2.]

The children of the first marriage have a right to sue for partition on the death of the first parent but if they fail to exercise that right, the estate remains an undivided family estate and a fresh cause of action accrues to them on the death of the surviving parent. [p. 54, col. 2.]

Where a plaintiff in a suit for partition is not in possession of any of the joint family property, he can claim mesne profits from the date of the suit. [p. 55, col. 2.]

The rule laid down in O. VII, r. 2 of the Civil Procedure Code which requires a plaintiff to state in the plaint the approximate amount of mesne profits claimed does not apply to a case where mesne profits are claimed only from the date of the institution of the suit. [p. 56, col. 1.]

Ramkrishna v. *Bhimabai*, 15 B. 416; 8 Ind. Dec. (N. S.) 283, relied on.

Appeal against the decree of the District Court, Magwe, passed in Civil Appeal No. 4 of 1922.

Mr. *A. C Mukerjee*, for the Appellants.

Messrs. *Tha Gywe* and *Aiyar*, for the Respondents.

JUDGMENT.—The plaintiffs-respondents are the children and grand-children of Maung Kyauk Ke and Ma Ka, deceased. Ma Ka died many years ago and some years after her death Maung Kyauk Ke married Ma Thit. Ma Thit had been married before and had children by her former marriage. She also had children by Maung Kyauk Ke. The appellants-defendants are children by the two marriages of Ma Thit. Maung Kyauk Ke died about the year 1264, and Ma Thit in the year 1281. The plaintiffs claim that the land in suit was the ancestral property of Ma Ka, and sue for possession of it, and for mesne profits. The facts may now be taken practically to be undisputed. In the Trial Court the plaintiff Maung Po Thit only was examined as a witness, and the parties apparently agreed to accept what he stated as true. In any event no evidence of any sort is brought to contradict his evidence. He is old enough to have personal knowledge of the history of the land, and his statements may be accepted to the effect that the land in suit was the ancestral property of Ma Ka. It may also be accepted from his statement that Ma Thit left on her death, besides the land, certain joint properties of her marriage with Maung Kyauk Ke. Both the lower Courts have given the plaintiffs a decree for possession of the land and for mesne profits, and the principal ground of attack taken against these decrees in this Court is that the suit was barred by limitation. It is contended on behalf of the appellants that the cause of action arose on the death of Maung Kyauk Ke which occurred considerably more than twelve years before the filing of the suit. The plaintiffs might, had they so wished, have sued Ma Thit and her children for partition of the estate in accordance with the rules laid down in section 229 of Volume I of the Ex-Kinwunmingyi's Digest. But they did not do so, and the question for decision is whether a fresh cause of action arose on the death of Ma Thit, and whether they are entitled now to sue for partition in accordance with the rules laid down in section 238. It is contended on behalf of the appellants that

from the very nature of the suit it is clear that Ma Thit is not a joint owner of the property with the plaintiffs. If she were her children would be entitled to a share in the property. The plaint as drafted does lend some colour to this contention. The plaintiffs do not in their plaint ask for partition at all. They state that the land in suit was the ancestral property of Ma Ka, and they claim that they are entitled to it exclusively. They do mention certain other property which they say belonged to their parents, but they do not make it clear in their plaint what their claim is with regard to this property. Their suit does, therefore, at first sight appear to be a suit for the possession of certain property which they claim to be theirs entirely to the exclusion of Ma Thit's children, and they make no claim whatever to partition of any property. In spite, however, of the form in which the plaint is drawn up, it would appear that the suit is in reality a suit by the plaintiff to establish the rights accruing to them under section 238 of the Digest. They have subsequently waived any rights they may have to any of the rest of the property. And in fact it is doubtful whether under the rules laid down in that section they would have any right to a claim to any of the property other than such property as was brought by their father to the marriage with Ma Thit. So long as a Burman Buddhist husband and wife are alive their property from whatever source derived forms one estate, in which all members of the family have an interest, but which is under the control of the husband and wife. If one of the couple dies and the surviving partner marries again, the property is ordinarily treated as the property of the second marriage during the continuance of that marriage, and forms one estate together with property acquired during the second marriage. It is only on the death of the surviving spouse of the first marriage that the manner in which the property is acquired becomes important. The rules laid down in section 229 provide for the partition of what is treated as one estate in such an eventuality. Similarly when, after the death of the common spouse, the surviving widower or widow retains the property still intact and no partition takes place the *dhammathats* appear to contemplate the estate as still one estate only. It is only when the claim to partition is made that the importance of the manner in which the property is acquired arises. It appears to me, therefore, that although under the rules set forth in section 238 the children of the first marriage obtain the whole of the property of the first marriage, and no share in the rest of the property, they are still suing for a partition of an estate. And in this case although the claim is for the sole possession of certain land, the suit is nevertheless in essentials a suit for partition of an estate in which both the plaintiffs and the children of Ma Thit have a joint interest. In this view of the case the right to claim partition on the death of Ma Chit under the rules in section 238 arises independently of any right that may have arisen on the death of Maung Kyauk Ke. The plaintiffs could, if they had chosen, have sued for a partition of the property on the death of Maung Kyauk Ke. They did not do so, and the estate still remained an undivided family estate in which all the various heirs had rights vested or unvested. The estate having remained undivided a new cause of action arose on the death of Ma Thit. It is suggested that the provisions of Buddhist Law cannot override the provisions of the Statutory Law of Limitation, but it does not appear to me to be a question of overriding such a law. If the plaintiffs are to be considered as suing for a distributive share of the property of their father within the meaning of Art. 123 of the First Schedule to the Limitation Act, the share for which they sue did not become payable until the death of Ma Thit and, therefore, limitation did not begin till then. What they are suing for is a share of the undivided estate left with Ma Thit in accordance with a right which accrued to them only on the death of Ma Thit. Any claim they might have made to a share in their

father's estate on his death may be barred by limitation. But the Buddhist Law gives them a right to share in the family estate left with Ma Thit on her death, and it is that right which they are now suing to enforce. On the death of his father an *orasa* son is entitled to claim one-fourth of the property. But if he does not exercise that right and his mother does not die till more than twelve years after the death of his father, I do not think it would be suggested that he was barred by the Law of Limitation from claiming a share of inheritance on the death of his mother. Similarly I see no reason why the failure of the plaintiffs to exercise their right to partition on the death of their father should debar them from claiming an entirely separate right on the death of Ma Thit. Extracts from a very large number of *dhammathats* are quoted in section 238, and in not one of these extracts is there any suggestion that the rules as to partition there laid down are in any way dependant on which of the partners of the last marriage died first. It is not suggested that the children only of the last surviving parent can claim. It appears to me that the *dhammathats* contemplate the case in which the family property is, as a matter of fact, kept undivided until the death of the last of the parents, in whatever order they may have died. I am of opinion that the cause of action in the present case arose only on the death of Ma Thit and that the suit was not barred by limitation. As regards the share which the plaintiffs are entitled to claim I do not understand it to be seriously contended that the law has been wrongly interpreted by the lower Courts. The majority of the *dhammathats* quoted in section 238 including the *Manugye* lay down that if there is joint property of the last marriage the children of the first marriage each take the property brought by their parent to the subsequent marriage. In one or two passages it is laid down that if one of the parents brings no property to the second marriage, then the children of the other parent by his or her first marriage do not get all the property brought by that parent to the second marriage. But the authority for this rule is slight. The great majority of *dhammathats* lay down that the rule which has been followed in the present case should be followed if there is property of the last marriage. I am of opinion, therefore, that the plaintiffs have rightly been given a decree for possession of the land in suit.

The question remains whether the plaintiffs should have been given a decree for mesne profits. The term "mesne profits" is defined in section 2 (12) of the Code of Civil Procedure as "those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits . . . . ." In an ordinary suit for partition the question of mesne profits can hardly arise. Where there is property in possession of both sides, and the Court has to adjudicate as to how this property is to be partitioned, it can hardly be said that either party is in wrongful possession of any of the property. But in the present case there is no allegation that the plaintiffs are in possession of any of the property belonging to the estate, and if the finding that they are entitled to the land in dispute be correct, then they were entitled to possession as soon as they filed the suit. The plaint in the present case does not say from what date mesne profits are claimed. But presumably they claim mesne profits only from the date of institution of the suit. In any case they do not appear to have established their right to any such profits prior to the institution. If from the date of institution the plaintiffs were entitled to possession, then they were entitled to the usufruct of the land from that date, and in refusing to allow the plaintiffs to have possession the defendants must be held to have been in wrongful possession. The plaint sets forth that the four appellants are in possession of the property, and this is not denied in the written statement. It is not and never has been the case for the appellants that they were willing to make over that possession when required. They still claim

that they are entitled to retain possession. I see no reason, therefore, to interfere with the order for mesne profits from date of institution of the suit. But it does appear to me that the order as passed by the Trial Court is wrong. Under the provisions of r. 12 of O. XX of the Code of Civil Procedure the Court may include in the decree for possession a decree directing an enquiry as to rent or mesne profits from the institution of the suit until the delivery of possession to the decree-holder, the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or the expiration of three years from the date of the decree, whichever may occur first. But the question of mesne profits cannot now be decided in execution. After the enquiry has been held a final decree has to be passed under the provisions of the second clause of r. 12.

It is objected that under the provisions of r. 2 of O. VII of the Code of Civil Procedure, when a claim is made in a plaint for mesne profits, the plaint should state approximately the amount sued for. But it does not appear to me that this rule can apply to a case where mesne profits are claimed only from date of institution of the suit. It is obviously impossible to state even approximately the amount of such mesne profits, as that depends entirely on the period that may elapse between the date of institution and the delivery of the land. This was the view taken under the old Code in the case of *Ramkrishna* v. *Bhimabai* (1). The procedure to be adopted in dealing with claims for mesne profits has been considerably altered in the new Code, and such matters can no longer be dealt with in execution. But the wording of r. 2 is not greatly altered in the Code of 1908, and it must be presumed that the plaintiff is not required to perform an impossibility. The decree passed by the Trial Court appears to me to be substantially correct, and to need amendment only in form.

I alter the decree of the lower Courts into a decree for possession of the land in suit and for an enquiry under the provisions of r. 12 (1) *(c)* of O. XX of the Code of Civil Procedure as to the mesne profits accruing from date of institution of the suit. After completion of the enquiry the Trial Court will pass a final decree in accordance with the provisions of r. 12 (2), for such mesne profits as may be found to be due from that date.

The appellants will pay the plaintiffs their costs throughout.

Z. K. *Decree altered.*

(1) 15 Bo. 416; 8 Ind. Dec. (N. S.) 283.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 505 OF 1921.

May 23, 1922.

Present :—Mr. Justice Ryves and Mr. Justice Stuart.

RAM SAMUJH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SHEORAJ TEWARI AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Redemption—Suit by transferee of mortgagor—Term for redemption, validity of, whether can be challenged.

In a suit for redemption of a mortgage brought by a transferee of the mortgagor it is not open to the latter to raise the plea that the term for redemption fixed in the mortgage-deed is excessive.

Second appeal from a decree of the District Judge, Benares.

Dr. *K. N. Katju* and Mr. *Harnandan Prasad*, for the Appellants.

Mr. *Iqbal Ahmad*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit to redeem two mortgages executed in 1883 and 1888 respectively. The mortgages were for a term of sixty years. The lower Appellate Court has dismissed the suit on the ground that it is premature. In appeal the only point strongly urged before us is that the term of sixty years was excessive having regard to the value of the property and the necessities of the family. This suit was not brought by the mortgagors but

by the vendees and we do not think it is open to them to raise this plea. In our opinion the appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 305 OF 1921.

July 3, 1923.

Present:—Mr. Justice Lindsay and Mr. Justice Sulaiman.

Musammat MAHRANA KUNWAR—PLAINTIFF—APPELLANT

versu

Mr. E. V. DAVID, OFFICIAL RECEIVER OF THE PROPERTY OF RAM DUTT AND OTHERS, INSOLVENTS, AND ANOTHER—DEFENDANTS—RESPONDENTS.

Provincial Insolvency Act (V of 1920), ss. 4, 68, scope of—Stranger aggrieved by act of Receiver—Remedy—Civil suit, maintainability of—Leave of Court, whether necessary—Hindu Law—Property purchased in name of wife—Presumption.

Per *Curiam*:—Section 4 of the Provincial Insolvency Act does not confer exclusive jurisdiction on the Insolvency Court, and it cannot be said that the only remedy open to an aggrieved stranger is to apply to that Court. [p. 58, col. 2.]

Where a person has made no attempt to bring the matter up before the Insolvency Court and there is no order of that Court which can be pointed out as amounting to a decision within the meaning of sub-clause (2) of section 4 of the Provincial Insolvency Act, he is at perfect liberty to have recourse to the ordinary Civil Courts. [p. 58, col. 2; p. 59, col. 1.]

Section 68 of the Provincial Insolvency Act provides a speedy remedy to which recourse can be had if the person aggrieved chooses to seek it. But it is not the only remedy open to him. [p. 59, col. 1.]

If a person applies under section 68 of the Provincial Insolvency Act, he is subject to the time limit prescribed therein, but if he wants to enforce his claim in the Civil Courts in the ordinary way, his rights would be those of an ordinary person. [p. 59, cols. 1 & 2.]

It is open to a third person whose property has been taken possession of by the Receiver, and who does not claim title through the insolvent, to treat the Receiver as a trespasser and maintain his claim in a Civil Court. There is no provision in the Provincial Insolvency Act other than that contained in section 4 of the Act, which in any way takes away the jurisdiction of a Civil Court to try such a suit. [p. 59, col. 2.]

There is no statutory authority for the proposition that a person who is suing a Receiver appointed under the Insolvency Act has to obtain the permission of the Insolvency Court. [p. 63, col. 1.]

Per *Sulaiman, J.*—A Receiver appointed under the Code of Civil Procedure merely holds the estate on behalf of the Court. The estate does not vest in him, nor does he in any way represent it and leave of the Court is necessary in order that by impleading him the estate may be bound. Without leave of the Court he represents nobody; after leave he represents the real beneficiary. A Receiver under the Provincial Insolvency Act holds a different capacity altogether. He is more than a mere officer of the Court. Under section 28 (2) of the Act the insolvent's estate vests in him. He alone, and no one else, represents the estate. He, therefore, is the proper party to be impleaded in the action. No leave is accordingly necessary for suing him. [p. 60, col. 1.]

Under section 4 of the Provincial Insolvency Act, if a question of title is actually raised by a stranger to the insolvency and decided by the Insolvency Court, the decision is final, and the question cannot be re-opened. [p. 58, col. 2.]

There is no presumption that property standing in the name of a Hindu woman, even though purchased in her name, belongs to her husband. [p. 60, col. 2.]

First appeal from the decree of the Second Subordinate Judge, Cawnpore, dated the 25th of June, 1921.

Mr. *G. W. Dillon* for Messrs. *B. E. O'Conor* and *Ramnama Prasad*, for the Appellant.

Dr. *K. N. Katiu*, for the Respondents.

JUDGMENT.

Sulaiman, J.—This is a plaintiff's appeal arising out of a suit for a declaration that she is the owner in possession of a certain house situated in the City of Cawnpore; and that the insolvent defendant No. 2 had no concern with it, and it is not liable to be attached by the Official Receiver. The house in question was purchased on the 29th of May 1914 under a registered sale-deed in the name of the plaintiff. Some years afterwards, in 1919, Chhote Lal defendant, the plaintiff's husband, entered into a partnership with one Ram Dutt—a commission agency business—which ultimately failed in 1920. On the petition of certain creditors the firm was adjudicated an insolvent, and the Official Receiver took charge of the insolvent's estate. On the 6th of November 1920 he attached the house in question as property belonging to the the insolvent Chhote Lal. The report of the Receiver says that the present plaintiff

protested and stated that the house belonged to her parents.

It is important to note that she made no attempt to seek redress in the Insolvency Court, but filed this regular suit for declaration on the 21st of February 1921.

The Official Receiver, who mainly contested the suit, pleaded that the house belonged to the insolvent and not to the plaintiff. It was further urged that the plaintiff not having raised any objection at the time of the attachment was estopped from suing; that her only remedy was to file objections in the Insolvency Court within 21 days of the attachment and the Civil Court had no jurisdiction to try this case, and, lastly, that the permission of the Insolvency Court was necessary before the institution of the suit.

The insolvent, as might be expected in either view of the matter, supported the plaintiff's claim.

The learned Subordinate Judge decided the three legal issues in favour of the plaintiff, but on the question of fact came to the conclusion that the house in dispute belonged to Chhote Lal and not to the plaintiff.

The plaintiff has come up in appeal to this Court and on her behalf the finding of fact arrived at by the Court below is challenged. The learned Advocate for the defendant-respondent has not only supported the decree on the finding of fact, but also on the legal pleas decided against him.

As the questions of law come first in logical sequence, I propose to dispose of them first.

The plea of estoppel raised in the Court below has not been pressed at all, and it may be said at once that there was manifestly no substance in it.

The points which have been very strongly pressed in appeal are: (1) that under the new Provincial Insolvency Act, V of 1920, exclusive jurisdiction is conferred on Insolvency Courts with the result that no regular suit on the civil side is maintainable as against the Official Receiver, and (2) that in any case no such suit without the permission of the Insolvency Court can lie.

The argument is that an Official Receiver under the Insolvency Act is an officer of the Court, that, therefore, the act complained of must be deemed to be an act of the Court and the person aggrieved thereby should have recourse to that Court and to no other Tribunal. But the present plaintiff not claiming title through the insolvent was a stranger to the proceeding and was in no way represented therein. It is difficult to see how her rights can in any way be prejudiced by an act done by the Receiver in spite of her protest. It is suggested that the policy of the act is to expedite matters and not to permit claims to be brought after a number of years, and it is argued that it was with this object in mind that section 4 was enacted which in effect means that the question should forthwith be disposed of finally by the Insolvency Court.

In my opinion section 4 of the Act is an enabling section and confers full power on the Insolvency Court to decide all questions of title or priority or of any nature whatsoever which arise before it, or which it may deem necessary to decide. Sub-clause 2 makes "such" decision final and binding for all purposes on all claimants against him. In reality section 5 gives to the Insolvency Court the powers of a Civil Court.

It is to be noted that prior to the passing of this Act there was a conflict of opinion between this Court and the Calcutta High Court, the view prevailing in the latter Court being that questions of title could be disposed of by a regular suit only. Obviously the enactment of section 4 gives effect to the view which prevailed in this Court. I accept the contention of Dr. Katju that under the new Act if a question of title has been actually raised by a stranger to the insolvency and decided by the Insolvency Court the decision is final and the question cannot be re-opened in a separate regular suit.

This, however, does not mean that exclusive jurisdiction has been conferred on the Insolvency Court, and that the only remedy open to the aggrieved stranger is to apply to that Court. In my opinion where a person has made no attempt to bring the matter up before the Insolvency Court and there is no order of the Insolvency Court which can be pointed out as amounting

to a decision within the meaning of sub-clause (2) of section 4, he is at perfect liberty to have recourse to the ordinary Civil Courts. In the present case the plaintiff never appeared before the Insolvency Court nor put her case before it, nor was any evidence led nor any adjudication of her rights made. How then can it be said that there is a "decision" against her which precludes her from suing? The act of attachment was an act of the Receiver and not necessarily an act of the Court, much less was it a "decision" by the Court.

The act of the Receiver may be compared to the act of the Civil Court *Amin* who wrongly attaches the property of a third person in execution of a decree. Such an act is done as much under the authority of the Execution Court as the act of a Receiver under that of the Insolvency Court. No special sanctity attaches to the acts of the Receivers under the Act. It is true that in certain particulars and subject to certain conditions the decision of the Court is final and absolute against third parties also and in that way the proceeding differs from proceedings in execution where the order disallowing the objection is not final. But in other respects the similarity certainly exists. In the absence of such decision the Civil Court remedy is not barred.

Reliance was also placed on section 68 of the Act which says that if the insolvent or any of the creditors or any other person is aggrieved by any act or decision of the Receiver, he may apply to the Court, and the Court may confirm, reverse or modify the act or decision complained of, and make such order as it thinks just. It is strongly contended that the word "may" in the section should be read as "must" and that, therefore, the only remedy open to the aggrieved person is by way of an application under this section In my judgment this contention is untenable. Section 68 provides a speedy remedy to which recourse can be had if the person aggrieved chooses to seek it. It is not the only remedy open to him. Of course if a person applied under that section, he would be subject to the time limit prescribed therein. But if he wanted to enforce his claim in a Civil Court under section 9 of the Code of Civil Procedure, his rights would be those of an ordinary person. I am of opinion that it is open to a third person who does not claim title through the insolvent, to treat the Receiver as a trespasser and maintain his claim in a Civil Court. There is no provision in the Act other than that contained in section 4 which in any way takes away the jurisdiction of a Civil Court to try such a suit.

In the case of *Bhairo Prasad* v. *S. P. C. Dass* (1) which came under the old Act, the opinion was expressed that a stranger to the insolvency may, at his option, seek his redress in the ordinary Civil Court. The effect of section 4 of the new Act has in no way been to alter the law so far as this point is concerned.

The next point urged is that before instituting the suit it was necessary to obtain the leave of the Insolvency Court. It is conceded that there is no statutory provision under which such leave is necessary. On the other hand, it may be pointed out that whatever provision there is in the Act relating to the grant of such leave is confined to claims of creditors. Reference may be made to section 28 sub-clause (2) which provides that no creditor to whom the insolvent is indebted shall commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose. If leave were necessary in all suits, this provision would be altogether superfluous. I may also point out that under section 28 (6) the power of a secured creditor to realise or otherwise deal with his security remains unaffected. Much less can then the rights of a stranger who claims an independent title be prejudiced. The utmost that can be said is that an Official Receiver is a public officer within the meaning of section 2 sub-clause (17) (*d*) of the Civil Procedure Code, and that notice under section 80 is necessary In the present case it is not disputed that such notice was sent before the institution of the suit.

It is, however, very strongly urged that on general principles it should be held that

(1) 51 Ind. Cas. 113; 17 A. L. J. 787; 1 U. P. L. R. (A.) 118.

an Official Receiver is merely an officer of the Court and that no suit can be maintained against him unless the leave of the Court which appointed him has first been obtained. Reliance has been placed on some cases of the Bombay, Madras, Calcutta and Patna High Courts in support of this contention. None of the cases cited, however, are cases arising out of insolvency proceedings. A Receiver appointed under the Code of Civil Procedure merely holds the estate on behalf of the Court. The estate does not vest in him, nor does he in any way represent it. Leave of the Court is necessary in order that by impleading him the estate may be bound. Without leave of the Court he represents nobody; after leave he represents the real beneficiary. A Receiver under the Insolvency Act holds a different capacity altogether. He is more than a mere officer of the Court. Under section 28 (2) the insolvent's estate vests in him He alone, and no one else, represents the estate. He, therefore, is the proper party to be impleaded in the action. No leave is accordingly necessary for suing him.

It should also not be overlooked that there is a distinction between the case where the plaintiff suing the Receiver had been represented in the previous proceeding and where he was not represented. For instance a creditor in an insolvency proceeding, a share-holder in the liquidation proceedings of a Company or a party to a litigation is represented in the proceeding when a Receiver of the property is appointed. In cases of this kind it may be that a party to that proceeding having himself submitted to the jurisdiction of the Court cannot subsequently challenge it, and start a fresh proceeding against the Receiver appointed in that litigation without having first obtained the leave of that Court. The position may, however, be quite different where a person who was a stranger to the proceeding in which the Receiver was appointed wants to sue the Receiver.

In certain Acts an express provision is made that no suit shall be instituted against an officer appointed by the Court; for instance section 171 of Act VII of 1913 so provides. It is conceded that there is no such provision in the present Act And independently of a statutory provision I can find no rule of law under which a suit against a receiver in insolvency can be thrown out on the mere ground that no leave of the Insolvency Court had been obtained This disposes of the questions of law raised in the appeal.

Coming to the merits of the case I can say without hesitation that it is impossible to uphold the finding of the Court below. The learned Subordinate Judge recorded a finding that the property in dispute belonged to Chhote Lal and not to the plaintiff. The question whether the plaintiff has succeeded in proving that the property belongs to her, I shall consider presently. But there can be no question that there is no evidence whatsoever on the record to support the finding that the property in dispute belonged to Chhote Lal. Undoubtedly as the plaintiff came to Court asking for a declaration of title the burden lay on her to establish a *prima facie* case that the property belonged to her. But after she had proved that the title-deeds stood in her name, that her name was entered in the Municipal registers and she had been paying the Municipal rates and taxes and had been assessed as owner, and that for all practical purposes she was the ostensible owner of the property, then if the defendant wanted to prove that she was a mere *benamidar*, the burden shifted on to him to show that the purchase money had been found by her husband. I wholly disagree with the view expressed by the Court below that there is a presumption that property standing in the name of a Hindu widow, even though purchased in her name, belongs to her husband.

In this case, as I have already remarked, the sale-deed of the 29th of May 1914 stood in her name. There had been a number of previous transfers which need not be mentioned, except the mortgage-deed dated the 13th of May 1913, executed by Kali Charan and *Musammat* Alpi, the previous owners, in favour of Dip Chand and Shimbhu Dat for a sum of Rs. 900. When the sale-deed of 1914 was executed, the amount due under this document was left in the hands of the vendee for payment to the previous mortgagees. Shimbhu Dat, one of the mortgagees, was an attesting witness to the sale-deed and he

also admittedly received the mortgage-money after the sale-deed had been executed.

The plaintiff has produced a building permit dated the 5th of May 1918 which shows that an application for making some new erections was made by her to the Municipal Board and permission was granted on that date. There are also receipts for payment of water and house taxes standing in the plaintiff's name. At the time when the Receiver went to attach this house the plaintiff admittedly was occupying a part of the house, the other portion being let out to certain tenants. These circumstances in themselves make out a sufficient *prima facie* case in favour of the plaintiff. In addition to these pieces of documentary evidence, the plaintiff produced a number of witnesses in support of her claim. She herself went into the witness-box and stated that the house had been purchased by her father and uncle some seven years ago. Then she said that the money was paid by her father and the sale transaction was carried out by Mathura Prasad. In a later portion of her statement she said that the money was given to the vendee by Mathura Prasad. In paragraph No. 1 of the plaint she had alleged that the house was purchased by her father with his own money. One of the points pressed on behalf of the contesting defendant is that there is a gross inconsistency in these statements. In my opinion there is no inconsistency or contradiction whatsoever. It is an admitted fact that the plaintiff's father and uncle were members of a joint family. The plaintiff's mother died when she was an infant and she was brought up in the house of her father and uncle. If the property was purchased with the money belonging to the family the money may be said to have belonged to either of the two or to both. She next stated that on account of some quarrel with the relations of her husband she had to leave her husband's house, and this was why her father and uncle thought o getting a house for her.

Her father was dead when the suit was brought. Her uncle, Mathura Prasad, went into the witness-box and swore that he had provided the money for the purchase of this house. Mathura Prasad owns some *zemindari* property, he also carries on some business, and is a *Lambardar* in one of the villages. He stated that he had Rs. 1,000 in the village and brought the amount to the city for payment to the vendee. It is true that he said that there were no account books kept by him, and that he was not in a position to produce any documentary evidence to prove the payment. He produced two witnesses, Mahadeo and Hanuman, to show that he actually brought the money from the village. It is unnecessary to comment on the evidence of these witnesses who are men of no status. But there is the evidence of Babu Chhote Lal, Vakil, a distant relation of the plaintiff, to the effect that before the sale-deed in question was executed, Mathura Prasad had gone to him and shown him some papers relating to the house and consulted him. His evidence certainly shows that Mathura Prasad was in some way or other connected with the transaction. Two witnesses, Gaya Din and Raghunath, were examined to prove that the rents were paid to the lady by them, and that the house taxes were also paid by the plaintiff. The evidence on behalf of the defendant Receiver is practically nil. No circumstances are shown which would make it at all probable that Chote Lal was the real purchaser and that the property had been obtained fictitiously in the name of the plaintiff. For instance it is not shown that in the year 1914 Chhote Lal had any motive to enter into a *benami* transaction, or that he was contemplating the starting of any business and it was with a view to cheat the future creditors that the property was purchased in the name of his wife. In fact it was many years after the sale that he entered into the partnership business which failed. The oral evidence produced by the defendant consists of three persons, Gur Dayal, Kanhaiya Lal and Jhabu Lal, whose statements are mainly to the effect that Chote Lal was in a position to advance Rs. 1,000 towards the acquisition of this house. They also tried to prove that Chote Lal, after the sale-deed was executed, made some statements alleging himself to be the real owner. Such a statement even, if true, is of no value against the plaintiff. Gur Dayal is a general attorney of one of the petitioning creditors. The

sale-deed was not executed in his presence nor is he able to say where the purchase-money came from. Kanhaiya Lal is himself a creditor. Jhabu Lal is a general attorney of another creditor. In the presence of neither of these the sale transaction took place. In my opinion, therefore, the evidence adduced by the defendant is wholly insufficient to overweigh that adduced by the plaintiff. The documentary evidence is entirely in favour of the plaintiff and there are no circumstances which in any way throw any suspicion on the transaction. The burden which lay on the plaintiff of establishing a *prima facie* case was sufficiently discharged by her evidence and no rebutting evidence worth the name has been adduced on behalf of the defendant. In this view of the matter the finding of the learned Judge must be overruled. I would, therefore, allow the appeal, set aside the decree of the Court below and decree the plaintiff's suit with costs.

Lindsay, J.—I agree with my learned colleague that this appeal should be allowed. There are no merits in the case of the respondent. I wish, however, to say a few words regarding the legal points which have been raised in the case. The questions which arise for decision are simple questions of the interpretation of Act V of 1920 and it does not appear to me necessary to resort to any previous decision or authority for the purpose of construing the relevant sections

So far as section 68 is concerned it cannot, in my opinion, be maintained on the language of that section that a person who is aggrieved by any act of a Receiver is under an obligation to apply to the Court for relief. What the section says is that such a person "may apply" to the Court, and it is further provided that if he exercises his option of applying to the Court he must make an application within 21 days from the date of the act complained of. On the face of it the language of the section is permissive, not mandatory. The person aggrieved has the choice either of applying to the Court or of seeking his ordinary remedy under the civil law.

It is argued that because of the provisions of section 4 of Act V of 1920, whereby jurisdiction has been conferred upon Insolvency Courts to determine questions of title arising in insolvency cases, it must necessarily follow that any person who has a question of title to raise must apply to the Insolvency Court; in other words it must be assumed from the provisions of section 4 that because these powers of deciding questions of title have been conferred upon Insolvency Courts, therefore, the Insolvency Court has exclusive jurisdiction. That appears to me to be a deduction which cannot be made from the language of section 4. All that the section intended to provide was that if a question involving title is raised before an Insolvency Court, then the Insolvency Court is to be deemed to have power to decide that question of title. I must not be taken to subscribe to the view that has been expressed by my learned colleague regarding what follows if an aggrieved person does elect to make an application to the Insolvency Court. I am not prepared to take the view that a decision under sub-section 2 of section 4 would be binding upon a stranger, like the plaintiff in the present case, who, in my opinion, is not making any claim against the debtor or the debtor's estate. What the plaintiff in the present suit is saying is that the property about which the dispute exists does not belong to the debtor's estate and never did belong to it, and so I cannot see how it can be said that she in the present proceedings is claiming against the debtor or his estate. That question, however, does not arise for decision and these observations are consequently *obiter*. I have only made them in order that I may not be supposed to hold the opinion that a decision under sub-section 2 is binding upon all parties including parties who are entire strangers to the insolvency proceedings.

It being settled, therefore, that the plaintiff in the present case had the ordinary civil remedy which was open under the law, the further question arises why she would be bound in any way to solicit the sanction of the Insolvency Court before she brought the suit against the Official Receiver. There is no statutory provision for such sanction being asked or given, and on principle I fail to see why any such authority is required. The Official Receiver may be an officer of the Court; but no

special sanctity attaches to his office when he is brought in contact with a person who is an entire stranger to the proceedings in the Insolvency Court. I can well understand the position that so far as the insolvency proceedings are concerned the Receiver or Official Receiver stands in a peculiar relation to all parties who are interested in the proceedings, that is to say, the insolvent himself or the creditors or other persons, who are seeking satisfaction out of his estate. But he has no particular status as against parties who are entire strangers to the proceedings in the Insolvency Court, and it under colour of his office as Receiver or Official Receiver he commits an act of trespass, it is difficult to understand on what principle the person against whom the trespass is committed is under any obligation to ask permission of the Insolvency Court to bring an action against the Receiver. The remedy of the person complaining is the ordinary remedy at law and no question, therefore, of any sanction arises. It may, of course, be that in cases where the defendant has an official status notice of the suit must be given to him as required by the Civil Procedure Code. In the present case I understand that such notice was necessary and was actually given.

It is admitted, as I have said, that there is no statutory authority for the proposition that a person who is suing a Receiver or Official Receiver appointed under the Insolvency Act has to obtain the permission of the Insolvency Court. There have been, no doubt, numerous cases in which it has been laid down that proceedings against a Receiver should not be taken without the leave of the Court. Where a Receiver has been appointed in the course of a suit it seems reasonable enough that all parties to that suit should be bound by the order appointing him and consequently, being subject to the jurisdiction of the Court, should not be allowed to question the acts of a Receiver without the Court's permission. But there is, in my opinion, no authority for the proposition that, where in a suit a Receiver has been appointed, no person who is a stranger to the suit can question an act of the Receiver without the sanction of the Court. That seems to be an absolutely untenable proposition and opposed to all principle. In the present case I am satisfied (1) that the plaintiff was under no obligation to seek any relief in the Insolvency Court; (2) that she had the ordinary remedy under the civil law against the Official Receiver; and (3) that for the purpose of maintaining the suit she was under no obligation to seek any sanction from the Insolvency Court.

By the Court—The order of the Court is that the appeal is allowed, the decree of the Court below is set aside and the plaintiff's suit is decreed with costs in both Courts including in this Court fees on the higher scale.

Z. K. *Appeal allowed.*

PRIVY COUNCIL.

APPEAL FROM THE CHIEF COURT OF LOWER BURMA.

July 6, 1922.

Present:—Lord Buckmaster and Lord Parmoor.

MA THAN THAN—APPELLANT

versus

MA PWA THAN—RESPONDENT.

Buddhist Law, Burmese—Adoption—Publicity and notoriety—Ceremony, whether required—Practice—Witness, credibility of—Witness believed by Trial Court—Appellate Court, position of.

There is no special ceremony in Burmese adoption but the adoption must be a matter of publicity and notoriety. Where an alleged adopted daughter has lived continuously in the house of her alleged adoptive father from her babyhood for twelve or thirteen years and the latter is entered in the register of the school in which she studied as her parent and has paid for her fees and clothing, it is strong evidence of the publicity and notoriety of the adoption. [p. 65, col. 1.]

Where a Judge, who has seen a witness, and has heard his evidence, comes to the conclusion that the witness is credible, that is to say, a witness who to the best of his recollection intends to tell the truth, it requires circumstances of exceptional character to justify a Court of Appeal in coming to a different conclusion. It is not a question of the weight of evidence but of the attitude and trustworthiness of the witness, and of the effect of his whole demeanour in the witness box. [p. 65, col. 2.]

Appeal from the judgment and decree of the Chief Court of Lower Burma reversing the judgment and decree of Mr. Justice Robinson of the same Court.

MA THAN THAN *v.* MA PWA THAN.

Messrs. *A. M. Dunne* and *E. B. Raikes*, for the Appellant.

Messrs. *Montgomery* and *Dube*, for the Respondents.

JUDGMENT.

Lord Parmoor.—The question involved in this appeal is whether the appellant is the *keittima* adopted daughter of Ko Po Kyaw and Ma Nyun. Ko Po Kyaw died at Edward Street in Rangoon, on the 27th October 1916, leaving considerable property, worth from Rs. 1,00,000 to Rs. 1,50,000. Ma Nyun was the first wife of Ko Po Kyaw, The appellant claims that she was adopted as *keittima* daughter in or about 1893, after the deceased and his first wife had been married 16 years without children. The respondent was the fifth of the six wives of the deceased. She was married to the deceased about 1906, was divorced from him about six months later, but resumed living with him after the death of his sixth wife, and was living with him at the time of his death. The appellant was born in 1892, being the daughter of Ma Gyoke, who was a cousin of Ko Po Kyaw and married to Ko Maung Gale. In the First Court the Judge, Mr. Justice Robinson, gave judgment in favour of the appellant, but this judgment was set aside in the Court of Appeal.

At the trial of the action, there was a considerable conflict of evidence between the witnesses, called respectively on behalf of the appellant and respondent. Mr. Justice Robinson held that implicit trust might be placed in the evidence of Maung So Naing, who had joined Ko Po Kyaw in business many years ago, and was the trusted manager of the business. He lived in Ko Po Kyaw's house, and was treated like a brother. There is no doubt of the importance of the evidence of Maung So Niang, but in the Court of Appeal his evidence was treated as unreliable, and the Chief Justice regrets that he cannot agree with the learned Judge's opinion of this man's impartiality. Before further considering the weight that should be given to the evidence of Maung So Niang, it will be well to state shortly certain facts which are either not disputed, or which in the opinion of their Lordships, have been clearly established.

Ko Po Kyaw and Ma Nyun took the appellant, when she was a child, aged about one year, away from her parents, and she lived in the house of Ko Po Kyaw in Edward Street for the next thirteen or fourteen years. She was taken to Ko Po Kyaw's house with the consent of the natural parents, and Ma Gyoke, the natural mother, states that she was taken to be adopted by Ko Po Kyaw and Ma Nyun; and this statement which alone might be of little value, is in accord with the subsequent sequence of events. From the time that the appellant was taken to the house of Ko Po Kyaw she appears to have been brought up publicly as his daughter, and to have lived openly and continuously under his protection. Their Lordships attach much importance to the evidence of Maung Po Lun, who kept a school in Rangoon, and who entered the appellant's name in the School Register for the month of March 1899, according to the regulations prescribed for the students' name in native schools. The entry in the register was produced, and in the column in which the name and occupation of parent or guardian is entered, the name entered is:—

"Maung Ba Kyaw.
Trader,
Edwards, Street."

In the first place, it is clear that the name entered in the register is not the name of the natural parents, and secondly, their Lordships see no reason for doubting that the name actually entered was that of Ko Po Kyaw, although some doubt is thrown on this in the judgment in the Court of Appeal. Evidence was further given that the school fees were paid by Ko Po Kyaw during the time that the appellant remained at school. A further exhibit from the school register was produced containing the entry of the appellant's sister, Ma Than Kin, and in this case name entered as parent is that of the natural father Mg. Mg. Gale. After the appellant had left school she continued to sleep in Ko Po Kyaw's house, until she was about fourteen years of age, after which she slept in the house of her

natural mother Ma Gyoke. The reason given for this change is that, at this time, Ko Po Kyaw brought Ma Pwa Gya as a wife from Mandalay, and that, as she often went up to Mandalay, there was no female companion for the appellant at Edwards Street. The appellant did not cease to visit Ko Po Kyaw's house frequently, and it is not suggested that, if she had become his adopted daughter, there was any action which denoted repudiation of her adoption, even if such repudiation is possible, a matter not before their Lordships, and on which their Lordships give no opinion.

The facts stated above point directly to the conclusion that Ko Po Kyaw did adopt the appellant as his *keittima* daughter. There is no special ceremony in Burmese adoption, but the adoption must be a matter of publicity and notoriety. It is strong evidence of such publicity and notoriety that the appellant lived continuously in the house of Ko Po Kyaw from her babyhood for twelve or thirteen years, and that he was entered on the register of the school as her parent, and paid the school fees. Moreover, there is evidence that the appellant was given jewelry by Ko Po Kyaw to wear, and that Ko Po Kyaw also paid for her clothes. It is, however, suggested that this evidence is consistent with Ko Po Kyaw taking over the charge of the daughter of his relative, Ma Gyoke, and bringing her up in his house, as an assistance to his relative, but without the intention of adopting her as his *keittima* daughter. It is in reference to this suggestion that it becomes necessary to consider shortly the more important evidence adduced at the hearing. Undoubtedly the most important witness is Maung So Niang. Mr. Justice Robinson, who saw Maung So Niang and heard his evidence, held that he was a credible witness, that is to say, a witness whose evidence could be trusted, and who intended, within the best of his recollection, to tell the truth.

It may well be that although a witness is credible, yet that his recollection of a particular incident is not of such a character as to carry much weight, but in this instance, if Maung So Niang is to be accepted as a credible witness it is hardly possible to reject the evidence which he gives as to the adoption of the appellant. He states that he was present at the time of adoption, together with the members of the household of Ko Po Kyaw and that a *Kimmoodat* ceremony was pre ormed, and that the *Phoongyis* were invited and fed. If this evidence has been invented for the purpose of the case, Maung So Niang could not be regarded as, in any sense, a credible witness: and the Court of Appeal in rejecting it have directly differed from Mr. Justice Robinson on the question of credibility. In the Court of Appeal certain inconsistencies in the evidence of Maung So Niang were referred to in support of the view that he was not a credible witness, and he was further criticised for his conduct in withholding the key of the safe after the death of Ko Po Kyaw, but it appears to their Lordships that, in this respect, he acted rightly, and in accord with the responsibilities which he came under at the death of Ko Po Kyaw. Where the Judge, who has seen a witness, and has heard his evidence, comes to the conclusion that the witness is credible, that is to say, a witness who to the best of his recollection intends to tell the truth, it requires circumstances of exceptional character to justify a Court of Appeal in coming to a different conclusion. It is not a question of the weight of evidence but of the attitude and trustworthiness of the witness and of the effect of his whole demeanour in the witness-box. In the opinion of their Lordships there are no such exceptional circumstances in the present case, and accepting Maung So Niang as a credible witness, it is clear that the appellant lived in the house of Ko Po Kyaw as his adopted daughter, and was publicly recognised by him as his adopted daughter. Evidence was given on behalf of the respondent by three near relatives of Ma Nyun and by U. Maung Gyi, a Pagoda Trustee, and rice miller, who state that they knew nothing of the adoption of the appellant by Ko Po Kyaw, but if the evidence of Maung So Niang is believed this negative evidence has little value.

AMRIT BIBI v. MUSTAFA HUSAIN.

There is a further incident in the case to be considered. It is said that the dispute was referred by the parties to the arbitration of four *Lugys*, or elders, each party nominating two elders and that on the 10th November 1916, the parties executed an agreement of reference. There is a question as to what were the matters in dispute to which the deed of agreement referred, but on the same day the *Lugys* made and delivered what purported to be an award, finding that, under the Buddhist Dhammathats the *keittiama* daughter, Ma Than Than, is entitled to a fourth share of the estate of Ko Po Kyaw, or Rs. 30,000, and that in accordance with this award the defendant, Ma Pwa Thit, shall, at the time of registration, in the Registration Office at Rangoon, pay the said sum in full into the hands of the *keittima* daughter, Ma Than Than. On the following day a sum of Rs. 30,000 was paid to the appellant by the respondent and a deed of release was executed by the parties in the presence of witnesses. What is the effect of his award and release? Mr. Justice Robinson held that the arbitrators acted collusively with the respondent, and that, by reason of such collusion, the award was invalid. It was not thought necessary to give any decision on this point in the Court of Appeal. but, in the opinion of their Lordships, the evidence is amply sufficient to maintain the finding of Mr. Justice Robinson. The result is that the award must be regarded as invalid. The finding in the award, that the appellant was the *keittiama* daughter of Ko Po Kyaw is not a finding on which the appellant can rely, and the payment of Rs. 30,000 under the terms of the award cannot be regarded as a valid release of the claims of the appellant against the estate of Ko Po Kyaw. This sum is part of the terms of an award based on the collusive action of the arbitrators, and such an award is necessarily wholly invalid owing to their misconduct. Their Lordships are unable to attach importance to the subsequent inconsistent evidence given by the *Lugys* at the trial, and agree with Mr. Justice Robinson that the release fails by reason of the decision that the award itself is vitiated by the collusive misconduct of the arbitrators.

In the result their Lordships will humbly advise His Majesty that the judgment of the Court of Appeal should be set aside with costs, and the judgment of Mr. Justice Robinson restored. In the Court of Appeal the appellant is entitled to costs, and in addition to the ordinary costs, special advocate's fees of ten gold *mohurs* a day for each day's hearing after the first. The respondent will pay the costs of the appeal.

N. H. *Appeal allowed.*

Solicitors for the Appellant:—Messrs. *Sanderson* and *Orr Dignams*.

Solicitors for the Respondent:—Messrs. *Waterhouse & Co.*

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ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 50 OF 1921.

July 3, 1923.

Present:—Sir P. C. Banerji, KT., Acting Chief Justice, and Mr. Justice Piggott.

Musammat AMRITBIBI—DEFENDANT—APPELLANT

versus

MUSTAFA HUSAIN—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Shia School—Will in favour of heir, validity of.

The Will of a Muhammadan governed by the Shia Law is valid to the extent of one-third of the property even without the consent of the heirs; if it is a Will of the entire property in favour of an heir, it would not be valid even to the extent of one-third unless the other heirs assent to it. [p. 69, col. 1.]

Fahmida Khanum v. *Jafri Khanum*, 30 A. 153; 5 A. L. J. 169; A. W. N. (1908) 55, followed.

First appeal from a decree of the Subordinate Judge, Allahabad, dated the 14th of January 1921.

Mr. *Iqbal Ahmad*, for the Appellant.

Messrs. *Haider Mehdi*, *Raza Ali*, *A. Sanyal* and Dr. *K. N. Katju*, for the Respondents.

JUDGMENT.—This and the connected Appeal No. 178 of 1921 arise out of a suit instituted by the plaintiff-respondent for possession of immoveable as well as moveable properties of various descriptions. The bulk of this property is alleged to have belonged to one Abid Husain, who died

in the year 1909. He left surviving him his widow, *Musammat* Amrit Bibi, the first defendant, a grand-daughter *Musammat* Umme Habiba (the daughter of a deceased daughter) and three grandsons of one of his sisters. These grandsons are the defendants Nos. 2, 3 and 4.

Abid Husain is said to have made a Will in the year 1907 when he was going to Karbala. *Musammat* Umme Habiba died in 1919. The plaintiff is her husband and he claims a share in the property which, according to him passed to Umme Habiba. If Abid Husain did not make a Will 14 annas of his property would go under the Shia Law, to which sect he belonged, to *Musammat* Umme Habiba and 2 annas to *Musammat* Amrit Bibi. Accordingly it is stated that *Musammat* Umme Habiba inherited 14 annas of the property, and the plaintiff as her husband is entitled to half of the aforesaid 14 annas, that is, to 7 annas out of 16 annas. The plaintiff denies the alleged Will, and he also claims a declaration that the Will was never made, and that if it was made it was invalid and could not have any operation under the Muhammadan Law.

The property claimed was of five descriptions. There was some *zemindari* property which is specified in Schedule A annexed to the plaint. There was some house property mentioned in Schedule B. Schedule C specifies certain deposits in the Allahabad Bank and also in the Post Office Savings Bank. In Schedule D is specified certain jewellery and other moveable property which is alleged to have belonged to Umme Habiba. And Schedule E is property which the plaintiff alleges belonged to him, being cricket gear and articles of a similar nature. Out of the property mentioned in Schedule D the plaintiff claims an eight annas share.

The Court below has dismissed the claim in regard to the property mentioned in Schedules D and E, and has granted the plaintiff a decree for the share claimed by him out of other properties.

Appeal No. 500 of 1921 has been preferred by *Musammat* Amrit Bibi; and the connected Appeal No. 173 of 1921 has been preferred by defendants Nos. 2, 3, and 4. The plaintiff has filed cross-objections in respect of the portion of the claim which has been dismissed by the Court below.

We shall deal now with each description of property claimed by the plaintiff. First of all as to the *zemindari* property *Musammat*. Amrit Bibi's defence was that her dower amounted to Rs. 51,000 and that she was in possession of the property in lieu of her dower. The Court below has found that the dower of the lady did not exceed Rs. 5,000 and that this Rs. 5,000 has already been realised by her out of the usufruct of the property, which she has been enjoying since the death of her husband. The evidence as to the amount of the dower being in excess of Rs. 5,000 is very meagre. After the death of her husband an application was made by her for Probate of the Will of her husband, to which we have referred above. With the application for Probate she filed an inventory and an affidavit, and in the affidavit she stated the amount of her dower to be Rs. 5,000. No doubt she denies in the present suit that she had any knowledge of the contents of the affidavit or of the application. But it has been clearly proved that she did put her thumb impression to the affidavit, and that she swore it before an Honorary Magistrate, and was identified by a *Mukhtear* who has given evidence in the case. There is no reason to disbelieve the evidence of this *Mukhtear* and the Court below has believed him. It is clear that the lady admitted her dower to be Rs. 5,000; and that being so, the usufruct of the property was more than sufficient to wipe off the amount of her dower.

Her contention in regard to the house mentioned in list B is that it is her own property, and that the house which belonged to Abid Husain was appropriated by the East Indian Railway when the Railway line was first constructed. There is no evidence to show that the house of Abid Husain was appropriated by the Railway; on the contrary in the schedule of property, to which we have referred, she stated that the house belonged to Abid Husain. Furthermore there is the evidence of her own witnesses that the house was re-constructed by Abid Husain. So that there can be no doubt that the house did belong

to Abid Husain and not to the defendant Amrit Bibi.

As regards the property mentioned in Schedule C, that property consists of a deposit of Rs. 7,000 and odd in the Allahabad Bank, and of a further deposit of Rs. 1,100 in the Post Office Savings Bank. As regards the amount deposited in the Allahbad Bank, it has been clearly proved that *Musammat* Amrit Bibi went to the Bank in an *ekka*, affixed her thumb impression to the receipt granted to the Bank for the amount payable under the deposit receipts, one of which originally stood in the name of Abid Husain alone, and the other jointly in her name and in the name of Abid Husain, and she directed the Bank clerks to make over the amount to the plaintiff who accompanied her to the Bank and identified her before the Bank Officials. The Bank Officials proved that the money was actually handed over to the plaintiff. It is however stated on behalf of *Musammat* Amrit Bibi that the plaintiff himself appropriated the Rs. 7,000 and odd realised from the Bank and never paid it over to her; against the statement of *Musammat* Amrit Bibi is the statement of the plaintiff himself in which he swears that he handed over the notes received from the Bank to Amrit Bibi and that she locked them up in her iron safe subsequently. It is most unlikely that the plaintiff was allowed to take away this large sum of Rs. 7,000 especially as at the time when the money was withdrawn the plaintiff was only a student in the College, and was quite a young man. On the other hand it is more probable that the lady herself kept the money in her iron safe. It is true there is no evidence to show what was the necessity for withdrawing the money from the Bank but the fact remains that the money was withdrawn and handed over by the Bank Officials to the plaintiff and afterwards remained in the custody of Amrit Bibi. This is further shown by the fact that one of the currency notes for Rs. 500 received from the Bank was lent by her to one Mital Prasad upon a promissory-note. Mital Prasad has given evidence, and in his account-book is mentioned the number of the note which he had received. The promissory-note was in favour of *Musammat* Amrit Bibi and Mital Prasad has sworn that he got the money, namely the currency note for Rs. 500 from *Musammat* Amrit Bibi's *karinda*. He has re-paid the money, and he is in possesion of the promissory note. It is suggested that the plaintiff returned the promissory-note to him, and he has obtained a discharge in order that he might give evidence in favour of the plaintiff to the prejudice of the defendant. There is no valid reason for accepting this suggestion. The promissory-note has been partially torn up and handed over to him. He deposed that he had in all probability made an entry of the re-payment in his account-book. That account book of course was not produced but we have the sworn statement and we have the other circumstance to which we have referred. The Court below has preferred to believe the statement of the plaintiff in this respect and we see no reason to come to a different conclusion.

As regards the amount of one of the fixed deposit receipts which stood in the names of Abid Husain and his wife *Musammat* Amrit Bibi, it was urged that all of that amount must be deemed to have belonged to *Musammat* Amrit Bibi herself. There is nothing to justify this contention: on the contrary in the written statement she admitted that the moneys mentioned in list C belonged to Abid Husain.

As for the Rs. 1,100 in deposit in the Post Office Savings Bank, it was said in the plaint that Amrit Bibi had witdrawn that amount. There is no evidence that she did so but the fact that the money was in deposit was admitted by her in her written statement, and if it is still in the Bank and has not been realised by her. She will be entitled to widhdraw the whole of it from the Savings Bank, and the passing of a decree against her for recovery of the plaintiff's share of the amount of that deposit will in no respect prejudice her in this suit. We therefore see no reason to disturb the decree of the Court below as regards deposit of Rs. 1,100 in the Post Office Savings Bank.

Mr. Iqbal Ahmad on behalf of *Musammat* Amrit Bibi raised a contention that the claim in regard to the deposits must be held to be time-barred inasmuch as the

money was withdrawn in 1915 and *Musammat* Umme Habiba was alive till 1919 and never claimed it. In the first place this contention was never put forward in the Court below. In the next place it is manifest from the evidence that the two ladies Amrit Bibi and Umma Habiba lived jointly and on most amicable terms. The possession of the money by Amrit Bibi was equivalent to possession by *Musammat* Umme Habiba. There was no conflict of interest between them and there was no occasion for her to demand this money from *Musammat* Amrit Bibi. In fact *Musammat* Umme Habiba had never been excluded from the ownership of this money and in her lifetime her right had never been denied by Amrit Bibi. As regards this part of the claim therefore the appeal has in our opinion no force.

As regards the cross-objections filed on behalf of the plaintiff, the evidence is not satisfactory, and it has not been shown to our satisfaction that the finding of the Court below is erroneous.

The result, therefore, is that the Appeal No. 50 of 1921 as well as the cross-objections filed in that appeal must fail.

As regards Appeal No. 178 of 1921, it relates to the question of the Will alleged to have been made by Abid Husain in 1907. The fact of the Will is no longer denied and it must be taken for the purposes of this case that as a matter of fact the Will was executed by Abid Husain. By that Will he provided that *Musammat* Amrit Bibi should be in possession of the whole of the estate for her life time, and that after her death *Musammat* Umme Habiba would be the owner (*malik*) of the property; that after her, her male issue and, failing male issue, female issue would get the property, and failing these the defendants Nos. 2, 3 and 4, the grandsons of the sister of Abid Husain, would get it. Under the Shia Law the Will would be valid to the extent of one-third even without the consent of the heirs; if it was a Will of the entire property in favour of an heir it would not be valid unless the other heirs assented to it. The point was considered by this Court in the case of *Fahmida Khanum* v. *Jafri Khanum* (1). In that case it was held that if a bequest was made of one-third only it would be valid; but if the bequest was of the entire property it would not be valid even as regards one-third unless it was assented to after the death of the testator by the other heirs. In the present case the bequest was clearly one of the entire property. It is true that a life-estate was given to *Musammat* Amrit Bibi but it was a life-estate in the whole of the property. Where as if no Will had been made she would have only got a 2 anna share and the granddaughter of the testator would have got 14 annas. The effect of the Will was to deprive the granddaughter of the testator of the 14 annas share which she would have at once inherited and to postpone her right to the fourteen annas to the death of Amrit Bibi. This was an exclusion of the granddaughter from a very considerable share of the property; and therefore the Will in the present case must be deemed to be a Will of the entire property to the exclusion of one of the heirs. Unless therefore *Musammat* Umme Habiba can be held to have assented to the Will it would not be valid even as regards one-third. It is said that the assent to the Will was given on her behalf by her father Jawad Husain. In the first place there is nothing to show that Jawad Husain ever assented to this Will. It is true that as *Mukhtear* of Amrit Bibi he got the Will registered and subsequently proceedings were taken for obtaining Probate of the Will; but he does not seem to have acted in his capacity as guardian of the minors and in those proceedings to have given his assent to the Will, either expressly or impliedly. *Musammat* Umme Habiba was herself a minor about ten or twelve years of age, at the time of the death of Abid Husain. She lived till she was about 22 years of age. But during this period she does not appear to have given her consent to the Will, or to have in any other manner acquiesced in the Will. There is nothing to show that she had any knowledge of the Will or that she had ever seen it or heard of its contents. Two witnesses were no doubt examined who stated that the lady had said that she had no objection to her grandfather's Will. The lower Court has disbelieved

(1) 30 A. 153; 5 A. L. J. 169; A. W. N. (1908) 55.

these witnesses and we are not in a position to say that the conclusion of the Court below in that respect was erroneous. We think it very unlikely that Umme Habiba stated in the presence of these witnesses that she had no objection to the Will and that she assented to it.

The appeal filed on behalf of the defendants Nos. 2, 3 and 4, namely Appeal No. 178 of 1921, also fails.

The result is that we dismiss both the appeals and the cross-objections with costs which in this Court will include fees on the higher scale.

Z. K.

Appeals and Cross-objections dismissed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 67 OF 1923.

September 17, 1923.

Present:—Sir Walter Salis Schwabe, KT., Chief Justice, and Mr. Justice Krishnan.

Hajee SHAKOOR GANI—DEFENDANT—APPELLANT

versus

T. S. SABAPATHY PILLAI—PLAINTIFF—RESPONDENT.

Tariff Act (VIII of 1894), as amended by Act IV of 1916, s. 10—Duty payable how ascertained—Benefit of reduction in tariff value—Seller and buyer—Excess payment under protest, if voluntary.

The plaintiff entered into a contract in December 1922 for the purchase by him from defendant of certain Java sugar to arrive by a named ship about the end of the year at Rs. 20 a cwt., "*ex* godown." At the time of the contract the duty was payable on sugar at 25 per cent. on the "tariff value," which was fixed annually by notification by the Governor-General and was fixed the previous year at Rs. 26-4-0. The method adopted in fixing was to take on the date fixed, the average of the market prices ruling during the previous 12 months ending in September, the practice being to bring the new tariff valuation into operation from the beginning of January. In this case, when the goods arrived, the tariff valuation had been reduced from Rs. 26-4-0 to Rs. 16-4-0, the rate of duty remaining the same at 25 per cent. The amount of duty payable thus became less but on the defendant seller refusing the plaintiff buyer the benefit of the reduction, the plaintiff buyer had to pay the full contract amount and thereafter sued to recover back the excess amount paid;

Held, (1) that the plaintiff was entitled to the benefit of section 10 of the Tariff Act; and

(2) that the excess amount having been paid to defendant under duress was legally recoverable.

The word 'duty' in section 10 of the Tariff Act refers to the amount payable and is arrived at by taking into account the tariff value and the rate of duty and in the latter part of the section what can be recovered is the "duty" paid which cannot be arrived at without taking into account the tariff value. [p. 72, col. 1.]

Appeal from a decree and judgment, dated the 14th August 1923, of Mr. Justice Coutts-Trotter passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in Civil Suit No. 109 of 1923.

Messrs. *A. Krishnaswami Iyer* and *V. Tyagaraja Iyer*, for the Appellant.

Mr. *V. V. Srinivasa Iyengar*, for the Respondent.

JUDGMENT.

Schwabe, C. J.—This case, which is a test case, raises an interesting question as to the true meaning of section 10 of the Tariffs Act now in force, Act VIII of 1894 as amended by Act IV of 1916.

The facts of the case are quite simple. The plaintiff entered into a contract in December 1922 for the purchase by him from the defendant of certain Java sugar to arrive by a named ship due somewhat about the end of the year at a price working out at about Rs. 20 a cwt. "*ex* godown." At the time of the contract, duty was payable on sugar at 25 per cent. on what is known as the "tariff value." This tariff value is fixed annually in practice, though by this Statute, section 3 (2) "the Governor-General in Council may, by notification fix, for the purpose of levying duties, the tariff values of any articles enumerated in the Schedule,' and no time is fixed for the issuing of such notifications. In this case the tariff value had in fact, been fixed about a year previously at Rs. 26-4-0, and it is accepted in this case that the method used by the Governor-General in Council in fixing tariff values is to take at the date when they are fixed the average of the market price ruling during the previous twelve months ending in September

and the practice being to bring the new tariff valuation into operation from the beginning of January. In this case, when the goods arrived there had been a notification of an alteration of the tariff valuation of sugar by reducing it from Rs. 26-4-0 to Rs. 16-4-0, the rate of duty payable remaining the same at 25 per cent. The effect of this was that the actual duty paid in respect of these goods was Rs. 2-8-0 per cwt. less than it would have been if the old tariff value had remained in force. As the sale was *ex* godown the result, of course, was that the seller paid so much less duty, while the buyer would have to pay to the seller a fixed price which included duty, and the seller would be, if his contention referred to hereafter is right, Rs. 2-8-0 per cwt. better off than he would have been if the delivery had taken place before the alteration of the tariff value. The Tariff Act makes provision by section 10, the object of which is to protect parties to contracts for future delivery of goods, from having to pay more duty than, in fact, is current at the time of delivery, or being able to escape the payment of such duty. The principle, no doubt, is that merchants dealing in commodities may be quite willing to take the risk of a rise and fall in the market price of the commodity between the contract date and delivery date, as being a matter which is their business, but merchants are not, as a rule, prepared to take the risk of the sudden alteration of prices of the commodities in which they deal by reason of the Act of the Legislature in imposing increasing, reducing or remitting the duties payable in respect of those commodities.

Section 10 runs, "In the event of any duty of customs or exciseor any article being imposed, increased, decreased or remitted after the making of any contract for the sale of such article without stipulation as to the payment of duty, where duty was not chargeable at the time of the making of the contract, or for the sale of such article duty-paid where duty was chargeable at that time,—(*a*) if such imposition or increase so takes effect that the duty or increased duty, as the case may be, is paid, the seller may add so much to the contract price as will be equivalent to the duty or increase of duty, and (*b*) if such decrease or remission so takes effect that the decreased duty only or no duty, as the case may be, is paid, the purchaser may deduct so much from the contract price as will be equivalent to the decrease of duty or remitted duty." It is argued on behalf of the seller that the word "duty' in the first part of the section refers to 'rate of duty" and rate of duty only and that for the purpose of seeing whether that section applies or not, we are not entitled to look at an alteration of the tariff value. It is argued that tariff value is merely a convenient way of arriving at the market value, that, where *ad valorem* duty is imposed, it has to be paid on market value, and that the buyer or the seller, as the case may be, takes the risk of the rise or fall in the tariff value in the same way as he takes the risk of the rise and fall of market value in cases where there is no tariff value. I confess that, at first sight, I was much impressed with the argument in favour of that construction but on a close examination of the Statute and particularly looking at the history of this section I have come to the conclusion that the contention is not right. In the Tariff Act of 1894, before amendment, this clause *i. e.*, section 10 was contained and there was power then, under section 22 of the Sea Customs Act which was then in operation, for the Governor-General in Council from time to time by notification to fix, for the purpose of levying tariff duty, the value of goods, and in Schedule II to the Act one finds that, in the case of many articles, including sugar, there was a tariff valuation in the second column and a rate of duty in the third column; so that at that time, in order to ascertain the duty payable, one had to take the tariff valuation fixed by the Statute itself and take the rate per cent. on that tariff valuation also so fixed; and, indeed, that was the way of ascertaining the duty payable in most of the dutiable goods in the Schedule to that Act. It seems to me that the duty payable depends just as much on tariff valuation as on the rate of duty. The tariff valuation

is not the real value; in fact, it is agreed that it is based on a value of an entirely different period, namely, the preceding year, and the Legislature has chosen to say, in effect, that the duty payable shall be, *e. g.*, 5 per cent. per. cwt., a cwt. being taken to be of the hypothetical value, whatever the real value may be, of Rs. 10. The rate of duty payable per cwt. is to be ascertained and it could only be ascertained by working out that sum, and it seems to me that, if the Governor-General in Council makes an alteration of the tariff valuation, he is acting with the power of Legislature delegated to him for this purpose and the position is exactly the same as if a new Statute or a new schedule was brought in by the Legislature to alter the tariff valuation fixed in the Original Schedule by increasing or decreasing it: and, in such a case, I think it would be very difficult to argue that there has not been an increase or decrease, as the case may be, in the duty payable. The Act of 1916 brought into the Tariff Act the power of the Governor-General in Council to fix the tariff values and at the same time altered the form of the schedule by substituting for tariff value merely a unit, or the words "*ad valorem.*" As far as sugar was concerned, it became 25 per cent. *ad valorem;* but, by reason of the amendment to section 3 referred to above, that meant, as there was a tariff value in existence, the same thing, namely, 25 per cent. of the tariff value. I can find no reason for supposing that it was the intention of the Legislature in any way to alter the rights of contracting parties under section 10 and I think they remain as before. In my view the word "duty" in that section must refer to the amount payable and arrived at by taking into account (*a*) the tariff value and (*b*) the rate of duty. It is to be observed that in the latter part of that section what can be recovered is the duty paid and that cannot be arrived at without taking into account the tariff value. This anomaly does remain that after the making of a contract, in cases where there is no tariff value and there is a fluctuation in the market price, the duty in fact that is payable will be more or less according as the market price has risen or fallen, and on a contract *ex* godown, such as this, the effect would be that, on a fall in the market price, the seller, if he can show that the market price has fallen, would get the benefit for himself really at the expense of his purchaser. But that results from the fact that the Legislature in section 10 is only contemplating things that follow from the Acts of Government. The words used are "being imposed, increased, decreased or remitted," showing quite clearly that it considered only the imposition or alteration of duty by Government, leaving it to the parties in cases where duty is payable on real market value, to make their own arrangements by their contracts. It is not uninteresting to observe that section 10 of the Tariff Act is based on section 20 of the English Customs Consolidation Act of 1876, the existing version of which is to be found in the Finance Act 1901, section 10. It was perhaps not a very happy idea in drafting the Indian Statute to take the section bodily from the English Act, when the method of levying customs in England and in India is totally dissimilar; for in England there is no duty payable on tariff value, or, indeed, on any value, real or otherwise. The duties, as far as I know, are all imposed there by weight or measure, and the sort of question that has arisen in this case and as far as I know has arisen for the first time in this case, could not have arisen in England. Section 10 might, in my judgment, well have been made much clearer, so that this question could not have arisen. Giving the best consideration I can to the words themselves, I have come to the conclusion that the plaintiff in this case is right.

A second point was taken, namely, that this was a voluntary payment and, therefore, cannot be recovered back. The learned Judge has found on the evidence before him, and there was ample evidence to support the finding, that the plaintiff had to pay the full contract amount, in order to get the goods, though he asked to be allowed to clear the goods on

payment of an amount less than the contract price by reason of the alteration in the tarih valuation; but that the defendant had refused and insisted, as a condition of getting the goods, on his paying the full amount. On those facts, it is quite clear law that that amounts to money by duress. It is common in such cases and advisable to pay in terms under protest, in which case no question can arise. But the principle of law does not depend on the protest being made or not, that is merely evidence of the fact that an excess demand was made and that the plaintiff meant to retain his rights to claim back the excess. But the real question to consider is whether or not it was a voluntary payment, or whether it was a payment extorted by the other party using, no doubt, as he thought legitimately, his hold over the goods to make the plaintiff pay what the defendant considered it was his right to have, but it cannot be said under those circumstances, that the payment was a voluntary payment. That being so, as the defendant was wrong in his contention, as we hold in this case, he must re-pay to the plaintiff the amount claimed, that is to say, the amount of over-payment as money had and received to the use of the plaintiff.

The appeal is, therefore, dismissed with costs.

Krishnan, J.—I entirely agree that this appeal fails. The judgment of the learned Trial Judge is right and it must be upheld on both the points that have been taken before us. As the learned Chief Justice has dealt with the questions fully in his judgment, I think it is unnecessary to add anything of my own in the case. I, therefore, content myself by saying that I agree to the order proposed by the learned Chief Justice.

V. N. V. *Appeal dismissed.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1067 OF 1921.

June 28, 1923.

Present:—Justice Sir Jwala Prasad, KT., and Mr. Justice Ross.

RANG LAL SAHU—PLAINTIFF—APPELLANT

versus

Babu KALI SHANKAR SAHAI—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), ss. 69, 70—Tenure, sale of—Payment of rent-decrees by purchaser—Amount, whether can be recovered from tenant.

The purchaser of a tenure purchases the property with the incumbrance of rent due from the original tenant with respect to the tenure in question at the date of his purchase, the rent being the first charge on the property. He must be deemed to have knowledge of the prior incumbrances and the existence of an incumbrance must have affected the price which he offered at the auction-sale. The liability to pay the rent for a period previous to the purchase is, therefore, that of the purchaser, and in discharging the rent charges or in paying off rent-decrees, he simply discharges his own liability and not that of the original tenant, and has no right to recover the payments made by him from the original tenant. Sections 69 and 70 of the Contract Act have no applicability to such a case. [p. 74, col. 2; p. 75, col. 1.]

Case-law discussed.

Appeal from a decision of the Judicial Commissioner, Chota Nagpur, dated the 11th January 1921, reversing that of the Subordinate Judge, Ranchi, dated the 10th November 1919.

Messrs. *P. K. Sen* and *S. N. Palit*, for the Appellant.

Mr. *G. S. Prosad*, for the Respondent.

JUDGMENT.

Jwala Prasad, J.—This appeal arises out of a suit to recover Rs. 1,546-14-5 with interest at 24 per cent. per annum aggregating to Rs. 2,210-6-5.

The learned Subordinate Judge had decreed the suit. On appeal the learned Judicial Commissioner set aside the decision of the Subordinate Judge and dismissed the plaintiff's suit. Hence the plaintiff has come in second appeal.

The facts are admitted. Plaintiff Ranglal Sahu purchased the tenure which belonged to the defendant Kali Shanker Sahai in execution of a mortgage-decree on the 7th March 1916. Prior to this plaintiff's superior landlord, the Maharaja of Chota Nagpur, had obtained a decree for rent

and cess against the original tenure-holder Kali Shankar Sahai for the years 1966-1969 (corresponding roughly to 1909-1912). That decree was dated the 19th September 1913. In execution of that decree the tenure was advertised for sale and the plaintiff Ranglal Sahu paid the dues under that decree, Rs. 824 odd, on the 17th March 1916 and thus saved the tenure from being sold in execution of the decree. The landlord had obtained another decree for arrears of rent for the years 1914 to part of 1916, that is, prior to the purchase of the plaintiff, against the original tenure-holder. The decree was put into execution and the tenure was attached. On the 8th September 1917, plaintiff Ranglal, however, filed a petition on the strength of his purchase under the mortgage-decree and got his tenure released from attachment. At that time Ranglal's name was mutated in place of the original tenant in the landlord's book. The landlord then sued Ranglal for arrears of rent for the same period, that is, 1914-1916, excepting the first year which was barred by limitation, and obtained a decree on contest on the 15th July 1918. In execution of this decree the tenure was advertised for sale, and Ranglal prevented the sale of the property by putting into Court the sum of Rs. 722-5-9, the amount due under the decree. On the 4th March 1919, plaintiff commenced the action out of which this appeal has arisen for recovery of the aforesaid two sums of Rs. 824 odd and Rs. 722-5-9, which he had paid in order to protect the property from sale. The said sums represent the arrears of rent due from the tenure when the original tenant Kali Shankar Sahai was in possession of it, that is, prior to the purchase of the tenure by plaintiff under the mortgage-decree.

The sole question for determination in this appeal is whether plaintiff can get himself re-imbursed of the aforesaid sums from the original tenant, Kali Shankar Sahai, the defendant in the present case.

Learned Counsel on behalf of the appellant has invoked the aid of sections 69 and 70 of the Indian Contract Act in support of his contention that the plaintiff is entitled to recoup the said sums from the defendant. The Court below has overruled this contention and has held that the provisions of the aforesaid sections do not apply to the present case. In this view the learned Judicial Commissioner is supported by the decisions in the cases of *Srimati Moharanee Dasya* v. *Harendra Lal Roy* (1), *Maharaja Manindra Chandra Nundi* v. *Jamaher Kumari Bibi* (2) and *Peary Mohan Mukhopadhya* v. *Sreeram Chandra Bose* (3). It is not disputed by Mr. Sen that the aforesaid authorities apply to the present case. The first two cases are on all fours with the present one. In the case of *Srimati Moharani Dasya* v. *Harendra Lal Roy* (1), as in the present case, the plaintiff had purchased the tenure in execution of his mortgage-decree and then paid the money due under the decree obtained by the landlord against the tenure-holder for arrears of rent for a period anterior to the confirmation of sale. It was held that the plaintiff was not entitled to recover the money paid by him for satisfying the rent-decree. Similarly in the case of *Peary Mohan Mukhopadhya* v. *Sreeram Chandra Bose* (3), the plaintiff purchased a *putni taluk* in execution of a rent-decree and subsequently paid the decree for rent obtained by the landlord for a period anterior to that of the rent-decree in execution of which plaintiff had purchased the property. It was held in that case that the purchaser was not entitled to contribution from the original tenant against whom the rent-decree was obtained. These cases lay down that the purchaser of a tenure purchases the property with the incumbrance of rent due from the original tenant with respect to the tenure in question at the date of his purchase, the rent being the first charge. He must be deemed to have knowledge of the prior incumbrances and the existence of an incumbrance must have affected the price which he offered at the auction-sale. The case of *Srimati Giribala Debia* v. *Srimati Ranee Mina Kumari* (4), goes to the length of saying that the arrears of rent due in respect of the property sought to be sold is a

(1) 1 C. W. N. 458.
(2) 9 C. W. N. 670; 32 C. 643.
(3) 6 C. W. N. 794.
(4) 5 C. W. N. 497.

material fact which must be notified at the time of the sale of the property. The purchaser therefore purchases the property with the liability of the prior rent charges. In short, the trend of the view expressed in the case referred to above seems to be that the liability to pay the prior rents, due for a period prior to the purchase (as in the case of the plaintiff in the present case) is that of the purchaser and in discharging the rent charges or in paying the rent decrees, he simply discharges his own liability and not that of the original tenant. Therefore the purchaser is not entitled to recover the prior rent charges paid by him from the original tenant.

Mr. Sen virtually says that the aforesaid authorities were wrongly decided and in support of his contention, he refers to the following cases, *Dakhina Mohan Roy* v. *Saroda Mohan Roy* (5), *Mahatha Harsankar Sahai* v. *Bandhu Sahu* (6), *Mohendra* [*Suchand Ghosal*] v. *Bhuban* [*Balaram Mardana*] (7), *Prosonno Kumar Basu* v. *Jamaluddin Mahomed* (8) and *Serafat Ali* v. *Issar Ali* (9).

In *Dakhina Mohan Roy* v. *Saroda Mohan Roy* (5), the plaintiff obtained possession under the decree of the High Court, of a rent paying estate and he paid the rents and cesses in default of which payment the estate would have been sold. The High Court decree was afterwards reversed by the Privy Council. In 1885 the defendant obtained possession of the estate in execution of the High Court decree, and the plaintiff claimed the revenue and cesses paid by him while he was in possession of the property. Lord Macnaghten in delivering the judgment of the Judicial Committee observed:—"It seems to their Lordships to be common justice that when a proprietor in good faith pending litigation makes the necessary payments for the preservation of the estate in dispute, and the estate is afterwards adjudged to his opponent, he should be recouped what he has so paid by the person who ultimately benefits by the payment, if he has failed through no fault of his own to reimburse himself out of the rents." There can be no doubt that the plaintiff in that case had paid the revenue and cess believing the property to be his own and with a view to protect it from being sold for arrears of Government revenue. The payment was to save the estate from sale, and the defendant having ultimately been adjudged to be the rightful owner of the estate was therefore benfitted by the same. The plaintiff was interested in the payment because at the time when he made the payment he believed to be—and in fact he was under the decree of the High Court—the rightful owner of the property. The tenure in the present case has been lost for good to the defendant and the preservation of the tenure by payments of the rent-decrees in question benefitted not the defendant but the plaintiff who had, prior to the payments, acquired title in the property. Therefore the important element which is essential for the application of the principles of sections 69 and 70 of the Indian Contract Act and on the basis of which the plaintiff in the aforesaid Privy Council case was declared entitled to recover from the defendant the sums paid by him, is wanting in the present case. The case of *Mohendra* [*Suchand Ghosal*] v. *Bhuban* [*Balaram Mardana*] (6), was really case of a co-sharer having discharged the liabilities on the property, and he was therefore held entitled to recover the sums paid by him which benefited his co-sharers. In that case the entire tenure was sold in execution of rent-decrees obtained against only some of the co-sharer defendants. The plaintiff co-sharer who was not made a party in the rent-suit deposited under section 310 of the Code of Civil Procedure, with the approval of the Court, the entire sums due under the decrees and thus had the sale set aside. This was a case of contribution. The case of *Prosonno Kumar Basu* v. *Jamaluddin Mahomed* (8) is again one of a co-sharer; so also are *Serafat Ali* v. *Issar Ali* (9) and *Sakal Singh* v. *Chanderdip Lal* (10) cases of contribution among co-sharers.

(5) 21 C. 142; 20 I. A. 160; 17 Ind. Jur. 576; 6 Sar. P. C. J. 366; 10 Ind. Dec. (N. S.) 727 (P. C.).
(6) 22 Ind. Cas. 720.
(7) 6 Ind. Cas. 810; 38 C. 1; 14 C. W. N. 945; 12 C. L. J. 566.
(8) 15 Ind. Cas. 55; 18 C. W. N. 327.
(9) 42 Ind. Cas. 30; 45 C. 691; 27 C. L. J. 607; 22 C. W. N. 347.
(10) 49 Ind. Cas. 627.

RANG LAL SAHU v. KALI SHANKAR SAHAI.

In a case of contribution the principles of the very sections of the Indian Contract Act, namely, sections 43 68, 69, 70 and 72 would apply. The present case is not one of a co-sharer nor is it a suit for contribution.

The case of *Mahatha Harsankar Sahai* v. *Bindhu Sahu* (6) relied upon by the learned Counsel does not seem to support him so far as section 69 is concerned, for it was held that the claim of the purchaser to recover from the outgoing tenant the amounts under the prior rent decrees could not be supported by section 69 of the Act. Their Lordships, however, allowed the claim under section 70 of the Indian Contract Act. No reason has been given for this view, nor the cases referred to in the earlier part of this judgment, in which a contrary view was taken seem to have been noticed in the case. Whereas the facts of the cases relied upon by Mr. Sen are not similar to those of the present case, the facts of the cases upon which the learned Judge has relied are on all fours with the present case. Therefore if this case was to be decided upon the authority of decided cases, there is no doubt that the contention of Mr. Sen must fail.

It appears to me. however that upon a true construction of sections 69 and 70, there is hardly any room for doubt that they do not afford any assistance to Mr. Sen in his contention that the present case is governed by the provisions therein contained. True, a decree for rent binds not only the tenure but also the holder thereof for the payment of the same, and the decree-holder may at his option proceed against the person and other properties of the judgment-debtor instead of against the tenure concerned. If in the present case the landlord had proceeded against the person and other properties of the tenant defendant then no question would have arisen that the plaintiff who had purchased the tenure was not in any way interested in the payment of the said decrees. That event, however, did not occur. The landlord proceeded against the tenure itself. Having elected thus to proceed against the tenure he precluded himself from in any way proceeding against the person and other properties of the judgment-debtor so long as the tenure was not sold and the amount fetched at the sale was not sufficient to pay off the decrees in question. The latter event also did not happen because the plaintiff paid off the decrees before the properties were sold. But for aught we know from the result of the sale in the mortgage decree in which the plaintiff purchased the property, it was a very valuable property worth about Rs. 35,000, and the rent decrees in question would have very easily been paid off out of the sale-proceeds without driving the landlord to the necessity of proceeding against the person and other properties of the judgment-debtor, for the balance of any decretal amount left unrealised by the sale-proceeds of the tenure in question. The landlord in the present case proceeded against the tenure and advertised the same for sale, and thus all danger to the person and other properties of the judgement-debtor ceased. Therefore he was not interested in the payment of the rent-decrees in order to protect his person and other properties. In the tenure itself certainly he was not interested. his entire interest having ceased by the purchase thereof by the plaintiff. Therefore the defendant was not interested in the payment of the rent-decrees, and the plaintiff paid the same simply to protect his own propeity which he had already purchased. As has already been shown the plaintiff was bound in law to pay the prior rent decrees and charges with the incumbrances of which he purchased the property in question. Therefore the important element of section 69, namely, that defendant should have been bound by law to pay the sums of the decrees which the plaintiff paid is wanting in the present case. Now as to the benefit by the payment in question, the tenure was saved; defendant was not interested in the tenure; therefore, no benefit accrued to him, and unless any benefit accrued to the defendant by the payment made by the plaintiff the defendant was not liable under section 70 of the Indian Contract Act. Consequently section 70 has no application.

I, therefore, agree with the views expressed in the decisions relied upon by the learned

Judicial Commissioner and dismiss the appeal with costs.

Ross, J.—I agree.

Appeal dismissed.

Z. K.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1746 OF 1920.

March 30, 1922.

Present:—Mr. Justice Cuming and Mr. Justice Panton.

Mirza DILBAR HOSSAIN AND OTHERS—PRINCIPAL DEFENDANTS—APPELLANTS

versus

SADARUDDIN CHOUDHURI AND OTHERS—PLAINTIFFS AND OTHERS—*Pro forma* DEFENDANTS—RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 35 (ii)—Suit to recover value of trees cut under claim of right—Court of Small Causes, jurisdiction of.

A suit to recover the value of trees cut down by the defendant under *bona fide* claim of right does not fall under Art. 35 (*ii*) of Schedule II to the Provincial Small Cause Courts Act and is not, therefore, excluded from the cognizance of a Small Cause Court.

Appeal against a decree of the Additional Subordinate Judge, Malda, dated the 22nd of March 1920, reversing that of the Munsif, Second Court at Malda, dated the 5th of August 1919.

Babu *Santi Moy Mazumdar*, for the Appellants.

Dr. *Jadu Nath Kanjilal*, for the Respondents.

JUDGMENT.—In the suit out of which this appeal has arisen the plaintiffs sued for recovery of Rs. 25 on account of the price of trees which they alleged have been wrongfully cut away by the defendants Nos. 1 to 4 from a plot of land in their possession and which they had recently purchased from the *pro forma* defendants Nos. 5 to 7. The defendants Nos. 1 and 2 contested the suit and their case was that the land belonged to defendant No. 5 alone, the defendants Nos. 6 and 7 had no concern with the land, that they had taken lease of this land from defendant No. 5 and were in possession of the land as tenants, and further that they had purchased the trees alleged to have been cut from defendant No. 5 for Rs. 11. The Trial Court dismissed the plaintiff's suit. On appeal the lower Appellate Court found that defendants Nos. 6 and 7 had interest in the land in suit; that the interest of defendant, No. 5 was not that of a sole owner, and that, therefore, the defendant No. 5 had no right to sell the entire trees to defendants Nos. 1 to 4. He decreed the plaintiffs' suit for Rs. 8-12-0.

The defendants Nos. 1 to 3 appealed. A preliminary objection has been raised by the respondent that in accordance with the provisions of section 102 of the Code of Civil Procedure no appeal lies in the present case. His contention is that the present suit is a suit of the nature cognizable by a Court of Small Causes as the amount of the subject-matter does not exceed Rs. 500. The appellants on the other hand contend that the suit is one coming with the provisions of Art. 35 (*ii*) of the Second Schedule of the Provincial Small Cause Courts Act. This Article runs as follows: "For an act which is, or save for the provisions of Chapter IV of the Indian Penal Code would be, an offence punishable under Chapter XVII of the said Code." It appears that the defendant was prosecuted by the plaintiffs for the cutting o these trees and acquitted Now it has been found that the defendants had right to some portion of trees. The mere taking of the trees by the defendants would not of itself amount to theft or criminal misappropriation unless this was done with dishonest intention. The criminality of the act of the defendants will, therefore, depend on the intention with which this act was done and not whether the particular act is saved by the provisions of Chapter IV. We are of opinion that the present case does not come within Art. 35 (*ii*) of the Second Schedule of the Provincial Small Cause Court Act and, therefore, no second appeal lies.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

Z. K.

BHOLA NATH *v.* RASOOL BAKSH.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 9 OF 1923.

May 15, 1923.

Present :—Mr. Dalal, J. C.

BHOLA NATH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RASOOL BAKSH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 23—Stifling prosecution of non-compoundable offence—Pro-note executed by accused—Debt otherwise due—Consideration, whether unlawful.

Defendant who was indebted to the plaintiff passed a *hundi* to the latter which was dishonoured. The plaintiff, who believed the *hundi* not to be genuine, instituted a prosecution against the defendant for forgery. Pending prosecution the parties came to terms and the defendant executed a pro-note, on the plaintiff promising to withdraw the prosecution :

Held, that the stifling of a criminal prosecution for a non-compoundable offence was the object of the execution of the pro-note and that the fact that the debt was otherwise due was no answer to the consideration being void. [p. 78, col. 2.]

Lachman Das v. *Narain*, 25 Ind. Cas. 409; 17 O. C. 213; 1 O. L. J. 553, *Jai Kumar* v. *Gauri Nath*, 28 A. 718; 3 A. L. J. 506; A. W. N. (1906) 212, *Sukhdeo Dass* v. *Mangal Chand*, 41 Ind. Cas. 812; 2 P. L. J. 630; 2 P. L. W. 140, *Kessowji* v. *Hurjivan Mulji*, 11 B. 566; 6 Ind. Dec. (N. S.) 373, distinguished.

Appeal against an order of the District Judge, Lucknow, dated the 23rd November 1922, reversing that of the Subordinate Judge, Lucknow, dated the 4th January 1922.

Messrs. *A. P. Sen* and *H. K. Ghosh*, for the Appellants.

Mr. *Niamat Ullah*, for the Respondents.

JUDGMENT.—This is an appeal from a remand order under O. XLI, r. 23 of the Code passed by the learned District Judge of Lucknow. I am not in agreement with him on the point of law, but his order of remand must be maintained.

The plaintiff brought his suit for the recovery of money due to him and acknowledged by a pro-note dated the 19th May 1919. The learned Subordinate Judge, who tried the suit, was of opinion that the consideration for the pro-note was vitiated by the fact that it was given for the stifling of a criminal prosecution. Even so the mistake made by him was to overlook the fact that the consideration was not a new one according to the plaint allegation but an existing one. The consideration did not originate on the 19th of May 1919. Money was due to the plaintiff on *bahikhata* accounts, and the pro-note secured that amount. Under the circumstances even if the pro-note failed, as for instance it would have failed for want of a receipt stamp, an enquiry is necessary whether any money was due to the plaintiff from the defendant and whether a claim for the recovery of that money was within time at the date of the institution of the suit. Those points have not been determined and for the determination of those points a remand to the Trial Court is necessary.

Next as to the whether the pro-note itself is void or not, I am of opinion that it is void under the provisions of section 23 of the Contract Act. The mortgage-deed of even date narrates how this pro-note came to be executed. *Bahikhata* debts were due to the plaintiff whereupon the defendant passed two *hundis* for Rs. 6,000. The *hundis* were dishonoured and were believed by the plaintiff not to be genuine. The plaintiff thereupon instituted a prosecution of one defendant, Murlidhar, for forgery. While the prosecution was pending the parties came to terms and the defendants executed the pro-note and the mortgage-deed, on the plaintiff promising to withdraw the prosecution against Murlidhar. There is no doubt, in my mind, that the stifling of a criminal prosecution of an offence which could not be compounded was the object of the execution of the pro-note. It is true that the debt was otherwise due to the plaintiff, but that is not a sufficient answer to the consideration being void. Illustration *(k)* to section 23, Contract Act lays down: "*A* promises *B* to drop a prosecution which he has instituted against *B* for robbery, and *B* promises to restore the value of the things taken. The agreement is void, as its object is unlawful." Here the value of the things was due from *B* to *A* and still the promise of *A* to drop the prosecution against *B* rendered the agreement to re-pay the value of the things unlawful. Mr. Niamat Ullah pointed out that here the promise of restoration was invalid under section 214 of the Indian

Penal Code and, therefore, the agreement was held to be void. I am afraid I cannot accept that view. The consideration which is void is the stifling of the prosecution and not the agreement to restore the property in consideration of the concealment of the offence. In my opinion, though the facts of some of the cases quoted by the learned Judge of the lower Court are similar to those of the present case the reasoning in every case is in favour of the defendant-appellant. Possibly, the facts of the case reported in *Lachman Das* v. *Narain* (1) cannot be distinguished from the facts of the present case, but the reasoning on which the judgment proceeded was that the stifling of the prosecution was no part of the consideration in that case. On the face of it the facts seem to indicate that that was the consideration, but the learned Judge seems to have held otherwise on the facts. In *Jai Kumar* v. *Gauri Nath* (2) no prosecution had been launched and "there was even a doubt as to whether there had been any embezzlement. In such a case no question of stifling of a criminal prosecution can arise. In *Sukhdeo Dass* v. *Mangal Chand* (3) one learned Judge observed at page 633*: "That does not mean that the consideration for the agreement into which they entered was a promise not to prosecute Moni Lal. In fact, there is no evidence that any such promise was made." The facts of that case therefore were not similar to those of the present case where I hold it as a fact that the stifling of the criminal prosecution was the consideration of the pro-note. The same considerations apply to a case quoted by the respondent's learned Counsel and reported as *Kessowji* v. *Hurjivan Mulji* (4). There the learned Judge insisted on the proviso that the person in whose favour a guarantee was executed did not, in consideration of such guarantee, agree not to prosecute. In all these cases the application of law appears to depend on the interpretation placed on the facts of the case. I hold the pro-note to be void.

The remand order is upheld and the Trial Court is directed to try the suit in accordance with the directions given in the first paragraph of this judgment. The plaintiff shall be permitted to amend his pleadings, if he so desires, and the parties given every opportunity to state their different cases in view of the removal of the pro-note from evidence. I pass no opinion as to the use that can be made of the pro-note under section 19 of the Limitation Act. Costs here and heretofore shall abide the result. This order amounts to a dimissal of the appeal with modification of directions to the Trial Court

N. H. *Appeal dismissed.*

(1) 25 Ind. Cas. 409; 17 O. C. 213; 1 O. L. J. 553.
(2) 28 A. 718; 3 A. L. J. 506; A. W. N. (1906) 212.
(3) 41 Ind. Cas. 812; 2 P. L. J. 630; 2 P. L. W. 140.
(4) 11 B. 566; 6 Ind. Dec. (N. S.) 373.
*Page of 2 P. L. J.—[*Ed.*]

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 123 OF 1922.

March 23, 1923.

Present:—Mr. Simpson, A. J. C. and Mr. Dalal A. J. C.

Thakur RAMNARAIN SINGH—PLAINTIFF—APPELLANT

versus

RAM SUKH AND OTHERS—DEFENDANTS—RESPONDENTS.

Construction of document—Transfer of under-proprietary rights—Perpetual lease or sale—Pre-emption.

An under-proprietor transferred his under-proprietary rights in a village by a document described as a deed of perpetual lease. Under the terms of the deed the lessee was given heritable and transferable rights. The rent was fixed at Rs. 53 per annum, out of which Rs. 52 were payable to the superior proprietor. The premium paid by the lessee was Rs. 5,000. Provision was made for the recovery of Re. 1 reserved for himself by the lessor but the lessee was in no case to be ejected from the property. There was nothing to show that the parties had really agreed upon a sale or that the agreement as to the payment of Re. 1 per annum to the lessor was fictitious:

RAMNARAIN SINGH *v.* RAM SUKH.

Held, that the transfer was a lease and not a sale so as to give rise to a right of pre-emption. [p. 81, col. 1.]

Moorooly Ram v. *Baboo Hurree Ram*, 8 W. R. 106; *Babu Baldeo Prasad* v. *Shaikh Ali Husain*, 10 O. C. 348, followed.

Appeal against a decree of the District Judge, Rai Bareli, dated the 16th January 1922, upholding that of the Subordinate Judge, Partabgarh, dated the 25th July 1921.

Mr. *Hari Kishen Dhaon* holding brief of *Hardhian Chandra*, for the Appellant.

Messrs. *Radha Krishna* and *Bisheshar Nath*, for Respondents.

JUDGMENT.—This appeal and Second Civil Appeal No. 170 of 1922 have been referred to a Bench under section 8 (*c*) of the Oudh Courts Act (XIV 1891). The suit in the First Court was one for pre-emption. The transaction which has given rise to the suit for pre-emption is described in the document of transfer as a perpetual lease of an 8 anna under-proprietary share in the village of Pura Murli in the Partabgarh District. The transferor Amarjit Singh has transferred half his under-proprietary interest in the village. It was alleged in the plaint that the transaction was really a sale but that with a view fraudulently to prevent pre-emption the sale price was noted as *nazrana* and a fictitious sum of Re. 1 was entered as rent payable by the lessee to the lessor. The terms entered in the document are that the lessees shall have heritable and transferable rights under the perpetual lease on payment of Rs. 53 as rent out of which Rs. 52 would be payable to the superior proprietors. The premium paid by the lessees was Rs. 5,000 Provisions is made for the recovery of Re. 1 reserved for himself by the lessor, but in no case are the lessees to be ejected from the property. The document is to be construed in accordance with its terms; there is no evidence to prove that the parties had really agreed upon a sale or that no rent was really payable to the lessor and the payment of Re. 1 per annum was fictitiously entered in the deed.

Both the subordinate Courts dismissed the suit and the plaintiff has appealed. The appellant's learned Counsel rightly argued that transactions of this nature could be divided into two classes (1) where by a contrivance the transaction falls short of a sale and (2) where the intention of the parties is to make an effective sale and yet the deed is thrown into another form in order to avoid pre-emption. In the first class of cases there would be no pre-emption but it will be allowed in the second class of cases. It has been held in two Bench decisions of this Court that it is not forbidden to a person to circumvent the law of pre-emption by taking a transfer which falls short of a sale, but which may eventually have the same effect as a sale [*Badri Singh* v. *Chandika Baksh Singh* (1) and *Majida Bibi* v. *Malik Fazl Karim* (2).] These were cases of mortgage in which the conditions were so onerous that there was a very remote chance of redemption.

The present case is one of a transfer of an under-proprietary interest and must be distinguished from cases where a superior proprietor carves out an under-proprietary interest. Where the transfer of the under-proprietary interest is made by the superior proprietor in the form of a lease, but the rent reserved for payment to the superior proprietor is equal to or slightly more than the revenue, such a transaction is held to be a sale giving rise to a right of pre-emption In section 4 of the Land Revenue Act III of 1901 an under-proprietor is defined as a person possessing a heritable and transferable right in land who is liable to pay rent thereof. According to that definition, a person possessing a heritable and transferable right in land will be an under-proprietor even where he pays rent to the proprietor far in excess of the revenue. But the distinction has been long established in this Court that, where in a lease by a superior proprietor, the rent reserved is equal to or only nominally in excess of the revenue the transfer will be considered to be one of an under-proprietary interest, while in the case where the rent reserved is considerably in excess of the revenue, the transfer would be a lease as it purports to be:— *Ram Faqir* v. *Sheo Ratan* (3), *Ram Autar*

(1) 14 Ind. Cas. 8; 15 O. C. 1.
(2) 19 Ind. Cas. 679; 16 O. C. 9.
(3) 8 O. C. 121.

v. *Drigpal* (4), *Ram Suchit* v. *Sheo Sewak Singh* (5), *Zulfan Khan* v. *Sant Bakshi Singh* (6) and *Saheb Bakhsh Singh* v. *Thakur Din Singh* (7).

The question does not arise here and we are not called upon to consider the validity of this long established distinction.

The difference between a transfer by a superior proprietor and one by an under-proprietor is explained in *Zulfan Khan* v. *Sant Bakhsh Singh* (6) (third paragraph).

The case-law so far as it goes is in favour of construing the document in suit as a lease. In 1867 it was held by the Calcutta High Court in *Moorooly Ram* v. *Baboo Hurree Ram* (8) that a lease in perpetuity, however small the reserved rent, is not a sale for the purposes of pre-emption. In that case also an annual rent of Re. 1 was reserved. In *Babu Baldeo Prasad* v. *Shaikh Ali Husain* (9) the transaction in suit was described as a *patta istimrari dawami* (perpetual lease) executed by under-proprietors. The consideration for the lease was the payment of a sum of Rs. 700 and the lease further reserved a sum of Rs. 18-13 yearly as rent payable to the lessor. The lease purported to confer full rights of enjoyment of the property so leased on the lessee and his heirs and it was stipulated that the lessee would not be ejected from the holding. It is not clear whether the sum of Rs. 18-13 included the rent payable to the superior proprietor or not. In that case the transfer was held to be a perpetual lease as it purported to be and not liable to pre-emption. In the present case the premium is Rs. 5,000 the rent payable to the superior proprietor Rs. 52 and the rent payable to the lessor Re. 1. It is not possible to compare the rents in the two cases as the facts of the reported case are not full. The Court quoted with approval the opinion of a Judge of the Punjab Court that a perpetual lease did not give rise to the right of pre-emption merely on the ground that it was tantamount to a sale. In the Punjab also pre-emption is based on Statute Law. In the case in *Badri Singh* v. *Chandrika Baksh Singh* (1), referred to above, two Judges of this Court quoted with approval the opinion of another Judge of the Punjab Court on the construction of a mortgage transaction. "It is not safe for the Courts to attribute meanings to the terms of deeds other than those plain on the face of them. If such a course were generally adopted, any mortgage, the terms of which were at all onerous, or which it was not probable the mortgagor would be able to redeem, might be construed as a sale. The decisions of the Courts would be based on surmise, and there would be a wide divergence of opinion as to how onerous a mortgage must be in order to be held to be a sale." We may enumerate the points in which the transaction in suit falls short of a sale:

(1) Rent of Re. 1 is payable annually to the transferor by the transferee.

(2) The transferee does not become a member of the village community and does not acquire any right of pre-emption under section 9 of the Oudh Laws Act; in the present case the transferor has transferred only half his property and so his right to pre-empt other property in the village remains with him, but, even if he had transferred his entire property, a lease which falls short of a sale would reserve to him his right of pre-emption.

(3) If rent is not paid to the superior proprietor by the transferee the transferor would be liable for the rent to the superior proprietor who can recover it by suit against the transferor and sale by the property, without notice, to the transferee.

We agree with the observations of the learned Judge of this Court, Mr. Daniels in *Zulfan Khan* v. *Sant Bakhsh Singh* (6) that Courts should not go out of their way to encourage perpetual leases which have the inconvenient effect of permanently divorcing title and possession. At the same time pre-emption has been held in various decisions of this Court to be a weak right and has been refused in the

(4) 8 Ind. Cas. 725; 14 O. C. 41.
(5) 56 Ind. Cas. 629; 23 O. C. 50.
(6) 65 Ind. Cas. 97; 24 O. C. 310; (1922) A. I. R. (O.) 81.
(7) 68 Ind. Cas. 966; 9 O. L. J. 334; 4 U. P. L. R. (O) 85; (1928) A. I. R. (O.) 229.
(8) 8 W. R. 106.
(9) 10 O. C. 348.

case of an exchange [*Abid Ali* v. *Arab-un-nisa* (10), *Raj Kishore* v. *Raghu Nath Parshad* (11), and *Lachhman Prasad* v. *Mir Fida Husain* (12)] and in mortgages with onerous conditions (15 Oudh Cases quoted above).

Having regard to the Statute and the case-law on the subject, we are unable to hold the lease in suit to be a sale. The inconvenience of perpetual leases can only be prevented by an alteration in the Statute.

We dismiss these appeals with costs.

N. H. *Appeals dismissed.*

(10) 1 O. C. 75.
(11) 4 O. C. 169.
(12) 30 Ind. Cas. 232; 18 O. C. 109; 2 O. L. J. 220.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 85 OF 1923.

July 18, 1923.

Present:— Mr. Justice Sulaiman.

RATI RAM—PLAINTIFF—APPLICANT

versus

BIRMAJIT AND OTHERS—DEFENDANTS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. XXI, r. 63, applicability of—Suit by unsuccessful claimant against judgment-debtor for return of purchase-money, nature of.

Order XXI, r. 63 of the Civil Procedure Code is a bar only to a subsequent suit, instituted to establish the right which the plaintiff claimed to the property which was in dispute, in the proceeding in which the objection was raised. It has no application to a suit by the unsuccessful claimant, who had purchased the property from the judgment-debtor, to recover from the judgment-debtor the sale consideration paid by him to the latter. [p. 82, col. 2.]

Civil revision from an order of the Judge of Small Cause Court, Mainpuri, dated the 24th of February 1923.

Mr. *Panna Lal*, for the Applicant.

Mr. *Baleshwari Prasad*, for the Opposite Parties.

JUDGMENT.— This is a revision under section 25 of the Provincial Small Cause Courts Act from a decree of the Judge of Small Cause Court, Mainpuri, dismissing the plaintiff's suit. The plaintiff's case in the plaint was that the defendants had executed a sale-deed of certain crops on the 9th of February 1921, in his favour, that one Kirat Singh attached these crops and an objection being preferred to the attachment by the plaintiff the Execution Court dismissed his objection on the 13th of May 1921; that after that the defendants took away the crops and also refused to return the sale consideration; hence the suit.

In their written statement the defendants pleaded that the whole of the sale consideration had not been paid. They also said that it was the plaintiff himself who had appropriated the crops and that no part of the crops came into the possession of the defendants; it was further pleaded that the attachment in favour of Kirat Singh had fallen to the ground for want of payment of expenses of the sale. The amount of the sale consideration was also challenged and lastly it was contended that the sale-deed had been found by a Court to be invalid and no suit on the basis of it was maintainable. Then there were general pleas that the plaintiff was not entitled to any money or relief. The learned Judge of the Court below has thrown out the suit on the preliminary ground that the objection having been dismissed on the 14th of May 1921 and the present suit having been brought more than a year after that order, it was not maintainable. He relies on a ruling of this Court which has a bearing on O. XXI, r. 63 of the Code of Civil Procedure.

There has been a gross irregularity in this case as there has really been no proper trial on the merits. Order XXI, r. 63 is a bar to a subsequent suit instituted to establish the right which the plaintiff claimed to the property which was in dispute in the proceeding in which the objection was raised. It is manifest that in the present suit the plaintiff did not put forward any claim to the property which was then in dispute. He was suing for refund of sale consideration and not possession of the property. Order XXI, r. 63, therefore, had no application and nor has the ruling cited by the Court below. A case of this kind is not governed by one year's rule of limitation.

The learned Vakil who appears for the respondents sought to support the decree

on a slightly different ground. His point was that the order of the 14th of May 1921 was conclusive between the parties and that it is not now open to the present plaintiff to go behind the finding on which that order was based. That finding according to his contention means that the sale transaction was a fictitious one This matter has not been gone into by the Court below and, therefore, I do not propose to go into it now in revision. I may, however, point out in passing that it is not quite clear whether the judgment-debtor was a party to the proceedings relating to the previous objection, that is to say, whether any notice had been issued to him and he had appeared in Court. It has been held in the case of *Krishnasami Naidu* v. *Somasundaram Chettiar*(1) that a judgment-debtor, who is not in fact a party to the claim proceedings, does not in the eye of law become such by reason solely of his being the judgment-debtor. Further more according to the plea raised in the written statement the attachment itself fell through because of non-payment of the expenses of sale. If the attachment was released it is difficult to say why the objector should have been compelled to institute a suit to establish his right As I have pointed out above the case has not been decided by the Court below on the merits. It has simply thrown it out on the preliminary ground that it was brought more than a year after the order passed in the execution department. I accordingly allow the application, set aside the decree of the Court below and remand the case to that Court for disposal according to law. Costs here and hitherto will abide the event.

Z. K. *Application allowed.*

(1) 30 M. 335; 17 M. L. J. 95; 8 M. L. T. 116 (F. B.).

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL NO. 22 OF 1922.

ORIGINAL SUIT NO. 5265 OF 1921.

July 21, 1922.

Present :—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Marten.

DADABHOY FRAMJEE CAMA—PLAINTIFF No. 3—APPELLANT

versus

COWASJI DORABJI PANDAY AND OTHERS—PLAINTIFFS NOS. 1 AND 2 AND DEFENDANTS—RESPONDENTS.

Construction of document—Settlement deed—Gift to person and his male heirs—Estate conferred—Maintenance clause, effect of—Estate unknown to law, whether can be created—Originating summons—General questions whether can be asked—Opinions of Counsel, whether relevant—Trustees, position of—Practice—Appeal—Order appealed against, whether must be produced.

A Parsi widow executed a deed of settlement by which she settled certain properties upon trustees for her benefit for her life, then for her son, Rustomji, for his life and then for Rustomji's sons and their male heirs absolutely and in equal proportions as tenants-in-common. One of the clauses of the deed was as follows :

"Provided . . . that from and after the decease of the said Rustomji if the sons of the said Rustomji or the heirs male of any of them shall be under the age of eighteen years then..it shall be lawful for the trustees..during every such minority to receive the rents...of the...hereditaments and premises..or *the share* or shares therein respectively to which such infant son or sons or his or *their male heirs shall be so entitled as aforesaid* and to pay and apply the same or...part thereof...for.....the maintenance and education of the person aforesaid for the time under the age of eighteen years;"

Held, (1) that the words "and their male heirs," did not import any limitation on the estate given to the sons of Rustomji ; [p. 86, col. 2.]

(2) that the maintenance clause did not in any way curtail the estate given to the sons of Rustomji; [p. 87, col. 1.]

(3) that, therefore, the estate given to the sons of Rustomji under the deed was absolute and not limited. [p. 86, col. 2.]

Per *Marten*,—*J*. Ordinarily co-plaintiffs cannot sever at the trial and must appear by the same Solicitors and Counsel. [p. 87, col. 2.]

The same person cannot be made a plaintiff and a defendant in one proceeding. [p. 87, col. 2.]

Rustomji v. *Purshotamdas*, 25 B. 606 at p. 612; 3 Bom. L. R. 227, followed.

On an originating summons the Court should not be asked to give its opinion on general questions when specific questions can easily be framed. [p. 87, col. 2.]

In re Harman, Lloyd v. *Tardy*, (1894) 3 Ch. 607 at p. 614; 63 L. J. Ch. 822; 8 R. 549; 71 L. T. 401; relied on.

DADABHOY FRAMJEE CAMA *v.* COWASJI DORABJI PANDAY.

The better practice is not to plead opinions of Counsel on an originating summons; in general they are no more relevant on an originating summons than in an ordinary suit. [p. 88, col. 1.]

On an originating summons trustees should not submit that certain beneficiaries of their are barred by limitation or otherwise. That is for the Court to decide. Trustees should not take sides. [p. 88, cols. 1 & 2.]

An appeal lies not from what a Judge says but from what he orders; and that what he orders is to be found in the sealed or signed formal order which is entered in the records of the Court. Apart from urgency or some special ground, no appeal should be determined without the production of the formal order under appeal. [p. 88, col. 1.]

A gift to a man and his male heirs is an attempt to create an estate unknown to Indian law, and such a gift must be construed as conferring an absolute estate on the donee. [p. 90, col. 1.]

Estates tail or in tail male are unknown to Indian Law. [p. 90, col. 1.]

Novel estates unknown to the law of India can no more be introduced into Bombay by Parsi settlors than they can be by Englishmen or Hindus. [p. 90, col. 2.]

Appeal from a decision of Kanga, J., on an Originating Summons for the construction of a deed of settlement.

Mr. *Coltman*, for Defendant No. 10 Appellant.

Mr. *Kania*, for Defendants Nos. 1 and 2 Respondents Nos. 3 and 4

Mr. *B. J. Wadia*, for Defendant No. 4 Respondent No. 6.

Mr. *Jayakar* for Mr. *Rao*, for Defendants Nos. 5 and 6 Respondents Nos. 7 and 8.

Mr. *Taleyarkhan*, for Plaintiffs Nos. 1 and 2 Respondents Nos. 1 and 2.

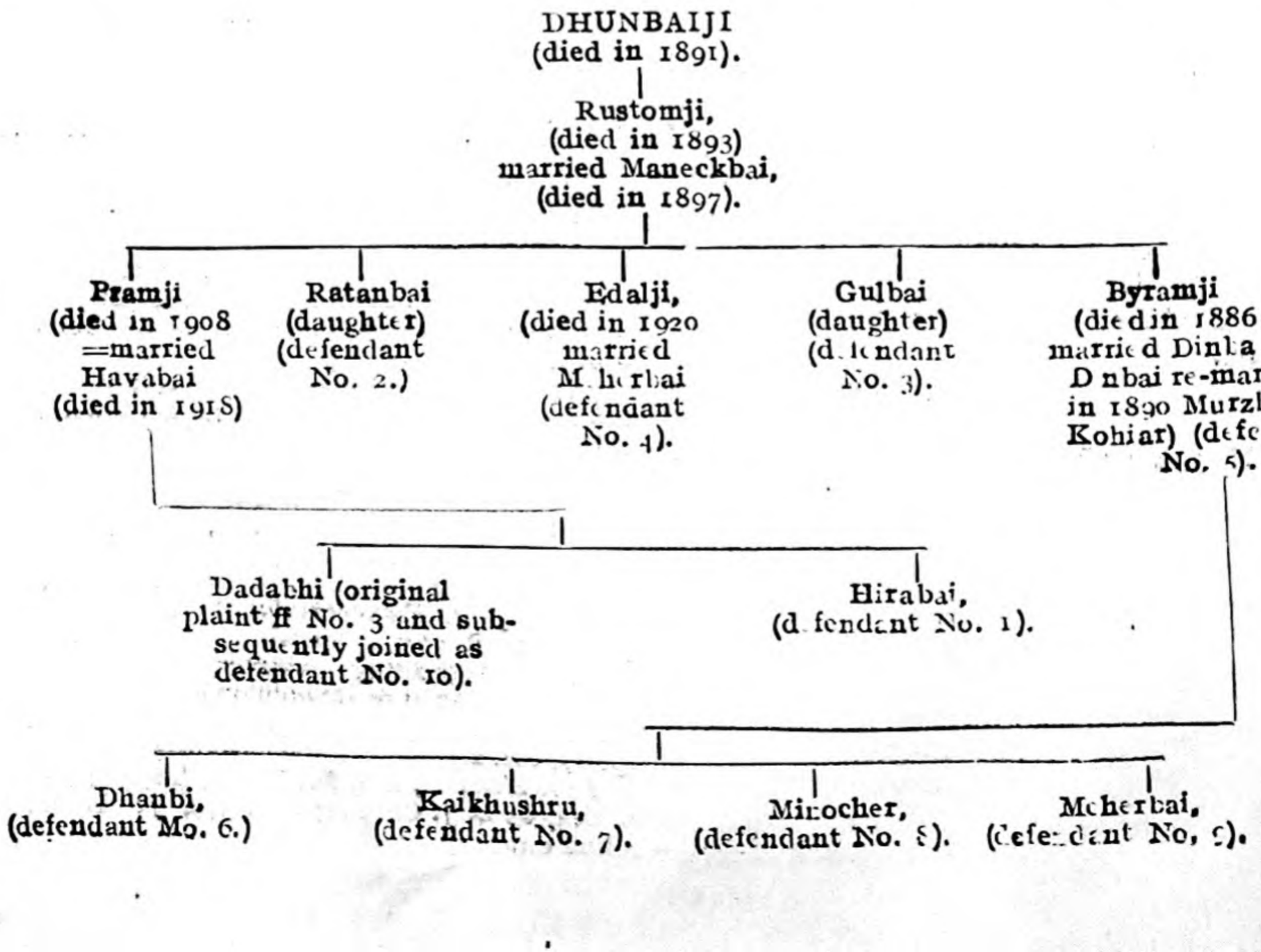
Mr. *Gupte*, for Defendants Nos. 7, 8 and 9 Respondents Nos. 9, 10 and 11.

Mr. *Bahadurji*, for Defendant No. 3 Respondent No. 5.

JUDGMENT.

Shah, Ag. C. J.—This appeal arises out of an Originating Summons taken out by the trustees for the construction of two deeds, one of August 13, 1879, and the other of July 19, 1888. The original summons stated the questions in a general form; but the questions for decision are stated in the judgment of Mr. Justice Kanga, and we have ordered the summons to be so amended as to indicate in terms the points which we have to decide. On a further hearing of this appeal, we have directed further amendment of the summons, and as a result of that two more questions have been raised.

It will be convenient to show in a tabular form the relationship of the parties interested in these questions:—



DADABHOY FRAMJEE CAMA v. COWASJI DORABJI PANDAY.

The plaintiffs, including Dadabhoy, son of Framji, obtained the summons as trustees but in view of his personal interest in the estate Dadabhai has been joined as defendant No. 10.

Dhunbaiji executed a deed of settlement in August 1879, by which she settled certain properties upon trustees for her benefit for her life, then for Rustomji for his life, and then for Rustomji's sons and "their male heirs" (Exhibit B.) Rustomji in his own right and as a trustee, and Muncherji Cama as the co-trustee were parties to this deed. Byramji died in 1885 without any issue, but left a widow Dinbai. In 1888 another deed was executed by Dhunbaiji, Rustomji and his two sons, Framji and Edulji, and the trustees under the first deed (Exhibit 1 C). This deed in terms purports to revoke the first deed and to settle the same properties in trust upon the same trustees for the benefit of Dhunbaiji, then for her son Rustomji and after his death for the benefit of his sons, Framji and Edulji, in equal shares and for division and distribution, in the manner stated therein, after their deaths. Rustomji and his two sons, Framji and Edulji, and the trustees under the first settlement were parties to this deed of revocation. It dealt with the whole property described in the first deed and Government Promissory Notes of the face value of Rs. 10,000.

Dhunbaiji died in 1891 and Rustomji in 1893. Rustomji left a widow Manekbai, who died in 1897. She left a Will under which her daughter Gulbai is the residuary legatee. Dinbai, widow of Byramji, remarried during the interval. She died in 1901 leaving her second husband and children by the second husband. Framji died in 1908 leaving his widow Havabai, who died in 1918, and a son Dadabhoy and a daughter, Hirabai. Edulji died in 1920 leaving a widow, Meherbai.

The original trustees were succeeded by different trustees as detailed in paragraphs 12 and 13 of the plaint. The plaintiff No. 3, though one of the trustees, is interested in his own right under these deeds. The other trustees seek the directions of the Court as to the administration of the trusts.

Defendant No. 1 is the sister of Dadabhoy and is interested like her brother in the estate under the second deed. Defendants Nos. 2 and 3 are the daughters of Rustomji but their interests are not identical so far as Manekbai's share is concerned; defendant No. 4 is Meherbai, the widow of Edulji.

The other defendants Nos. 5 to 9 are the second husband and children of Dinbai. The Originating Summons was taken out in December 1921. The questions raised at the hearing and now stated in the summons are as follows:—

(1) Whether on a true construction of the deed of August 13 1879 the three sons of Rustomji Dadabhoy Cama after the death of their father, Rustomji Dadabhoy Cama, took the trust properties absolutely in equal shares, as tenants-in-common or whether they were entitled to a life interest in the said properties?

(2) Whether the trusts created by the deed of 1879 are validly revoked and whether the deed of 1888 is a valid trust deed?

(3) Whether the claims of defendants Nos. 3 and 5 to 9 to the immoveable properties comprised in the trust deed of 1879 are barred by the law of limitation?

(4) Whether the words "the said trust property", where they appear in the following passage of the deed of revocation and re-settlement of July 19, 1888, refer to the whole of the trust estate or to the share therein only of the grandson of the settlor dying without issue, *viz.*, "And if either of them the said Framji Rustomji Cama and Edulji Rustomji Cama shall die without issue then and in such case the said trust property shall go to and be divided between the sons and daughters, &c.?"

(5) In what proportions the income accruing up to the death of Edulji ought to have been distributed among the parties entitled thereto?

(6) Whether the widows of Framji and Edulji took absolute interest under the gift over contained in the deed of 1888 or for widowhood only or at all?

The learned Judge came to the conclusion—(a) that the three sons of Rustomji took absolutely the trust pro-

perties after the death of Rustomji in equal shares as tenants-in-common :

(*b*) that the deed of 1879 was not revocable but the interests of the consenting parties only were validly settled under the deed of 1888 ; but the interests of the heirs of Byramji, not parties to the deed, *i. e.*, Dinbai (the widow) and Manekbai (the mother), were not affected thereby, whose shares in the one-third share of Byramji were one-half and one-sixth of that one third, *i. e.*, one-sixth and one-eighteenth of the whole property respectively according to the rules of Parsi intestate succession :

(*c*) that the claims of Gulbai claiming under Manekbai and of defendants Nos. 5 to 9 claiming under Dinbai under the deed of 1879 were not time-barred : and

(*d*) that the words "the said trust property" in the particular clause of the deed of 1888 meant the whole trust property, including the Government Promissory Notes, with accumulated interest effectively settled by that deed.

As regards question 5 it appears that the question of the distribution of the income of the trust property was left over for decision hereafter, but at the hearing of the appeal to-day the question has been put in a definite form, and it is clear that the point as thus stated can be dealt with by us.

As regards the 6th question, though the opinion of the learned Trial Judge is indicated in the judgment, the point does not appear to have been specifically raised.

From this judgment Dadabhai, son of Framji, has appealed, and Meherbai, the widow of Edulji, has filed cross-objections. All the questions have been argued before us on behalf of all the parties according to their respective interests.

I shall deal with these questions in the order in which they are stated.

As regards the first question, the material passage in the deed of 1879 is as follows :—

"Upon trust for the said Dhanbaiji for and during her life..and after the decease of the said Dhanbaiji widow, upon trust for the said Rustomji.....and after his decease upon trust for his sons and their male heirs absolutely in equal shares and proportions as tenants-in-common."

It is urged on behalf of the appellant that the use of the words "male heirs" imposes a limitation upon the interests of the sons of Rustomji and in support of the contention reliance is placed upon the clause about maintenance in the deed.

Looking at the main clause without reference to the maintenance clause, I do not feel any doubt that the estate given to the sons of Rustomji is absoluteand not limited. The use of the expression "male heirs" means no limitation upon it. The words "absolutely in equal shares and proportions as tenants-in-common" appear to me to negative the idea of any limitation upon the estate given to the sons of Framji.

Further, the use of the words "male heirs" does not import any limitation. According to the rule of construction laid down in section 84 of the Indian Succession Act as to Wills, such an expression in a Will will be rejected as having no effect in the absence of any indication of a contrary intention. I do not see any reason why a different effect should be given to that expression in a deed. It may be that under the English Law there is some reason for interpreting the same expression differently when used in a Will and in a deed. I express no opinion on that point. But I do not see any reason for such differentiation under the Indian Law. Apart from that if the expression is taken literally, it will create an estate which is anomalous and uncertain in its operation. It will include male heirs among collaterals and exclude females in the descending line. No authority has been cited to show that such a construction is permissible. On the contrary it appears from *Doe d. M'Kenzie* v. *Pestonji* (1), decided so far back as 1852 by Sir Erskine Perry, C. J., that the grant to "master builders and their sons" and to "their family and descendants" was held to be an absolute estate; and the contention of the son of the grantee that the alienation by the grantee was invalid

(1) (1852) Perry O. C. 531 at p. 534; 4 Ind. Dec (O. S.) 485.

was disallowed. Though it was a grant by the Crown it was held that it did not create an estate tail and that no revertion to the Crown was reserved.

Further even according to English Law the use of this expression in deeds imports no limitation. As pointed out in Williams on Real Proporty at page 90 (21st Edition) and Norton on Deeds, pages 305, and 306, Edition of 1906) under a gift to *A* and his male heirs, *A* takes the fee simple.

Lastly, I do not think that the words used in the maintenance clause curtail in any way the absolute estate to the sons of Rustomji nor do they indicate any intention to the contrary. I do not think that the clause was intended to have or that it can have any such effect even if it be construed as suggested by Mr. Coltman on behalf of the appellant. But in fact it appears as if the clause has been copied from some precedent without any relation to the requirements of the deed in question. I do not think that in fact anything more than "the sons of Rustomji" is meant by the expressions "the heirs male" and "his or their male heirs" used in that clause. I have not considered it necessary to quote the clause here. It is to be found at the top of page 4 of Part III of the paper-book. Even assuming that, for the purpose of maintenance and education, if any son of Rustomji died leaving a minor son that minor son would have a legal right to claim some interest in the share of his father at the discretion of the trustees, I do not think that it could be said to curtail the gift to the sons of Rustomji in the prior clause which I have already dealt with. On the contrary it would be rejected as being repugnant to the absolute gift in the prior clause in favour of the sons of Framji, if the clause as to maintenance is read in that sense. I think, therefore, that the view of the learned Judge is right and the appellant's contention must be disallowed.

[The remaining portion of the judgment is not material for the purposes of this report.]

Marten, J.—This is an appeal from the judgment of Mr. Justice Kanga on an Originating Summons taken out by the then plaintiffs as trustees, and asking the following two questions, *viz.*:—

(1) On the true and proper construction of the deed of settlement of August 13, 1879, and the deed of revocation and appointment, dated July 19, 1888, who are entitled to the immoveable properties set out in the said deeds and in what proportions?

(2) Who are entitled to the funds mentioned in the deed of revocation and appointment and the accretious thereto and in what proportions?

Unfortunately, the parties have given the Court a good deal of unnecessary trouble by disregarding ordinary rules of procedure. In the first place, mere general questions like these should not be asked, when specific questions can easily be framed. See *In re Harman*, *Lloyd* v. *Tardy* (2). Accordingly, we directed the Originating Summons to be amended so as to raise the exact questions which the Court was asked to decide.

Nor should the third plaintiff have been joined as such. It is true that he is one of the trustees, but his interests as a beneficiary are distinct and substantial, and cannot be represented by any of the other parties. This is exemplified by the fact that he is the sole appellant. There is the further difficulty that, speaking generally, co-plaintiffs cannot sever at the trial but must appear by the same Solicitors and Counsel. Accordingly before us the proceedings were amended by striking out the appellant as the third plaintiff and adding him as the tenth defendant. The original draftsman of the plaint and Originating Summons had fallen into the opposite error of making the appellant both a plaintiff and defendant, although Sir Lawrence Jenkins had long ago pointed out that this cannot be done. *Rustomji* v. *Purshotamdas* (3). The Trial Court remedied this mistake, but unfortunately the amendment then made was to strike out the appellant as defendant No. 10, and to retain him as plaintiff No. 3. Hence the further amendment ordered by us.

(2) (1894) 3 Ch. 607 at p. 614; 63 L. J. Ch. 822; 8 R. 549; 71 L. T. 401;

(3) 25 B. 606; at p. 612; 3 Bom. L. R. 227.

Then the preparation of the paper book leaves much to be desired. It does not contain the formal order of the learned Judge: and it now appears that the order was never drawn up, and that we were allowed to hear this appeal without our attention being drawn by any body to this material omission. The explanation now given to us is, that this was thought unnecessary, because, after the question of construction was decided in the Appellate Court, the Trial Judge would decide certain further subsidiary points. It is, however, elementary practice both on the Original Side and in the English High Court that an appeal lies not from what a Judge says but from what he orders, and that what he orders is to be found in the sealed or signed formal order which is entered in the records of the Court. Apart then from urgency or some special ground, no appeal should be determined without the production of the formal order under appeal. And, in my opinion, there was no adequate excuse in the present case for departing from this well established practice.

So, too, the notes of hearing before the Trial Judge were not printed. Consequently one cannot tell what has been put in evidence and what not. All one can say is that the alleged Exhibit numbers in the paper-book do not correspond with the actual Exhibit marks on the documents produced to us. We have taken steps to put all these matters in order, and also to supplement the evidence by a pedigree and by two deeds of appointment of new trustees, but in my opinion this is not work which Appellate Judges should find it necessary to do.

One other matter I will mention. No doubt in course of time practitioners in this Court will get more familiar with the procedure by Originating Summons; but with reference to paragraph 15 of the plaint, I think the better practice is not to plead Counsel's opinions. In general, they are no more relevant on an Originating Summons than they are in an ordinary suit. So, too, as regards paragraph 11, trustees should not submit that certain beneficiaries of theirs are barred by limitation or otherwise. That is for the Court to decide. The trustees should not take sides.

Turning to the facts, the parties to the suit are all Parsis, and the deeds in question were settlements executed by Dhunbaiji, a Parsi widow, in favour of herself and her only son Rustomji and remoter issue and others. The settled property is all in Bombay, and is stated by Counsel to be now worth some twelve lacs. We are entitled to know the exact position of her family at the dates of these two deeds, and accordingly we directed a pedigree to be put in to supplement the evidence in the Court below. This pedigree shows that at the date of the 1879 deed Rustomji had three sons Framji, Edulji, and Byramji, and two daughters, Ratanbai and Gulbai. Framji and Edulji had both married, but had no issue: Edulji and Byramji were both minors. At the date of the 1888 deed, Byramji had died a minor without issue, leaving a minor widow Dinbai. Framji had meanwhile had two children, *viz.*, the appellant and Hirabai, the first defendant. Edulji had no issue. The subsequent events were that Dhunbaiji, the settlor, died in 1891, Rustomji her son in 1893, Framji her grandson in 1908, and Edulji her surviving grandson in 1920. Framji had only the above two children, *viz.*, the appellant and his sister, Hirabai. Edulji never had any issue. Framji's widow, Hawabai, predeceased Edulji, but Edulji's widow, Meherbai, is still living, and is defendant No. 4. Byramji's widow Dinbai died in 1901, and his and her interests are represented by defendants Nos. 5 to 9 who are her second husband and her children by him. Rustomji's daughters, Ratanbai and Gulbai, are still living, and are defendants Nos. 2 and 3. Rustomji's widow, Manekbai, died in 1897, and her interests have passed to her daughter, Gulbai, defendant No. 3.

On the first point raised on the Originating Summons the decision of the learned Judge was as follows:—

"The first question is, whether on a true construction of the deed of August 13, 1879, the three sons of Rustomji Dadabhoy Cama, after the death of their father Rustomji Dadabhoy Cama, took absolutely

the trust properties in equal shares, as tenants-in-common, or whether they were only entitled to a life-interest in the said properties.

"The trusts as regards the said three sons of Rustomji Dadabhoy Cama are as follows:—

"From and after his (Rustomji Dadabhoy Cama) decease, upon trust for his sons and their male heirs absolutely in equal shares and proportions as tenants-in-common.

"It has not been contended before me that Parsis in the Island of Bombay are not subject to English Law generally and that the English Law does not apply to this case. According to English Law, a gift or devise to a man and his heirs gives him the fee. The words "his heirs or his male heirs" are regarded as words of limitation and not of purchase. They are not taken as conferring any estate on the heir, but simply as showing or making out the estate the ancestor takes.

"On the construction, therefore, I hold that the three sons of Rustomji Dadabhoy Cama took absolutely the trust properties after the death of their father in equal shares, as tenants-in-common."

I concur in the result which the learned Judge arrived at, but for somewhat different reasons. The real difficulty arises here from the maintenance clause which runs:—

"Provided...that from and after the decease of the said Rustomji if the sons of the said Rustomji or the heirs male of any of them shall be under the age of eighteen years then...it shall be lawful for the trustees...during every such minority to receive the rents...of the... hereditaments and premises..or *the share* or shares therein respestively to which such infant son or sons or his or *their male heirs shall be so entitled as aforesaid* and to pay and apply the same or.. part thereof... for...the maintenance and education of the person aforesaid for the time being under the age of eighteen years."

Then follows a trust for accumulation of the surplus rents and to stand possessed thereof upon the trusts therein declared "concerning the trust premises or the share or shares therein from which the same shall have respectively proceeded."

Now this maintenanse clause contemplates the heirs male of a son being "entitled" to a share under the trusts of the settlement. If, however, the true view is that the son takes absolutely then his share would pass either to his assigns *inter vivos*, or on his death to his devisees or his heirs general. In no event, therefore, would the heirs male as such take the son's share. Further, if they took at all, they would take as on the intestacy of the absolute owner (*viz.*, the son), and not as persons "entitled" under the trusts of the settlement. Further, this limitation to the sons and their male heirs may be contrasted with the limitations elsewhere in the deed to the trustees and their heirs.

It is consequently argued that this maintenance clause must be read along with the main clause quoted by the learned Judge, and that these two clauses when read together show an intention on the part of the settlor that the heirs male should succeed to the sons. Assuming, for the sake of argument, that that is so, I fail to see how the settlor's alleged intention can be carried out except by construing the limitations as conferring an estate in tail male. But this proposed construction raises many difficulties and to my mind they are insuperable. In the first place, even if this was an English deed of settlement, the gift is to the "sons and their male heirs" and not to "the sons and the male heirs of their bodies" Nor are there any other provisions confining this male heirship to descendants of the sons. Consequently, the first requisite for an estate tail is wanting. As is put in Coke upon Littleton, 9 b: "If a man devise land to a man *et sanguino suo*, that is a fee simple; but if it be *semini suo* it is an estate taile" [see Halsbury, Vol. XXVIII, p. 767, note (*h*)]: The word "devise" there means by deed. In those old days its use was not confined to Wills as nowadays.

The *cy-pres* doctrine is an instance of how this may sometimes be done (see Halsbury, Vol. XXVIII, p. 672). Another example will be found in Halsbury, Vol. XXVIII, p. 764, where it is said: "The context may show that by 'heirs' was

meant 'heirs' of the body, so that an estate tail only is created."

Next, if one confines the limitation to male heirs generally, this limitation as such is unknown to the law. Under English Law in a deed a gift to a man and his heirs confers an estate in fee simple: and a gift to a man and the heirs of his body or the heirs male of his body gives him an estate in fee tail or tail male as the case may be. But a gift to a man and his male heirs is an attempt to create an estate unknown to the law. Consequently, English Law rejects the word "male" as being repugnant, and construes the gift as if it were to the man and his heirs *simpliciter*, *viz.*, as a gift in fee simple (see Norton on Deeds, page 305, and Williams on Real Property, 22nd Edition, page 148.)

Another example will be found in Peerage cases. Thus the limitation in the Letters Patent must be to the future heirs of the patentee and the limitation must be one known to the law. The usual limitation is to the heirs male of the body. But, as stated in Halsbury, Vol. XXII, p. 268: "A limitation to heirs male, as distinguished from heirs male of the body, is void in England, but not in Scotlahd," [See also *Wiltes Claim of Peerage* (4).] Then at Halsbury, *ib.* page 269, it is said: "A peerage is an incorporeal hereditament, inalienable and descendible according to the words of limitation contained in the grant. A limitation to a man 'and his heirs' will not carry it to collateral heirs. For the purposes of descent, therefore, this limitation is practically equivalent to 'heirs of the body." It can be understood, therefore, that in a Peerage case there would be a strong reason for construing the limitation as one to the heirs of the body, for otherwise the limitation would practically fail. That reason does not, however, exist in English Law in a grant of land by deed similar to the one we have to deal with. Such a grant of land would vest an absolute estate in fee simple in the grantee.

But English Law draws a distinction between gifts by deed and gifts by Will. In an English Will there is authority to show that a devise to a man and his male heirs would be construed as giving an estate in tail male [see Williams on Real Property, 22nd Edition, page 259; Theobald on Wills, 7th Edition, page 400, and see *Crumpe* v. *Crumpe* (5).]

But in the present case we have to deal with a deed. If then one applies English Law to the present settlement, the word "male" in the main gift and also in the maintenance clause would I think be rejected. And this construction would be aided by the word "absolutely" in the main gift. Under those circumstances the main gift would confer an estate in fee simple, and in my opinion the maintenance clause *quoad* the heirs would be rejected as being repugnant to the prior absolute gift.

But the difficulties of the appellant do not stop there. The settled land is Indian land and must devolve according to the *lex loci*. But estates tail or in tail male are unknown to Indian Law, and may they always remain so. To introduce into this country the mixed Common and Statute Law on the subject, and to refer to the Statute De Donis and to recoveries, and fines, disentailing deeds and protectors of settlements would indeed be a calamity. I am, therefore, unable to concur in the view of the learned Judge that Parsis are subject to English Law generally, and that English Law applies to this case. In my opinion novel estates unknown to the law of India can no more be introduced into Bombay by Parsi settlors than they can be by Englishmen or Hindus. As was pointed out by Mr. Kania for defendant No. 2 the illustrations to section 84 of the Indian Succession Act make it quite clear that in Wills governed by that Act, gifts which under English Law would confer an estate tail confer under Indian Law an absolute estate. *A fortiori*, therefore, the same result would follow in a settlement effected by deed and not by Will. So in

(4) (1869) 4 H. L. 126.

(5) (1900) A. C. 127; 69 L. J. P. C. 71; 82 L. T. 130.

effect, both under Indian Law as well as under English Law, the result would be the same in a settlement effected by deed and not by Will, *viz.*, an absolute estate.

I, therefore, reject entirely the suggestion that the sons took an estate in tail male.

I also reject the applicant's argument that on the death of Rustomji in 1893, the persons to take were a class to be ascertained at that date, and consisting of (*a*) his then surviving sons, and (*b*) such of their heirs presumptive then living as were male. This contention appears to me to be a hopeless one. For one thing, it introduces the element of survivorship of Rustomji, which the settlement itself does not stipulate for. For another, it gives part of the property to persons who on no construction of the settlement can possibly take as specified beneficiaries. Heirs presumptive are not necessarily the heirs at law. *Nemo est hoeres viventis.*

Question (1) will accordingly be answered by declaring that the three sons took the trust property comprised in the 1879 deed absolutely in equal shares as tenants-in-common.

[The remaining portion of the judgment is not material for the purposes of this report—*Ed.*]

Z. K. *Order accordingly.*

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 58 OF 1922

October 24, 1922.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

DURGA PRASAD—DEFENDANT—APPELLANT

versus

HET RAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 13—Ex parte decree, application to set aside—Adjournment of suit—Notice to parties—Court, duty of.

When a Court finds it necessary to adjourn a pending suit, it is part of the duty of the Court to see that the date fixed for the adjourned hearing is communicated to the parties concerned, or to their legal representatives, or, at any rate, to such of them as are present or represented in Court when the adjournment takes place. [p. 92, col. 1.]

A suit for partition was compromised and a preliminary decree was passed in accordance with the compromise. A Commissioner was also appointed to make a report as to the actual division of the property. On the date fixed for the consideration of the Commissioner's report one of the defendants, who had no notice of the date, was absent and an *ex parte* decree was passed against him;

Held, (1) that in the absence of notice of the date of hearing to the defendant an *ex parte* decree should not have been passed against him; [p. 92, col. 1.]

(2) that the absence of notice was a sufficient cause for setting aside the *ex parte* decree. [p. 92, col. 1.]

First appeal from an order of the Subordinate Judge, Aligarh, dated the 9th December 1921.

Mr. *Panna Lal*, for the Appellant.

JUDGMENT.—This is an appeal against an order refusing to set aside an *ex parte* decree. We have had to hear the appeal *ex parte*, the respondents having entered no appearance. So far as we can ascertain from the record before us, the appellant has a very strong case. The suit was one for partition and the parties had compromised it, to the extent, that they had agreed upon the form of the preliminary decree to be passed. What was left for the Court to do was to carry out in detail the division of the property concerned in accordance with the terms of the preliminary decree. There was property situated in two different districts to be dealt with, and certain arrangements were made for the partition of the property in the Moradabad District to be carried out on commission. After sundry adjournments, a definite date, namely, 20th December 1920, was fixed for the return of the Commissioner's report and, no doubt by implication, for the consideration of that report by the Court in the presence of the parties. So far as the record shows, neither Durga Prasad nor his Pleader received any notice of the fact that this date had been fixed. Durga Prasad was absent on that date and, in his absence, a final decree for partition was drawn up against which Durga Prasad

contends that he has valid objections to offer. When he applied to have the *ex parte* decree set aside and his objections judicially considered, his application was rejected. The only reason given is that Durga Prasad, as a party interested in the suit, ought to have kept himself informed of all dates which the Court might fix for hearing. It is true that in the order under appeal the learned Subordinate Judge has also remarked that Durga Prasad produced no evidence to corroborate his own sworn statement that he did not know that the partition suit was dowa for hearing before the Court on the 20th of December 1920. It is not easy to see what oral testimony Durga Prasad could have produced in support of this negative assertion; but what makes the appellant's case harder is that the Court below has actually believed his statement. The learned Subordinate Judge records his finding that Durga Prasad did not in fact know that the 20th of December 1920 had been fixed for the hearing of the suit, though he still maintains that for this Durga Prasad was to blame. We are not prepared to endorse this view. When a Court finds it necessary to adjourn a pending suit, it is part of the duty of the Court to see that the date fixed for the adjourned hearing is communicated to the parties concerned, or to their legal representatives, or, at any rate, to such of them as are present or represented in Court when the adjournment takes place. In the present instance there have been a number of orders of adjournment and the record shows that the successive dates fixed were communicated to the Pleaders representing parties other than Durga Prasad. Why or how the Court failed to communicate these orders to Durga Prasad or his Pleader, the record does not explain. Under the circumstances we think Durga Prasad has shown sufficient cause for his failure to appear on the date on which the Court finally disposed of the suit. We think he was entitled to have the *ex parte* decree set aside and any objection which he had to offer to the partition proposed by the Commissioner appointed by the Court taken into consideration and judicially determined. We allow this application. We set aside the order under appeal and in lieu thereof we pass an order setting aside the final decree for partition passed by the Court below. The record will be returned to that Court in order that the partition suit may be re-admitted on to the pending file and taken up at the precise stage which it had reached when the case was called upon on the 20th of December 1920. A further date should be fixed of which proper information is given to all the parties concerned, and, on that date, the parties should be heard in respect of any objection which they may take to the manner in which it is proposed to carry out the preliminary decree into final effect. As this appeal has been heard *ex parte*, we leave the costs of this appeal, including fees on the higher scale, to be dealt with by the Court below when it passes its final decree.

Z. K.

Application allowed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 31 OF 1921.

February 21, 1923.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

MAHADEVAPPA *alias* CHANSOMAPPA DESAI—PLAINTIFF—APPELLANT

versus

KASHIRAO *bin* SOMAPPA AND OTHERS DEFENDANTS NOS. 1 TO 6, 8 AND 9 —RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11 Expl. IV—Res judicata—*Causes of action different—Amendment of plaint, refusal to allow, effect of—Hindu Law—Custom—Primogeniture, rule of* —Deshgat vatan—*Burden of proof—Impartibility—Presumption.*

Plaintiff sued to recover his share in his father's property under a partition effected by the father in his lifetime and under the father's Will. At a late stage of the suit he applied for leave to amend the plaint and claim partition in the alternative. Leave to amend was refused and the suit was dismissed on the ground that the partition effected by the father was unequal and unfair. Plaintiff subsequently sued for partition of the property:

MAHADEVAPPA *v.* KASHIRAO.

Held, that the plaintiff's claim to partition was not *res judicata* inasmuch as

(*a*) the causes of action in the two suits were different and the plaintiff was not bound to claim partition in the alternative in the earlier suit; [p. 94, col. 1.]

(*b*) the plaintiff's failure to claim partition in the earlier suit was due to the action of the Court in refusing leave to the plaintiff to amend the plaint. [p. 94, col. 1.]

Where a certain claim is omitted from the plaint and the plaintiff realising his mistake before the record is closed asks for leave to amend; which is refused, though the omission of the claim from the plaint is due to the plaintiff, the rejection of the prayer for amendment is the direct cause of the omission of the claim from the suit. [p. 94, col. 1.]

The question whether a Deshgat is impartible and subject to the rule of primogeniture must be determined in each case, but in the Southern Maratha country, a Deshgat Vatan almost always descends according to the rule of primogeniture. [p. 94, col. 2.]

Timmangavda v. *Rangangavda*, (1878) P. J. 240; *Adrishappa* v. *Gurushidappa*, 4 B. 494: 7 I. A. 162; 4 Sar. P. C. J. 154; 3 Suth P. C. J. 757; 4 Ind. Jur. 421; 3 Shome L. R. 206; 7 C. L. R. 1; 2 Ind. Dec. (N. S.) 838 (P. C.), followed.

In the case of an ancient Deshgat Vatan in the Southern Maratha country which has never been divided, lands being given to the Kumar for maintenance and reverting to the eldest branch when their lines of descendants became extinct, the Court is justified in holding that the Vatan is impartible and descends according to the rule of primogeniture. [p. 95, col. 1 & 2.]

Per *Crump, J.*—A custom of primogeniture, if clearly proved, supersedes the general Hindu Law of descent. [p. 96, col. 1.]

Sindhojirav v. *Naikojirav*, 10 B. H. C. R. 228 followed.

Such a custom as the above is not, however, an unusual feature of Deshgat Vatans in the Southern Maratha country, but it is for the party who sets up the custom to establish it in each case. [p. 96, col. 1.]

The best evidence of impartibility is that over a long period of years there has been no partition. [p. 96, col. 1.]

Appeal against the decision of the First Class Subordinate Judge, Bijapur, in Suit No. 41 of 1918.

Mr. *G. N. Thakor*, (with him Mr. *V. D. Limaye*), for the Appellant.

Mr. *H. C. Coyajee*, (with him Mr. *H. B. Gumaste*), for Respondents Nos. 1 and 8.

Mr. *G. R. Madbhavi*, for Respondent No. 2.

JUDGMENT.

Mcleod, C. J.—The plaintiff filed Suit No. 41 of 1918 in the Court of the First Class Subordinate Judge of Bijapur to recover his one third share by partition of the property specified in Schedules A to E to the plaint, to get a declaration that the alienation of the property in Schedule D by his father by an award decree in Suit No. 2 of 1906 in the Bijapur District Court was null and void after his father's death and to get a declaration that he was entitled to a one-third share in the property in Schedule E after the death of defendant No. 6 together with past and future mesne profits.

Somappa his father had three sons, Krishnarao, defendant No. 1, Krishnappa defendant No. 2 and Maladevappa, the plaintiff. During his lifetime he divided the plaint property into 4 shares and gave each of his sons one share, keeping one for himself. Subsequently he willed away his own share in favour of his sons. In Suit No. 221 of 1913 filed by the Plaintiff in the Court of the First Class Subordinate Judge of Bijapur to recover his share under the partition and under his father's Will, it was held that the partition was unequal and unfair so the Court dismissed the suit. It was contended by the present defendant No. 1 in that suit that the property in suit was impartible, but no finding was recorded on that issue.

With regard to the property in Schedule D, an award decree was passed in Suit No. 2 of 1906 filed by the plaintiff's father whereby it was decided that defendants Nos. 3, 4 and 5 should get possession of the property and remain in possession until March 2, 1926. Defendant No. 6 was the mother of Somappa and the property in Schedule D was held by her for her lifetime only. The plaintiff claimed that all these properties were joint family properties, in which he was entitled to a share by partition.

The 1st defendant pleaded that the property in suit was impartible, that there was a custom in the Gani Deshgat that the property descended by primogeniture, the junior members of the family being entitled to maintenance only, and this is the main issue in the case. It was also contended that the plaintiff's claim for partition was barred by *res judicata* by reason of Suit No. 221 of 1913 in which the plaintiff might and ought to have asked, as an alternative, for partition.

The 2nd defendant in his written statement admitted the plaintiff's claim and asked that his one-third share should be awarded on the partition. Defendant No. 5 claimed to be in possession of the lands in Schedule D under a lease from defendant No. 4 and that he was entitled to enjoy them in pursuance of the decree in Suit No. 2 of 1906. Moreover the plaintiff's claim was barred by section 4 (*a*) of the Revenue Jurisdiction Act as the Collector refused to restore the lands to the plaintiff when he applied under section 5 of the Vatan Act.

Defendant No. 6 claimed the property in Schedule E as her absolute property.

I cannot agree with the learned Judge that the plaintiff's suit is barred by *res judicata*.

The cause of action in Suit No. 221 of 1913 was the partition deed executed by his father and there was no obligation on him to sue in the alternative for a partition of the property as joint family property. He certainly might have done so and he even asked the Court for leave to amend his plaint at a later stage but his application was rejected by the Court. In the first place I do not see myself why the plaintiff was bound to claim equal partition. He may very well have been content, if the Court declined to give effect to the partition made by the father, which was extremely favourable to him, to remain joint with his father. Secondly, if the Court refused to allow his amendment and referred him to a separate suit for partition, it is difficult to see how it can be said that the omission to have the question of equal partition decided was not due to the action of the Court. If a plaintiff realises his mistake before the record is closed and asks for leave to amend, though the omission of the claim from the plaint was due to the plaintiff, the rejection of the prayer for amendment would be the direct cause of the omission from the suit. On the question of the impartibility of the property as Deshgat Vatan, we had recently in F. A. No. 3 of 1920 to consider the same question with regard to a Deshgat Vatan in the District of Belgaum. My learned brother, as he stated in his judgment in that case, has considerable familiarity with the Vatans of these hereditary offices in the Southern Maratha country and apart from that there is the experience acquired in the cases which have come before this Court that the evidence is generally conclusive in each case that the Deshgat Vatan descends according to the rule of primogeniture. Though as pointed out by the Privy Council in *Adrishappa* v. *Gurushidappa* (1) the question must be determined in each case whether the Deshgat is impartible, it is impossible to exclude from one's mind the fact that impartibility is the rule rather than the exception, and as pointed out by this Court in *Timmangavda* v. *Rangangavda* (2) evidence is admissible to show that the custom exists in other families, not as being in any way conclusive by itself, but as assisting to show that the custom set up in the particular case before the Court was not an unusual one in the district in which the parties resided. The evidence in this case is all on the side of the 1st defendant. As plaintiff was unable to prove any previous partition in the family, he could only rely on the fact that his father had attempted to divide the property. But considering the inequality of the division he made, it would appear as if he had attempted to divide the property before his death as if it were his own instead of dividing it as if all were equally entitled as members of a joint family.

The 1st defendant relies on the various exhibits which have been put in from the records of the Inam Committee; Exhibit 148 is the statement made by Kasappa, father of Somappa. The earliest *sanad* he produced was granted in 1077 *Hijri* 1666 A. D. and as in 1855 the whole of the Vatan was entered in Kasappa's name that is evidence that the Vatan had never been divided. That, of course, would not be sufficient to prove impartibility, but there is considerable body of evidence to show that when there were opportunities for division no division was made, and that at various times lands were given to the Kumars or members of the junior branches of the family for maintenance and not as re-

(1) 4 B. 494; 7 I. A. 162; 4 Sar. P. C. J. 154; 8 Suth. P. C. J. 757; 4 Ind. Jur. 421; 3 Shome L. R. 206; 7 C. L. R. 1; 2 Ind. Dec. (N. S.) 838 (P. C.).
(2) (1878) P. J. 240.

presenting their shares. Exhibit 149 is the pedigree of the family produced from the records of the Inam Committee. The 1st defendant detailed in his evidence how lands were given to Bhaubands for maintenance, and what lands were in the possession of living Bhaubands. He said in cross-examination that such lands were to be continued to the Bhaubands till the line of male decendants become extinct when they reverted to the Desai. He was willing to give lands to the plaintiff and defendant No. 2 for maintenance, Witnesses (Exhibits 119 and 120) Kshtriya Desais of Achali and Patalkal State deposed as to the custom of impartiblity existing in their families. Exhibits 121 and 122 were acquainted with the family in suit and deposed to the fact that lands were given to the Kumars for maintenance. Exhibit 131 was Bhimrao, one of the Kumars. He was the great-grandson of Kallappa, brother of Narsappa Naik in Exhibit 149 and had four lands in his possession which had been given to his ancestors, though in cross-examination he said they were given to his father by Somappa. This witness's name appears in Exhibit 116 which was a list of survey number given for enjoyment to Kumars purporting to have been written by one Venkaji Krishna and was Exhibit 105 in Suit No. 221 of 1913. Venkaji, who is now dead, was examined in that case and his evidence has been put in as Exhibit 139 under section 32 of the Evidence Act.

That evidence was very important as Venkaji was the *mukhtiar* of Somappa. Appellant's Counsel contended very strongly that his statement and the list were inadmissible in evidence, but it is difficult to see how they can be excluded. Venkaji was called by the plaintiff in Suit No. 221 of 1913 to prove the will made by Somappa and was apparently hostile to defendant No. 1. He had to admit, however, in cross-examination that lands were given to the Kumars and that he had written the list Exhibit 105.

I think that as the suit property is very ancient Deshgat Vatan in the Southern Mahratha country which has never been divided, lands being given to the Kumars for maintenance and reverting to the eldest branch when their lines of descendants became extinct, the learned Judge was justified in holding that it was impartible. I think that the appeal fails and should be dismissed with costs.

Crump, J.—The parties to this suit are the three sons of one Somappa, and the plaintiff seeks for patition of the family property claiming to be entitled to a share of one-third. The property in question forms part of a Deshmukhi Vatan, and defendant No. 1 who is the eldest son, claims that the succession is by lineal primogeniture. The only substantial question in the appeal is whether defendant No. 1 has established the defence which he sets up.

There is no possible doubt as to the nature of the estate. It was suggested in argument that this was not a service-tenure, but the evidence is conclusive to the contrary. Though the *sanad* is not produced, it is clear from Exhibit 148 that Kasappa, the grandfather of the parties, appeared before the Inam Committee in 1855 when proceedings were being taken for the commutation of the Vatan. From his statement it would appear that the original grant was made in the 16th century and that it was as remuneration for services to be rendered as hereditary Deshmukhs of the Chimalgi Pargana. The word "Chawrat" (*Vide* Exhibit 116) shows at once the nature of the property. The matter is not open to any doubt. It is common ground that the lands were held by plaintiff's ancestor in the capacity of Desais or Deshmukhs and a Desai or Deshmukh in the Southern Mahratha country is a hereditary District Officer. Their duties were to collect the revenue in the *pargana* or revenue division, and as every one knows, the British Government introduced a settlement whereby these services were dispensed with on payment of a *judi* or quit rent amounting to four to six annas in every rupee of the assessment. These settlements received legislative sanction by clause (2) of section 15 of Bombay Act III of 1874. The property continues to be Vatan property within the meaning of section 4 of the Act, and subject to the restrictions which that Act or Act II of 1886 enacts as to succession

or alienation. Those restrictions do not, however, touch the point before us but I have thought it well to preface my judgment by these remarks in view of what was said in argument.

For the purposes of the present question there is, I apprehend, no distinction between the various classes of District Hereditary offices. Whether it be a case of a Desai, a Deshmukh, a Nadgowda, or a Deshpande, the general rule must be taken to be that such Vatans are ordinarily partible and impartibility is an exception which may be established by evidence. It has been so decided by the Privy Council. [*Adrishappa* v. *Gurushidappa* (1)]. A custom of primogeniture, if clearly proved, supersedes the general Hindu Law of descent. [*Sindhojirav* v. *Naikojirav* (3)]. There can, however, be little doubt that such a custom is not an unusual feature of these Vatans; it has indeed been judicially recognized by this Court in more than one instance, the latest in the case of the Deshgat, which came before us in First Appeal No. 3 of 1920. It is not indeed surprising that this should be so if it is remembered that the lands were originally the emoluments of an hereditary office. Nevertheless, it is for the party who sets up the custom to establish it in each case.

The best evidence of impartibility is that over a long period of years there has been no partition. If at the same time it appears that the eldest member has succeeded to the bulk of the property, and that comparatively trifling portions have been assigned to the younger members, then we have an ordinary feature of these Vatans. There may be a practice in a Vatan family of long standing to lease the performance of the services of the Vatan in the hands of the elder branch and to provide the younger branches with maintenance only. When the practice is the result of an established custom, it will not be affected even if the services of the Vatan are dispensed with. [*Savitriava* v. *Anandrav* (4), *Ramrao Trimbak Deshpande* v. *Yeshvantrao Madhavrao Deshpande* (5).]

(3) 10 B. H. C. R. 228.
(4) 12 B. H. C. R. 224.
(5) 10 B. 327; 11 Ind. Jur. 24; 5 Ind. Dec. (N. S.) 606.

The pedigree of the family was produced by Kasappa in 1855. He was the tenth holder from the original grantee Kenchappa, and the heir by lineal primogeniture. At that date there were many branches in the family but the bulk of the estate was with Kasappa and he says "The *vahivat* came into my hands because I was the heir." The plaintiff admits that so far as he knows there has never been any partition in the family, and there is evidence that distant collateral members are in possession of small grants of land "for maintenance", which are far less than would have fallen to their share, had the ordinary Hindu Law of succession been applicable. One of these, Bhimraya is a witness, He is the grandson of Basappa, son of Kallappa, who is shown as living in the pedigee of 1855. He says "I have four lands in my possession; they have been given to me for maintenance. I do not know if I have any share in the Deshgat Vatan." In a previous suit between the parties one Venkaji was called as a witness for the plaintiff. He is dead and his evidence has been placed on the record in this suit [Exhibit 139]. He was the agent of Somappa the father of the parties and was instrumental in drafting the partition deed which led to this litigation. He stated that defendant No. 1 objected on the ground that the property was impartible. He was hostile to defendant No. 1. He said "I do not know whether the Deshgat property in dispute is partible or not." If Achutappa and Somappa (these are collateral members) were to get lands according to their shares they would have obtained more than this," that is to say, more than they actually hold. This witness was constrained to admit that Exhibit 105, now 116, was a statement in his handwriting. It appears that the members of the junior branches are styled "Kumars," and this statement is entitled "List showing the survey numbers given for enjoyment to the Kumars;" the statement shows that if any "Kumar" dies without an heir the lands revert to the Desai. It also shows that the lands are given for maintenance.

This evidence affords in my opinion *prima facie* proof that there is a family

usage whereby the lands of this Desbgat are held by the eldest male member alone. There is evidence further that this is a local usage in the case of such tenures. The plaintiff has adduced no evidence whatever to the contrary and in my opinion the finding of the lower Court on the point is undoubtedly correct.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 238 OF 1920.

July 3, 1922.

Present:—Mr. Justice Walsh and Mr. Justice Ryves.

RAM DAS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat BASANTI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 92—Trusts, public and private, distinction between—Dedication, proof of—Test.

In private trusts the beneficial interest is vested absolutely in one or more individuals who are, or within a given time may be, definitely ascertained. On the other hand, a public trust has for its object the members of an uncertain and fluctuating body, and the trust itself is of a permanent and indefinite character and is not confined within the limitation prescribed to a settlement upon a private trust. A man can create a private trust by building a temple and an idol and endowing it with funds or income for strictly private purposes, not merely retaining the management and control in the hands of himself and his family but restricting the enjoyment to himself and his family or other individuals, and he may out of the warmth of his heart allow other persons outside the original beneficiaries to enjoy from time to time the advantages thereby created. On the other hand, a private individual may construct out of his private purse a private temple and idol retaining the control and management in his own hands and in that of his family or some other selected individuals and yet so conduct himself as to provide conclusive evidence of dedication by implication and by conduct. Once he has shown his intention to dedicate, the matter passes out of his hands and the beneficiaries to whom the use is dedicated have a right in such use. Where there is no express deed of dedication or document creating the trust, the Court has to depend almost entirely upon the history of the place and the user by people generally from time to time to decide whether it is a private or was intended to be a public trust. [p. 97, col. 2; p. 98, col. 1.]

In construing a dedication there is a broad difference between conduct which shows that the owner of the property is giving express permission from time to time to particular individuals and conduct which shows that he intends certain members of a class whom he desires to benefit to act indiscriminately without permission, that is to say, as of right. A useful test for a Judge to apply to see whether the evidence satisfies the conditions of the private trust, is to ask himself whether any of the acts testified to by the witnesses could have been prevented or penalised by proceedings for trespass. [p. 98, col. 2.]

Appeal from a decree of the District Judge, Bareilly, dated the 23rd April 1920.

Mr. *Umi Shankar Bajpai*, for the Appellants.

Mr. *S. P. Gosh*, for the Respondent.

JUDGMENT.—We have come to the conclusion that the learned Judge has misdirected himself in this case as to what really is a public trust and that he has failed to appreciate the strong points in the evidence. The respondent has not been represented, but perhaps in view of the overwhelming character of the evidence it is not surprising. The suit is brought alleging that a certain temple and idol constituted a public trust, having been built and dedicated for the use and benefit of the Hindu public. That it was built and dedicated by the original owner out of his private purse, and as his private property, to be used for religious purposes, there can be no doubt whatever. No doubt also a man can create a private trust by building a temple and an idol and endowing it with funds or income for strictly private purposes, not merely retaining the management and control in the hands of himself and his family but restricting the enjoyment to himself and his family or other individuals, and he may out of the warmth of his heart allow other persons outside the original beneficiaries to enjoy from time to time the advantages thereby created but in such cases especially with a temple and idol publicly constituted and publicly accessible in which the appearance may be what one may describe as ambiguous, one would expect and ought to insist upon clear evidence of permission given

or license given and permission withheld because it is equally true that a private individual may construct out of his private purse a private temple and idol retaining the control and management in his own hands and in that of his family or some other selected individuals and yet so conduct himself as to provide conclusive evidence of dedication by implication and by conduct. Once he has shown his intention to dedicate, the matter passes out of his hands and the beneficiaries to whom the use is dedicated have a right in such use. Where there is no express deed of dedication or document creating the trust, the Courts have to depend almost entirely upon the history of the place and the user by people generally from time to time, to decide whether it is private or was intended to be a public trust. The words "public" and "private" in this connection do not bear the same significance that they do in popular language: A public trust for worship by, for example, Hindus may be as private a place as well as can be conceived. Perhaps the best statement of the distinction between public and private trusts is to be found in Lewin on Trusts in Chapter II, page 18 of the 12th Edition. By public must be understood such as are constituted for the benefit either of the public at large or some portion of it answering a particular description. "In private trusts the beneficial interest is vested absolutely in one or more individuals who are, or within a given time may be, definitely ascertained. On the other hand public trust has for its objects the members of an uncertain and fluctuating body, and the trust itself is of a permanent and indefinite character and is not confined within the limits prescribed to a settlement upon a private trust." An equally useful definition is to be found in the notes to section 92 in Woodroffe and Ameer Ali's Commentary on the Code. "Private trusts," they say, "concern only individuals or families for private convenience or support. By public trust may be understood such as are constituted either for the benefit of the public at large," and for the rest of the definition they follow the notes precisely as in Lewin. There are passages in the learned Judge's judgment which show that he has confused this issue in his own mind.

There is a broad difference, when one comes to construe a dedication, between conduct which shows that the owner of the property is giving express permission from time to time to particular individuals and conduct which shows that he intends certain members of a class whom he desires to benefit to act indiscriminately without permission, that is to say, as of right. A useful test of a Judge to apply to see whether the evidence satisfies the conditions of the private trust, is to ask himself whether any of the acts testified to by the witnesses could have been prevented or penalised by proceedings for trespass. It is impossible to suppose, after reading the large body of evidence of respectable persons in this record, that anybody thought for a moment that they were committing acts of trespass. There is evidence that Kanhaiya Lal the father of the principal witness gave a house to Sri Ram the *pujari* not as his own, for he was prohibited from selling it, but as a residence for himself as *pujari* for the time being instead of living in the temple. This witness says that his father and grand-father used to contribute monthly expenses and also that his father did some formal act by way of appointing Sri Ram *pujari*. One witness said that lectures were held for Hindus on religious subjects. Other witnesses say that Hindu festivals were recognised and attended by members of the Hindu public in the neighbourhood. Others testify to a practice from time immemorial not merely of giving offerings of food which might be expected in any event but to definite subscriptions or periodical contributions for the purpose of repair and white-wash. One old gentleman in the service of the Raja Saheb says that the Raja Saheb used to contribute to the up-keep. A *Bania* who was called said that an account-book was kept, a fact which is not alleged by anybody else, but which would appeal to him. This same *bania* explains that they used

to present the present *pujari* not merely with money but with brickbats, which probably means something different from what it sounds to be and which we imagine must have been building material. So far as we know this evidence was uncontradicted. At any rate it stands very high as evidence which is palpably true in the main and given by persons of position and good caste and many of them of advanced age with no possible interest, and the conclusion is inevitable that, however much the property might have been in private ownership and the control intended to remain in private ownership, the use and benefit of the temple was dedicated and intended for the use and enjoyment of the Hindu community, and the case must, therefore, go back for trial upon the remaining issues.

Unfortunately we cannot leave the matter here. The learned Judge has not settled the issues satisfactorily and it being found to be a public charity one or two nice questions remain to be decided on which we propose to give some further directions. The remaining issues which have not been disposed of strike us as embarrassing in form. Indeed the issues generally in the case were not well conceived. It being now decided that it is a public trust the next question that arises is in whom is the appointment of the *pujari* vested. Probably little remains to be decided on this question. Everything points to its being vested in the family of the donor and having rightly descended to the present occupant, *Musammat* Basanti. That may be treated as the second issue.

The third issue then arises whether the present occupant has conducted herself improperly in such matters as to constitute a breach of trust. The evidence before us is all one way although not going into much detail, but if it is at all true that she is of bad character, or has allowed wine to be introduced into the temple, or has left it and gone away, or has wilfully excluded Hindus who have a right to worship there, she is clearly not a fit and proper person. Her absence today and the absence of anything helpful from her point of view on the record rather looks as though she has not got much to say, but it is possible that it is due to the Judge having taken a strong view on the legal question in her favour. If this third issue is decided in her favour, that is to say, if the Judge thinks she is a proper person to administer this trust and to act as *pujari*, then it seems that this suit must fail and no further step can be taken until she dies either childless or any member of the family claims to succeed her. But if this issue is determined against her then the fourth issue arises; "what is the best direction for the Court to give with a view to filling the vacancy in accordance with the intention of the donor." Upon this issue the plaintiffs were in an obvious difficulty apparently not having cleared their own minds or having obtained advice upon the subject. They suggested in their claim for relief that "some" other person may be appointed *pujari* and *mutwalli* and necessary directions may be given in that behalf. This is really, if the plaintiffs had had the courage to ask for it, asking the Court under section 2 (*g*) to settle a scheme and we think the Court must take this duty upon itself; that is to say, having come to the conclusion, if it does, that the last successor and present occupant is unfit and that there is no fit person answering the description of the donor's original intention, then he must by his decree formulate a scheme which will result in the appointment of a fit person most nearly approaching the wishes of the donor, and so frame his decree as not merely to dispose of the present crisis but to appoint the future *pujari* in such a way that no dispute can subsequently arise as to the legal title of the person appointed either by him or under his new scheme. It is not possible for us to formulate a scheme. We can do no more than suggest a convenient and useful way of providing for such an emergency, namely, by the appointment of a small committee of electors or trustees, always providing for an odd number in case of contest, who shall by a majority of votes appoint the new *pujari* and in such scheme the Judge may, if satisfied on proper materials with the individual, start the ball rolling by selecting an

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individual as *pujari* as the first successor, subsequent appointments to be made under the scheme. We may add that the Judge must do his best when formulating his scheme to put it into the decree in such a form that everybody can understand it; that it is decisive and simple so as to be workable not by those only who have heard and understood the case, but by those who come after and have nothing to guide them except the Judge's decree. The appeal must be allowed and the case remitted to the lower Court for re-hearing on the remaining issues in lieu of of what we have stated under O. XLI, r. 23, the fresh issues to be settled not necessarily in the exact words but as near as possible approximately in the following form, (1) In whom according to the intention of the original donor, is the office of the *pujari* vested? (2) Is the defendant *Musammat* Basanti a fit and proper person to remain *pujari* of this public trust? (3) If not what is the best scheme most nearly approximating the original intention of the trust for providing for the existing and future vacancy in the office of the *pujari*?

The costs of this appeal and of the first hearing to abide the result of the suit.

Z. K. *Re-trial ordered.*

PRIVY COUNCIL.

APPEALS FROM THE BOMBAY HIGH COURT.

June 12, 1923.

Present:—Lord Chancellor, Viscount Haldane, Lord Parmoor, and Lord Phillimore.

THE MAHARAJA OF KOLHAPUR—APPELLANT

versus

SHRI BALA MAHARAJ AND OTHERS—RESPONDENTS.

SHRI BALA MAHARAJ—APPELLANT

versus

THE MAHARAJA OF KOLHAPUR AND OTHERS—RESPONDENTS.

Bombay Revenue Jurisdiction Act (X of 1876), ss. 4, 12, scope of—Summary Settlement, question of—Reference to High Court—Lands held by Shri Tatya Maharaj, whether subject to Summary Settlement.

A claim that certain lands were not validly subjected to Summary Settlement falls within the purview of section 4 of the Bombay Revenue Jurisdiction Act and can, therefore, be validly referred for decision to the High Court under section 12 of the Act. [p. 106, col. 2; p. 107, col. 1.]

The application in or about the year 1864 of the Summary Settlement under Bombay Acts II and VII of 1863 to lands then held by Shri Tatya Maharaj was valid and legal. [p. 107, col. 2.]

Consolidated appeals from the judgment of the Bombay High Court.

Sir *J. Simon*, K. C., Messrs. *DeGruyther*, *K.* C., *Lowndes*, K. C., *Raikes* and *Remsay* for the Appellant.

Messrs. *Upjohn*, K. C., *Luxmon*, K. C., and *Parikh*, for the Respondent.

JUDGMENT.

Viscount Haldane—These are consolidated appeals from a decision of the High Court at Bombay on a question referred to it by the Government of Bombay, under section 12 of the Bombay Revenue Jurisdiction Act (X of 1876). The question referred was whether the application in or about the year 1864 of the Summary Settlement under Bombay Acts II and VII of 1863 to certain lands then held by Shri Tatya Maharaj, which subsequently devolved on the late Baba Maharaj, was valid and legal. These Acts provided for the settlement of claims to exemption from payment of land revenue and for the guarantee of a title in perpetuity to the holder of the land, his heirs and assigns, without restriction by Government as to adoption, succession or transfer The Acts applied to holders of land the freedom of which from payment of land revenue had not been the subject of formal adjudication, where the holders had consented to submit the terms and condition of holding to Summary Settlement. But the Acts were not to apply where the land was held under treaty or was granted or held as a *jagir* or *saranjam*, or similar political tenure, which was defined to mean tenure created from or dependent on political considerations, the existence of which was to be determined by the Government.

Section 12 of the Bombay Revenue Jurisdiction Act of 1876 gave the Government a general power to refer questions arising in the investigation of claims, which, but for the passing of that Act, could have been tried by a Civil Court, to the High Court at Bombay for decision.

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The circumstances under which the question which has arisen was referred to the High Court were these. Baba Maharaj died in 1897 In 1901 a dispute arose between the second appellant in the present appeals, Shri Bala Maharaj, as claimant to the lands the title to which is in controversy, and the first respondent, Shri Jagannath Maharaj, as to which of them was the validly adopted son of the late Baba Maharaj. Jagannath, who was then a minor, brought a suit in the Court of the First Class Subordinate Judge of Poona against Bala, who claimed to be the properly adopted son, to establish his own title. The special purpose of the suit was to have it determined that Jagannath had been validly adopted by Baba's widow, and that it was consequently impossible for her to make, as she had endeavoured to do, a second adoption of Bala less than two months later. A point relied on by the latter in his written statement was that the approval of His Highness the Maharaja of Kolhapur was necessary to such an adoption, and that such approval not having been given, the earlier adoption was void. In July 1906 the Subordinate Judge decided in favour of Jagannath holding that he had been validly adopted as the son of Baba. It was held, as the consequence, that no title or interest in the property of Baba had passed in Bala, and he was restrained by injunction from interfering with Baba's property. The High Court at Bombay reversed this, but the Privy Council, differing, restored the judgment of the Subordinate Judge.

To these proceedings the Maharaja, who was no party to them, finally took exception, and he and Bala made representations to the Government of Bombay to the effect that, as the adoption of Jagannath had not received the approval of His Highness, the adoption could have conferred no title to the propeity of Baba, and that it must go to Bala whose adoption the Maharaja had approved.

The Bombay Government thereupon referred the point raised by this claim to the High Court under section 12 of the Bombay Revenue Jurisdiction Act of 1876. This section provides, as already stated, that if on the trial or investigation of any suit, claim or objection which but for the passing of the Act might have been entertained by a Civil Court, there arises any question on hich the Government desires the decision of the High Court, it may cause a statement to be prepared and refer the question for such decision. But by section 4 it is provided that no Civil Court is to exercise jurisdiction, *inter alia*, in the matter of any claim against the Government relating to lands held under treaty, or to lands granted or held as *jagir* or *saranjam* or on other political tenure, or to lands declared by Government, or by any officer duly authorised in that behalf, to be held for service. Unless, therefore, the claim in the case before their Lordships falls within these words, it is said that, as a Civil Court might have exercised jurisdiction, the Government had no power to refer the question which arose to the High Court.

Passing for the moment from the consideration of the point as to jurisdiction which arises under this section, it will be convenient to refer in the first place to the history of the dispute This is explained with sufficient accuracy in the statement submitted to the High Court by the Government of Bombay when defining the question referred. The history of the events which led to the reference to the High Court appears from the following abridgment of that statement:—

Shri Tatya Maharaj was a grandson of Shri Sidheshwar Maharaj, a learned and saintly man who at some date previous to 1800 was appointed by Chhatrapati Shivaji Maharaj III, the then ruler of Kolhapur, to be his spiritual preceptor. For the maintenance and dignity of the family of Shri Sidheshwar Maharaj hereditary grants of land had been made and hereditary honours, including the hereditary title of "Maharaj," conferred upon him by the said Maharaja of Kolhapur.

Upon the death of Shri Sidheshwar Maharaj in 1800, his property originally acquired from the Maharaja of Kolhapur was divided amongst his three sons, Baba, Nana and Bhau.

Between 1813 and 1821 Bhau Maharaj (Sidheshwar's youngest son) took an active part in Kolhapur politics, being

then the Prime Minister of Kolhapur, and rendered valuable services to both the British Government and the Maharaja.

Upon the downfall of the Peshwa, Sir Thomas Munro, in 1818, when settling the Southern Mahratha Country which had fallen into the hands of the British Government, returned to Baba Maharaj (Sidheshwar's eldest son) three villages in Chikodi, which were previously held by him, and by *sanad* dated the 2nd August 1818, granted to Bhau Maharaj, as "*inam dharmadaya*," hereditarily three villages and one hamlet. The *sanad* stated that he was "great, worthy and a well-wisher of the Company's Government." The villages and hamlet so granted were Kerur, Hebal, Kadapur and Kochari, in the Talukas of Chikodi and Manowlee. This grant was subsequently confirmed on the 24th October 1819 by a *sanad* in the same terms signed by the Honourable Mountstuart Elphinstone.

In a letter dated the 28th June 1818 addressed to the Honourable Mountstuart Elphinstone, Sir Thomas Munro referred to the above grant (which he was then proposing to make) as "the new *jahagir*," and in his subsequent report to the same officer on the state of the Southern Mahratha Country, dated the 28th August 1818, Sir Thomas Munro stated that the villages were given to Bhau Maharaj as a "*jahagir*."

By a private letter dated the 2nd August 1818, Sir Thomas Munro informed His Highness the Maharaja of Kalhapur that Bhau Maharaj being a particular friend of the Honourable Company, it had been deemed necessary to make him the above grant.

On the 2nd August 1818, Sir Thomas Munro wrote an official letter to His Highness the Maharaja of Kolhapur referring to the above grant and the assistance given by Bhau Maharaj, and in a letter dated the 15th August 1818 and also addressed to His Highness the Maharaja, the Collector of Dharwar also referred to the services of Bhau Maharaj and characterised him as "a very worthy man indeed."

On the 25th October 1818 His Highness the Maharaja [rewarded] Bhau Maharaj for his political services by a gift of a lakh of rupees.

In 1818 the said Talukas of Chikodi and Manowlee were made over by Sir Thomas Munro to His Highness the Maharaja of Kolhapur subject (*inter alia*) to the grants made as above stated.

In 1821 His Highness the Maharaja of Kolhapur granted to Bhau Maharaj ten villages, several of which were within the said Talukas of Chikodi and Manowlee.

On the 24th January 1826 a treaty was concluded between the British Government and His Highness the Maharaja of Kolhapur which, after reciting that a treaty had been concluded in 1812 and that certain misunderstandings had arisen, declared, with a view to the removal of such misunderstandings and to the confirmation of the alliance, that the British Government acknowledged that the Districts of Chikodi and Manowlee which had been transferred to His Highness by a *sanad* under the signature of Sir Thomas Munro, were ceded to His Highness in full sovereignty, His Highness the Maharaja engaging on his part to respect the rights and privileges of the *zemindars*, *inamdars* and *watandars* of those districts. The treaty further declared by Article 7 as follows:—

"The Raja of Kolhapur promises to continue to Bhau Maharaj and Baba Maharaj their respective lands and rights agreeably to the Schedule annexed. The guarantee of the British Government to the enjoyment of the above lands and rights shall only continue during the life time of the above-mentioned persons, but the rights of their descendants as founded on *sanad* or custom shall not be prejudiced by the cessation of the said guarantee."

This treaty was ratified by the Governor-General in Council on the 10th March 1826. The Schedules, a copy of which was sent to Bhau Maharaj, included the villages granted to him by Sir Thomas Munro in 1818 and the villages granted to him by His Highness the Maharaja of Kolhapur in 1821.

Nana Maharaj (the second son of Sidheshwar) had died without issue in 1816 leaving a widow. By order dated the 31st January 1826, the Sir Collector and

Political Agent, Dharwar, dealt with the succession to the share of Sidheswar's property which came to Nana upon partition after the death of the former. The order laid down that the widow was entitled to enjoy the property during her life but that she had no right to deal with it by way of gift, sale or mortgage; that she was not to make any adoption, and that after her death the property was to go to Baba Maharaj and Bhau Maharaj and their sons. This property was included in the Schedule to the Treaty of 1826.

A further treaty between the British Government and the Maharaja of Kolhapur was signed on the 23rd October 1827. The treaty recited the treaty of 1826 and stated that His Highness had uniformly evinced a total disregard of the friendship of the British Government and in violation of the conditions contained in Art. 4 of the treaty of 1826 had repeatedly infringed the rights of the *inamdars* and *watandars* of the Talukas of Chikodi and Manowlee, and that it, therefore, became necessary that His Highness should give back to the British Government the said Talukas "in the same state in which he received them" and that His Highness thereby agreed so to do. Article 3 provided as follows:—

"In the seventh Article of the said Treaty the possessions of Bhau Maharaj and Baba Maharaj were guaranteed to them for the terms of their respective lives only (provisions being made that the rights of their descendants, as founded on *sanad* or custom, should not be prejudiced by the cessation of the said guarantee). As, however, His Highness has never ceased to annoy and distress these persons by seizing their villages and other property, it has been deemed necessary to extend the guarantee of the British Government to their descendants, and His Highness accordingly engages never to molest them."

The Talukas of Chikodi and Manowlee accordingly passed into the possession of the British Government, but the Political Agent raised the question whether Government should retain the whole benefit of Article 2 of the treaty of 1827, which provided that the two Talukas should be given back to the British Government in the same state in which His Highness received them, or whether subsequent grants were to be considered valid, and he submitted a list of *inams* which according to the strict letter of the treaty might have been resumed, but which he had allowed to remain in the possession of the proprietors. That list included the villages granted to Bhau Maharaj and Baba Maharaj by the Maharaja between 1818 and 1827, while the Talukas were under his sovereignty, and it stated that they were given up "as being included in the Schedule of their possession guaranteed by the Honourable Company," *i.e.*, the Schedule to the Treaty of 1826. The Government of Bombay, by letter dated the 23rd May 1828, approved of the Political Agent's proposals and authorised him to carry them into effect.

Bhau Maharaj died in 1837, and on the 4th January 1838, Government inquired of the Agent for Sardars whether the deceased held any possession resumable at his death. The Agent replied, on the 3rd March 1838, that all the possession held by Bhau Maharaj were guaranteed by the third Article of the Treaty of 1827, and that from all the *sanads* and other documents which he had examined, it appeared that all such possessions were hereditary and not resumable at his death. The Agent further reported that Bhau Maharaj left two sons, Huree Hur Pandit *(alias* Tatva Maharaj) and Vishwumbhur Pandit *(alias* Dada Maharaj).

In 1828 Bhau Maharaj had petitioned Government to be allowed to exchange one of the villages granted to him by Sir Thomas Munro *(supra)* for others situated near Poona, where he usually lived. The exchange was effected (after Bhau Maharaj's death) by *sanad* dated the 7th February 1838 signed by the Principal Collector of Poona, whereby the villages of Vadgaum, Koarlee, Pimpulgaum and Kassgaum (together with other lands) in the Poona District, were granted to Bhau's sons in exchange for Keyroor, one of the villages granted by Sir Thomas Munro.

In 1844 the widow of Nana Maharaj in spite of the order referred to *(supra)* purported to adopt one Appa, a grandson

of Baba Maharaj, but the Government ruled in 1857 that "the consent of the Kolhapur Government not having been obtained to the adoption, and the difficulty of proof as to the consent of Tatya Maharaj to the arrangement are facts which are fatal to the claim of Appa Maharaj."

During the years 1851 to 1864, which covered the period of inquiry into the titles to Inam Estates in the districts in question, Raoji Maharaj was the representative of the elder branch of the family of Shri Sidheshwar Maharaj and Tatya Maharaj, the representative of the younger branch. In 1851 Tatya Maharaj submitted his *kaifiat*, or written statement, to the Inam Commission, Poona, in which he stated that the *sanads* relating to his lands had been scrutinised and signed by Mr. Baber, the Political Agent and Collector at Dharwar, who had also registered the schedules of possessions and sent the schedule to him. The Assistant Inam Commissioner afterwards inspected the *sanads* and returned them.

On the 11th June 1857 Tatya Maharaj wrote to the Assistant Inam Commissioner, Belgaum, who had called for the *sanads*, stating that they had been sent to him. The letter went on to point out that the grants had been enjoyed under the guarantee of the Company's Government and that inquiries had already been held about them many times.

In 1859 an inquiry was held as to the succession to the villages in the Poona District which had been exchanged for the villages of Keyroor in 1838 (*supra*) and the Sub-Assistant Inam Commissioner reported that Tatya Maharaj's (Huree Hur Pandit's) claim appeared to be firmly based on the recognised competency of the grantor and the guarantee of the British Government under the treaties above referred to. Acting upon such report, the Acting Inam Commissioner decreed that the property "be continued in Inam for so long as there may be in existence any male lineal descendant of Wasudeo Pundit, *alias* Bhau Maharaj."

In 1861 Summary Settlement was being proposed and Tatya Maharaj objected to its application to his possessions of the ground that they were held "under treaty." The Revenue Commissioner, Southern Division, on the 1st February 1862, referred to the Government of Bombay for decision under the Summary Settlement Reules XX (Clause C), the question whether Tatya Maharaj held any of his possession within the dominions of the British Government on political tenure. The Revenue Commissioner was informed in reply by letter dated the 6th March 1862 that His Excellency in Council

"does not consider that a *prima facie* case has been made out for excluding Tatya Maharaj's lands from the benefit of the Summary Settlement on the ground of their being held on political tenure. His Excellency in Council accordingly directs that the terms of the Summary Settlement be offered to Tatya Maharaj If he refuses to accept the unassailable title thus offered it will remain for further consideration whether any and what inquiry should be instituted into the title on which he holds the lands."

On the 28th March 1862 the Collector of Poona wrote to Tatya Maharaj requesting him to state in writing whether he agreed to the Summary Settlement being applied to his Inam holdings in British territory. He replied on the 29th March 1862 that since the time of his father the villages and lands had been continued to him through the friendship and favour of Government and this had been communicated in detail to the Agent for Sardars and the Revenue Commissioner, and continued: "In spite of it Government are passing the order and it cannot be helped. I therefore agree to the Summary Settlement being applied to the Inam villages and land, etc.....

In June 1862 Raoji Maharaj and Tatya Maharaj were served jointly by the Collector of Belgaum with formal notice giving them the option of either having the titles to their properties in the Belgaum District inquired into and adjudicated upon or of paying quit rent and *nazarana* and getting an absolute property in the holdings.

By letters dated respectively, the 14th and 25th August, 1862, Raoji Maharaj objected to paying quit rent and *nazarana* on the grounds that the titles had been already investigated by Government officers and that the holdings were guaranteed by

treaty. He asked that the notice might be withdrawn.

The Summary Settlement Act (Bom. Act II of 1863) was passed on the 9th April 1863.

On the 19th April 1863 the Collector of Belgaum informed Raoji that the Government had ruled that the Irams were not of such a nature as to preclude the application to them of the Summary Settlement Act (*supra*) and that it would, therefore, be applied.

By his reply dated the 10th June 1863 Raoji referred to the objections already put forward and stated that he was about to make a submission to Government in the matter.

On the 19th June 1863 the Collector of Belgaum again wrote to Raoji referring to the decision of Government that the Summary Settlement was applicable to his Inam holdings and informing him that notice had been served and that if he was unwilling to accept the Summary Settlement and desired an investigation into title under Act XI of 1852 he would have to furnish due security.

Raoji then, on the 6th July 1863, wrote setting out in detail his grounds of objection and submitting a prayer to Government that as the villages were guaranteed the title should not be investigated.

On the 2nd November 1863 the Revenue Commissioner, Southern Division, requested Colonel Etheridge, the Settlement Officer, Southern Division, "to prepare for submission to Government a comprehensive report indicating all the villages held by the family affected by the order contained in paragraph 3 of Government letter No. 860, dated 6th March 1862, and stating how the offer of Summary Settlement had been received by the holders."

Colonel Etheridge accordingly wrote to Raoji Maharaj on the 30th November 1863 and to Tatya Maharaj on the 2nd December 1863. As the result of his letters both Raoji and Tatya agreed to accept a Summary Settlement.

The Summary Settlement was accordingly applied to all the possessions of Raoji Maharaj and Tatya Maharaj in British India.

The Settlement was so applied without reference to or the consent or approval of His Highness the Maharaja of Kolapur.

In 1866 Tatya Maharaj died, and there were various claimants to his estate, one of whom was Baba Maharaj, who claimed to be an adopted son. The then Maharaja of Kolhapur was a minor and the British Government had assumed the administration of the State. The various claimants submitted their claims to British Government and the matter was referred to the Political Agent to report. Upon receipt of his report the Government of Bombay in the Political Department passed a Resolution No. 2105, dated the 24th June 1867, of which the following are the material paragraphs:—

"(12) The main question being whether the adoption should be recognised by Government, it is necessary first to obtain a clear idea as to the meaning and effect of its recognition by Government."

"(13) The recognition of the adoption can have effect merely as regards the right of the adopted son to succeed to the Inam lands, and here it must be mentioned that these lands are situated partly in British territory and partly in Kolhapur territory."

"(14) Now the lands in British territory have been included in the Summary Settlement under Bombay Act II of 1863 and the recognition by Government of the heir of the deceased Sirdar can, as regards these lands, have no meaning beyond a determination to whom the Government should primarily look for the payment of the *nazarana* commutation and quit rent due to Government under that Summary Settlement. As for the rights of any persons to succeed to these lands, whether by adoption or otherwise, their recognition by Government can have no effect whatever."

"(15) But as regards the holdings within the Kolhapur State, the recognition of the adoption by Government would have a distinct legal effect, inasmuch as under the laws of that principality the recognition by the Raja is essential to the validity of the adoption as entitling to continuance of the Inam holdings, and the Government is now in the place of the Raja."

The Resolution proceeded to order that the matter should be sent back to the Political Agent for a further report.

After receipt of the further report the Government of Bombay passed a final Resolution (No. 2610, dated the 21st November 1867) the material parts of which are as follows:—"The Governor in Council considers that the objections put forward by the various petitioners to the adoption of Wassoodeo Pandit (Baba Maharaj) by the late Tatya Maharaj have been satisfactorily disposed of. The adoption should, therefore, now be recognised on the part of the Kolhapur State....." "With reference to paragraph 26 of the Political Agent's report, care should be taken not to sanction any adoptions save from lineal male descendants of Shidesh-war Maharaj." (Paragraph 26 of that report dealt with a claim by the widow of a nephew of Tatya Maharaj that the right to adopt an heir rested with her.) This Resolution received the approval of the Secretary of State for India in Council in a despatch dated the 14th May 1868.

The acknowledged representatives of the family of Shri Sidheshwar Maharaj still bear the honorific title of "Maharaj" and are held in high reverence and esteem by His Highness the Maharaja of Kolhapur.

Baba Maharaj died in 1897 possessed of villages and lands both in British India and in Kolhapur, being those mentioned in the schedule aforesaid, the villages and lands in British India being part of those to which Summary Settlement was applied, as before stated. He left a Will whereby he appointed five trustees (one of whom declined to act) and directed his widow, Tai Maharaj, in certain events, which happened, to adopt a son. On the 28th June 1901 the widow purported to adopt Jagganath, whose adoption was supported by the four trustees who acted but did not receive the approval and sanction of His Highness the Maharaja of Kolhapur. On the 10th August 1901 the widow purported to adopt Bala Maharaj. His Highness the Maharaja approved of the latter adoption and sanctioned and recognised it. Jagganath filed a suit for a declaration that his adoption was valid; and it was ultimately decided by the Judicial Committee of the Privy Council in 1914, as already stated, that Jagganath was the validly adopted son of Baba Maharaj.

It was stated to the High Court in the present refererce that His Highness the Maharaja and Bala Maharaj contended that no adoption which had not received the sanction and approval of His Highness could confer a title to the property in question, and that succession to the same would have to be determined in accordarce with the terms of the guarantee in the treaties and the orders of Government based thereon, *i.e.*, the property in question should have to go to Bala Maharaj, whose adoption was sanctioned by His Highness.

The High Court held that it had jurisdition to entertain the reference, and the question referred was accordingly dealt with by Macleod, C. J., and Pratt and Fawcett, JJ. These learned Judges decided that the lands in question were not held either under treaty or on political tenure, and that the application of the Summary Settlement to the lands in question had been valid.

Reverting to the point as to jurisdiction under the Act of 1876, to which their Lordships have made reference earlier, they think that the High Court held rightly that it had jurisdiction to decide the question referred. This in substance turned on whether there was actually a claim against the Government relating to lands held under treaty, or as *saranjam* or on other political tenure. The Maharaja of Kolhapur had himself, in their Lordships' opinion, a claim coming within the language of the Act. He was seeking to have it declared that the lands in question were not subject to the Summary Settlement and should, therefore, go to Bala, whose adoption he had sanctioned. There was accordingly a claim against the Government, jurisdiction as to which under the Act of 1876 was excluded by section 4. this claim being that the lands were held under treaty or as *saranjam* or on other political tenure; and as the Maharaja's position and rights on the question of adoption were not affected by the result of the proceedings which were disposed of by

the decision of the Privy Council, for to these proceedings he had not been a party, the real question is whether power to answer the question referred to by the Government did not come to the High Court because the case was one of the cases excluded by section 4. Their Lordships agree with the High Court of Bombay in thinking that the claim in question was one of those excluded by section 4, and was, therefore, referable to that Court. They agree also with the conclusion at which the High Court arrived upon the merits.

They are of opinion that the nature of the title of Bhau Maharaj was really defined by the *sanad* of the 2nd August, 1818 and the later confirmatory *sanad* of 24th October 1919 referred to in the statement of the question laid before the High Court. In the first of these *sanads* Sir Thomas Munro, when settling the Southern Mahratha Country, which had fallen into the hands of the British Government, granted to Bhau three villages and a hamlet forming the bulk of the lands in question. The grant was made to Bhau as *Inam Dharmadaya* and was to be hereditary. The siginfication of such a grant is that it was made on grounds of religion, and not on political grounds. Their Lordships agree with the learned judges of the High Court that the mere fact that in occasional correspondence the grant is referred to as "*jagir*" or "*saranajam*", *i. e.*, political cannot derogate from the effect of the language of the grant itself. They also think that the question whether the tenure was political was one which was for determination by the Government under the provisions of the interpretation section (16) of the Summary Settlement Act II of 1863, and that, by treating the title as one to which the Act applied, the Government must be taken to have determined that the tenure was not political. It appears, moreover, from a formal letter which was before the High Court that on the 6th March 1862, just before the Summary Settlement Acts were passed, the Governor in Council had determined that no *prima facie* case had been made out for the exclusion of the lands from the settlement on the ground of their being held on political tenure.

Nor do their Lordships think that the lands can be properly said to have been held "under treaty." It is true that the treaty of 1827 referred to in the statement extended the guarantee of Bhau's title by the British Government to his descendants. But the correspondence with the Government at the time, also referred to in the statement, shows that Bhau's original title was not disturbed when action was taken against the Maharaja by the Government. Bhau, therefore, remained entitled under the terms of the original grant. Their Lordships agree on this point with the view taken of the effect of the treaty of 1827 by the learned Judges of the High Court.

As the result of the lands being thus brought under the Act of 1863 they became under section 2 the "heritable and transferable property of the holders, their heirs and assigns, without restriction as to adoption, collateral succession or transfer" in perpetuity.

It was, therefore, not only competent to the Bombay Government to refer the question they did to the High Court but the decision given on that question was well founded.

Their Lordships will humbly advise His Majesty that the appeals should be dismissed with costs.

Z. K. *Appeals dismissed.*

Solicitors for Appellants:—Messrs. *T. L. Wilson & Co.*

Solicitors for Respondent—Messrs. *Downer & Johnson.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 145 OF 1921.

May 8 1922.

Present:—Mr. Justice Gokul Prasad and Mr. Justice Stuart.

JETHU MISIR—DEFENDANT—APPELLANT

versus

GODAWARI DUTT AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O.

JETHU MISIR v. GODAWARI DUTT.

XXI, rr. 58, 63—*Decree for possession, failure to execute, effect of—Admission of decree-holder's title by judgment-debtor—Suit, fresh, whether barred—Adverse possession—Claim proceeding—Notice to judgment-debtor, absence of—Judgment-debtor, whether bound by order.*

Plaintiff obtained a decree for possession of a house against the defendant but failed to execute it as the latter admitted his title and paid the costs of the suit. Subsequently the defendant asserted an adverse title to the house and plaintiff again brought a suit for possession of the house:

Held, (1) that in view of the admission by the defendant of plaintiff's title subsequent to the decree in the previous suit the present suit was not barred by the provision contained in section 47 of the Civil Procedure Code;

(2) that defendant's possession after the admission made by him was not adverse to the plaintiff.

Where a judgment-debtor has no notice of any claim made by a third person to property attached in execution of the decree, he is not adversely affected by any order passed on the claim.

Mannu Lal v. *Harsukh Das*, 3 A. 233; 2 Ind. Dec. (N. S.) 99, followed

Second appeal from a decree of the District Judge, Allahabad, dated the 1st November 1920.

Mr. *S. D. Sinha*, for the Appellant.

Mr. *K. N. Malaviya*, for the Respondents.

JUDGMENT.—This is a defendant's appeal arising out of a suit for possession of a house.

The defence pleaded was (1) adverse possession (2) that as the plaintiffs' father had already obtained a decree for possession against the defendant and had failed to execute it, therefore, no second suit lay, and (3) that, when this house had been attached by one Baijnath a creditor of Godawari Dutt, the defendant appellant, put in an objection under O. XXI, r. 58 of the Civil Procedure Code, and succeeded in it and as Godawari Dutt brought no suit within one year under r. 63, so the title of the appellant to the property became absolute. All these pleas were found against the defendant by both the lower Courts which have decreed the claim. The defendant comes here in second appeal. The first plea argued before us was that of adverse possession. This is disposed of by the lower Appellate Court with the finding that Mania Lal, the former owner of the house, admitted the plaintiffs' title on the 15th of February 1908 when he sold the remaining portion of the house to the plaintiffs. The present defendant, Jethu, did not set up any title adverse to the plaintiffs independently in himself but claimed to be in possession with the permission of Mania Lal so that there was no adverse assertion of title by the present defendant up to the year 1907 when the suit between the present plaintiffs' father and Mania Lal was fought. It appears, however, that he did raise a question of adverse title in the year 1913 when he objected to the attachment and sale of this property in execution of the decree of Baijnath against Godawari Dutt. That portion of the claim was within 12 years from the date of the institution of the present suit. The plea of adverse possession was rightly repelled by the Court below and we disallow it.

The next question is that the present suit is not maintainable because of the previous suit of 1907 as the finding of the lower Appellate Court is that, after the decree of 1907, Mania Lal, the original owner of the house, admitted the plaintiffs' title and paid the costs of the suit. This was in 1908. In these circumstances we do not see how the present suit is barred by section 37 of the Code of Civil procedure. The then judgment-debtor admitted the plaintiffs' title and paid the costs of the litigation. The present suit is, however, based on the allegation that the defendant-appellant denies the plaintiffs' title and sets up a title in himself. Section 47 of the Civil Procedure Code is, therefore, no bar to the present suit.

The third point argued before us was that the title of the defendant-appellant had become complete because of the failure of Godawari Dutt, the then judgment-debtor to question the order passed under O. XXI, r. 58, Civil Procedure Code, by a suit under rule 63. There is nothing on this record to show that the judgment-debtor had any notice of the objection made by Jethu Misir and having regard to the case of *Mannu Lal* v. *Harsukh Das* (1), with which we see no reason to differ, the present suit is not time barred by r. 63. These are the

(1) 3 A. 233; 2 Ind. Dec. (N. S.) 99.

only points raised in this appeal. They have all failed. We, therefore, dismiss the appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

Z. K.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 163 OF 1922.

April 6, 1923.

Present:—Mr. Dalal, A. J. C.

DURGA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

JAMNA PRASAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 6 (a)—Contract Act (IX of 1872), s. 23—Reversionary right, transfer of—Possession not delivered—Future conveyance—English decisions, application of.

An immediate transfer by a next reversioner of his reversionary rights, being in contravention of section 6 (*a*) of the Transfer of Property Act, is unlawful and void with reference to section 23 of the Contract Act. [p. 112, col. 1.]

A transfer by a next reversioner of his reversionary rights, where the deed of transfer declares that the vendee has become absolute owner of the transferred property and been put in possession, is not to be interpreted as a contract for conveyance in future when the estate fell into possession, merely because immediate possession could not be given at the time of the transfer.

Harnath Kuar v. *Indar Bahadur Singh*, 71 Ind. Cas. 629; 50 I. A. 69; (1922) A. I. R. (P. C.) 403; 9 O. & A. L. R. 270; 9 O. L. J. 652; 44 M. L. J. 489; 37 C. L. J. 346; 45 A. 179; 27 C. W. N. 949; 18 L. W. 383; 26 O. C. 223; 33 M. L. T. 216 (P. C.), followed.

Bisheshar Dayal v. *Har Raj Kuar*, 66 Ind. Cas. 622; 8 O. L. J. 346; *Khurshaid Ali* v. *Rashid Husain*, 9 O. C. 331, *Raj Mohkam Singh* v. *Raja Rup Singh*, 15 A. 352; 20 I. A. 127; 6 Sar. P. C. J. 327; 17 Ind. Jur. 376; 7 Ind. Dec. (N. S.) 943 (P. C.), *Abdul Wahid Khan* v. *Shaluka Bibi*, 21 C. 496 at p. 502; 21 I. A. 26; 6 Sar. P. C. J. 399; Rafique and Jackson's P. C. No. 134; 10 Ind. Dec. (N. S.) 961 (P. C.) and *Shiam Sundar* v. *Dilganjan Singh*, 39 Ind. Cas. 540; 20 O. C. 155; 4 O. L. J. 380, distinguished.

The principle that an executant is bound *in foro conscientiae* to make good his promise when he obtains the estate in possession is not applicable to India. [p. 111, col. 1.]

Courts in India are bound to give effect to plain provisions of the Statute Law, instead of following a course of English decisions, which are based on long established practice rather than on principle. [p. 111, col. 2.]

Kakaralapudi Lakshmi Narayana v. *Kandukuri Veera Sarabha*, 29 Ind. Cas 241; 39 M. 554; 17 M. L. T. 419; 28 M. L. J. 650; (1915) M. W. N. 626, relied upon.

Second appeal against a decree of the District Judge, Rai Bareli, dated the 4th March 1921, setting aside the decree of the Subordinate Judge, Rai Bareli, dated the 12th January 1920.

Messrs. *Haider Husain* and *Bisheshar Nath Srivastava*, for the Appellants.

Mr. *Zahur Ahmad*, for the Respondents.

JUDGMENT.—Prag and Chandika, plaintiffs, purchasers from Biru, defendant, sued for possession of a one-fourth share of the property in suit. Their suit was dismissed by the Trial Court of the Subordinate Judge of Rai Bareli. The appeal of the plaintiffs was first dismissed on preliminary issues by the District Judge of Rai Bareli, but on remand by this Court on second appeal the plaintiffs' suit was ultimataly decreed by the lower Appellate Court. The defendants, Durga and Badal, have thereupon brought this second appeal.

The property in suit belonged to Ghissa; and the following pedigree will show his successors-in-interest and the dates of their deaths:—

GHISSA

Kali Charan, died 1897, widow *Musammat* Gulaba, died 28th October 1915.	Durga Prasad, died 1898. widow *Musammat* Menda, died February 1918
	Badri Prasad, died 1899, widow, *Musammat* Phulla died 1910.

The defendant Biru and one Narain were the next reversioners in equal degree to the property of Kali Charan, son of Ghissa and Badri Prasad his grandson. While the property was in the possession of *Musammat* Gulaba, widow of Kali Charan, and *Musammat* Menda, mother of Badri Prasad, they transferred the shares

in their possession—Menda to her brother Mewa Lal (defendant No. 2 here) and *Musammat* Gulaba to her son-in-law Sukhnandan. For the purposes of the appeal here there is a finding of fact binding on this Court that *Musammat* Menda was own mother of Badri Prasad and not a step mother. Biru and Narain had no means to start a protracted litigation and recover property from Sukhnandan or Mewa Lal, so on 13th December 1916 they sold half the property to the defendants Durga, and Badal, under a sale-deed (Exhibit C-4) for a sum of Rs. 2,000. At the time the estate of Kali Charan had fallen into possession, but *Musammat* Menda was alive. The vendors, however, did not accept *Musammat* Menda as Badri Prasad's own mother and claimed that she was a trespasser. No action was taken by the purchasers to oust Sukhnandan and *Musammat* Menda till after the death of *Musammat* Menda in February 1918. In March of that year the vendors and vendees applied for mutation and finally the names of Narain and Biru were entered. On 16th January 1919 Durga and Badal brought a civil suit against Biru and Narain for possession of the property sold to them. The copy of the order sheet (Exhibit C-2), dated 21st January 1919, shows that the defendants to this suit were called upon to file a written statement on 25th February while the hearing was fixed for the 27th. In the meantime Biru was run in for theft of a tree and put in the lock up. The plaintiff Chandika stood surety for him and got him released on 19th February. On 25th February the plaintiffs, Prag and Chandika, obtained a sale-deed of one-fourth of the property in suit, that is, half of Biru's share from Biru for a consideration of Rs. 1,000. The suit brought by Durga and Badal continued after that and on 7th March it was compromised and a decree was passed in favour of Durga and Badal against Biru and Narain for their claim with the exception of a certain grove, which they released under the compromise. There was also a suit by Biru, Narain, Durga and Badal against Mewa Lal and this was decreed on 19th November 1919 (decree Exhibit C26).

On 26th July 1919 Prag and Chandika brought the present suit against Biru, Mewa Lal, Durga and Badal for recovery of possession of one-fourth of the property in suit on the basis of the sale-deed of 25th February 1919. As stated above the suit was dismissed by the Trial Court and afterwards by the Court of Appeal. The District Judge held that the bargain evidenced by the sale in suit was hard and unconscionable and that it was obtained by the exercise of undue influence. These findings render the agreement voidable and so the sale in favour of the plaintiffs and consequently their suit failed. On second appeal a learned Judge of this Court disagreed with the findings of the lower Appellate Court and remanded the appeal to it for trial of the other issues. On this remand the learned District Judge held (1) that the sale in favour of the defendants, Durga and Badal, was vitiated by the provisions of section 6 (*a*) of the Transfer of Property Act and (2) that the compromise between Biru on one side and Durga and Badal on the other in the suit brought by Durga and Badal was collusive and so it did not operate as a bar against the plaintiffs' claim, as it would otherwise have done, under section 52 of the Transfer of Property Act.

These two findings are now attacked in appeal here by the defendants, Durga and Badal, who alone have appealed.

There was a third argument which, in my opinion, can no longer be urged. It was alleged that the consideration of the contract in favour of the plaintiffs was unlawful as it was opposed to public policy. The consideration of the sale was the probable expense of the litigation which Prag and Chandika had undertaken to launch against Mewa Lal and Sukhnandan. It was admitted that borrowing money for the purposes of litigation on a promise by the vendee to run a lawsuit was not unlawful. It was, however, urged that the contract became unlawful and against public policy because it was hard and unconscionable. It was pointed out that though the sale consideration was Rs. 1,000 the plaintiffs had spent nothing in litigation. I shall not enter into the merits of this issue because this Court has already held the contract not to be hard and unconscionable.

This Court has mentioned this argument in its judgment, dated 17th November 1921 and repelled it for reasons given therein. The same argument is advanced here again under the guise of the contract being contrary to public policy, but in essence it is the same.

It was argued on behalf of the appellants that the transfer in their favour was not an immediate sale, but an agreement to transfer property in future and that, therefore, the provisions of section 6 (*a*) of the Transfer of Property Act had no operation here. The following rulings were quoted in support :

Bisheshar Dayal v. *Har Raj Kuar* (1), *Kanhaiya Lal* v. *Gajadhar Prasad*, First Civil Appeal No. 79 of 1910 decided on 4th July 1910, *Khurshaid Ali* v. *Rashid Husain* (2), *Raja Mohkam Singh* v. *Raja Rup Singh* (3), *Abdul Wahid Khan* v. *Shalukz Bibi* (4). Except in the unreported case the bar of section 6 of the Transfer of Property Act was not considered in any of these cases. They all relate to the interpretation of the documents produced in those cases. As regards the unreported case the learned Judge who decided it held that the terms of the document produced before him showed that the transaction was in reality nothing more nor less than an agreement to convey property in future. It is true that he went on further to say "Agreements of this nature are not void because they happen to be made at a time when the interest of the executant is merely one in expectancy, and Courts in England as well as in this country have enforced them on the ground that the executant is bound *in foro conscientiæ* to make good his promise when he obtains an estate in possession." Whatever the law in England may be, it may be said with great respect that the principle will not be applicable in India. The same learned Judge (now Mr. Justice Lindsay) refused to apply this principle of equity some years later in 1917 in *Shiam Sundar* v. *Dilganjan Singh* (5). In the case reported as *Kakarlapudi Lakshmi Narayana* v. *Kandukuri Veera Sarabha* (6) the learned Chief Justice rightly said that Courts in India are bound to give effect to the plain provisions of the Statute Law, instead of following a course of English decisions, which are based on long established practice rather than on principle. On page 558* of the report the learned Chief Justice said: "On this question looked at apart from authority, I should not entertain any doubt as it seems futile to forbid such transfers of expectancies in contracts to transfer them are to be enforced as soon as the estate falls into possession." In my opinion the consideration of the sale-deed in favour of the defendants-appellants was unlawful because it was of such a nature that, if permitted, it would defeat the provisions of section 6 (*a*) of the Transfer of Property Act. (See section 23, Contract Act.)

It is true that in the documents there are some words that the parties to the contract shall take possession in equal shares after success in litigation, and that the vendors shall not compromise any suit without the permission of the transferees. At the same time there are other words making over possession immediately to the transferees from the date of the transfer. It is declared that the vendees had become absolute owners of half the property, over which they have been put in possession. If every such document where immediate possession cannot be given is to be interpreted as a contract for a conveyance in future, when the estate falls into possession, the definite object of section 6 (*a*) of the Transfer of Property Act would be frustrated. It would be possible to evade prohibition by representing that possession was not possible at the time of the transfer and could only

(1) 66 Ind. Cas. 622; 8 O. L. J. 346.
(2) 9 O. C. 331.
(3) 15 A. 352; 20 I. A. 127; 6 Sar. P. C. J. 327; 17 Ind. Jur. 376; 7 Ind. Dec. (N. S.) 943 (P. C.).
(4) 21 C. 496 at p. 502; 21 I. A. 26; 6 Sar. P. C. J. 399; Rafique and Jackson's P. C. No. 134; 10 Ind. Dec. (N. S.) 961 (P. C.).
(5) 39 Ind. Cas. 540; 20 O. C. 155; 4 O. L. J. 380.
(6) 29 Ind. Cas. 241; 39 M. 554; 17 M. L. T. 419; 23 M. L. J. 650; (1915) M. W. N. 626.

*Page of 30 M.—[*Ed.*]

take effect when the expectancy of the vendor matured into title. As regards the sale-deed in suit it has to be remembered that the estate of Kali Charan had already fallen into possesssion and there was no bar to the transfer of half of that estate. It was only Durga Prasad's estate which was in expectancy at the time because of the life-estate of *Musammat* Menda. As regards that property also the parties to the contract believed that *Musammat* Menda was a trespasser and not a rightful owner. In *Harnath Kuar* v. *Indar Bahadur Singh* (7) a Hindu next reversioner sold half his estate in reversion, declaring by the sale-deed that when he succeeds he would put the vendee in proprietary possession. Both the Courts in India and the Privy Council held this to be a transfer of an expectancy and, therefore, void under section 23 of the Contract Act. In this case possession was to be given when the estate fell into possession, yet the transaction was not treated as a contract for sale to take effect in future. I uphold the finding of the lower Appellate Court that what was sold to the defendants with respect to Durga Prasad's estate was a chance of reversion and that, therefore, the sale was invalid under section 6 (*a*) of the Transfer of Property Act and 23 of the Contract Act.

There is a finding of fact of the lower Appellate Court against the defendant-appellant that the compromise of 7th March 1919 was collusive. It was argued on behalf of the appellants that this was based on conjecture and not supported by any evidence. The learned Judge, however, has given satisfactory reasons in support. He has pointed out that Biru did enter into a contest by filing a written statement on 25th February and that he was won over by the defendants-appellants by the bribe of a grove which they released in his favour. A defence to the suit of the defendants-appellants was possible as regards half the property included in that suit because as regards that property the transfer was of an expectancy. A finding of fact based on sound reasons is binding on this Court.

All the three grounds of appeal are untenable and I dismiss this appeal with costs.

Appeal dismissed.

N. H.

(7) 71 Ind. Cas. 629; 50 I. A. 69; (1922) A. I. R. (P. C.) 403; 9 O. & A. L. R. 270; 9 O. L. J. 652; 44 M. L. J. 489; 37 C. L. J. 346; 45 A. 179; 27 C. W. N. 949; 18 L. W. 383; 26 O. C. 223; 33 M. L. T. 216 (P. C.).

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 303 OF 1919.

May 23, 1922.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Gokul Prasad.

SANWAL DAS—PLAINTIFF—APPELLANT

versus

SECRETARY OF STATE—DEFENDANT—RESPONDENT.

Land Acquisition Act (I of 1894), ss. 20, 31—Apportionment of compensation—Secretary of State, whether party—Parties interested.

Under section 20 (*c*) of the Land Acquisition Act, the Secretary of State is only interested in the amount of compensation which the Collector, or the Court, on reference by the Collector, awards. He is not interested as a party in the distribution or apportionment of the compensation. His interest ceases when he has placed at the disposal of the Court the total amount of compensation. Any dispute as to the distribution or apportionment of the amount must be fought out between the parties who claim a share in the compensation. [p. 113, col. 1.]

First appeal from a decree of the District Judge, Cawnpore.

Messrs. *G. W. Dillon* and *S. N. Mukerji*, for the Appellant.

Mr. *Lalit Mohan Banerji*, for the Respondent.

JUDGMENT.—This appeal is connected with First Appeal No. 258 of 1919 which we have just decided. It is an appeal by Sanwal Das, the owner of part of the land and he claims that he was entitled to the whole of the compensation for 1 *bigha* 2 *biswas* of land and the price of the trees and buildings standing thereon. His claim is directed against Debi Din who has been awarded compensation for the major portion of this land. The learned Judge did come to the conclusion that the claim of Sanwal Das was allowable

against Ganga Prasad and Debi Din (*zemindars*) but owing to a mistake has allowed him compensation for 12 *biswas* 15 *biswansis* only and has further omitted to give him Rs. 99 odd on account of the trees and buildings. He has allowed the balance to Debi Din which is against the finding he has arrived at. Sanwal Das in this appeal has made the Secretary of State for India in Council the only respondent and has not impleaded Debi Din against whom his main relief is directed. So far as the Secretary of State for India in Council is concerned, we have already given our reasons in detail in the connected appeal for coming to the conclusion that the total amount of compensation awarded was correct, so that this appeal on the question of the inadequacy of compensation must fail. The relief claimed is really sought against Debi Din but we cannot grant it because Debi Din is not a party to this appeal. Under section 20 (*c*) of the Land Acquisition Act, the Secretary of State is only interested in the amount of compensation which the Collector or the Court on reference by the Collector awards. He is not interested as a party in the distribution or apportionment of the compensation, see section 31 (2) proviso 3. His interest ceases when he has placed at the disposal of the Court the total amount of compensation. As Deb Din is no party to this appeal and cannot be made a party now because of the bar of limitation, we cannot help the appellant. It was his own fault that he did not implead Debi Din against whom his claim was really directed. Under these circumstances we dismiss this appeal also with costs including in this Court fees on the higher scale

Appeal dismissed.

Z. K.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1608 OF 1920.

May 8, 1922.

Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

SURAT SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

UMRAO SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 144, 148—Mortgage—Redemption by co-mortgagor—Suit by co-mortgagor to recover his share—Suit to recover property subject to charge—Limitation:

Where one of several co-mortgagors redeems a mortgage, the other co-mortgagors can bring a suit for redemption against the redeeming mortgagor within sixty years from the date of the original mortgage. [p. 114, col. 2.]

Ashjaq Ahmad v. *Wazir Ali*, 14 A. 1; A. W. N. (1891) 211; 11 A. 423; 7 Ind. Dec. (N. S.) 373, followed.

The period for the redemption of a charge is twelve years and not sixty years as in the case of a mortgage. [p. 115, col. 1.]

An award directed that plaintiff was entitled to obtain a certain share of property "A" from the defendant on payment of a proportionate share of the mortgage money paid by the defendant for redemption of the property and a certain share of property "B" on payment of a certain sum of money to the defendant. In a suit by the plaintiff to recover the respective shares of the properties from the defendant:

Held, (1) that in respect of his share in property "A" plaintiff had a period of sixty years from the date of the original mortgage within which to bring a suit for its recovery; [p. 114, col. 2.]

(2) that in respect of his share in property "B" defendant had a possessory charge on it for the sum made payable to him on the award, and the plaintiff had, therefore, twelve years from the date of the award to sue for its recovery. [p. 115, col. 1.]

Second appeal from a decree of the District Judge, Jhansi, dated the 31st of July 1920.

Messrs. *P. L. Banerji* and *Mangal Prasad Bhargawa*, for the Appellants.

Messrs. *E. A. Howard* and *K. R. Dang*, for the Respondents

JUDGMENT.—The only question with which we are concerned in this second appeal is the question of limitation. It arose in the following way. It seems that two cousins named Sughar Singh and Kesari Singh were the owners jointly of a 1 anna 7 pie 10 *karant* share in the village of Atagaon. It has been found

that this property was joint family property.

The plaintiffs in the present suit are the descendants of Sughar Singh, while the principal contesting defendants are the descendants of Kesari Singh.

In the year 1872 it is found that Kesari Singh as head of the joint family made a mortgage with possession of a 9 pie 15 *karant* share out of the joint share already mentioned. This mortgage was made in favour of Sughar Singh son of Risal Singh.

The Settlement of the district took place in the year 1885 and it is shown that after Kesari Singh's death the entries in the revenue papers stood as follows with regard to the 1 anna 7 pie 10 *karant* share above mentioned:—One-half of this share was entered in the name of a lady called Mohan Kunwar while the other half was recorded in the name of Arjun Singh and Durjan Singh who are the sons of Kesari Singh.

We have no clear information as to who the lady Mohan Kunwar was.

It appears that in the year 1885, however, a dispute arose between the two branches of this family. An agreement to refer to arbitration was executed and we have before us that agreement and the award which was made by the Arbitrators on the 23rd December 1885. It is this award really which determined the rights of the parties and it is on terms of this award that the present litigation must be decided.

The arbitrators laid down in that award.

(1) that the descendants of Sughar Singh (now represented by the plaintiffs) would be entitled to half of the 9 pie 5 *karant* share which has been mortgaged on payment of one-half of the mortgage money;

(2) As regards the remaining 9 pie 15 *karant* share which had formerly stood in the name of Mohan Kunwar, the descendants of Sughar Singh (now the plaintiffs) were to be entitled to recover half of this share on payment to Arjun Singh of a sum of Rs. 150. It is an admitted fact that the share which was mortgaged in the year 1872 was redeemed in the year 1904 by proceedings which were taken under the special Bundelkhand Act, and it is established that that redemption was obtained on application made to the Special Judge by the defendants. It is further established that the Special Judge held that the mortgage had been satisfied by the appropriation of the usufruct and that no sum was payable for redemption.

The defendants set up limitation as regards this part of the claim but on the rulings of this Court we think both the Courts below were right in holding that so far as this portion of the property in dispute is concerned, the plaintiffs' claim was within time. It has been held by this Court that where one of several co-mortgagors redeems a mortgage, the other co-mortgagors can bring a suit for redemption against the redeeming mortgagor within sixty years from the date of the original mortgage. That is laid down in the case reported as *Ashfaq Ahmad* v. *Wazir Ali* (1).

We have it that the date of the mortgage is the 12th of June 1872 and consequently this suit was well within the statutory period of sixty years.

As regards the other portion of the property in dispute, however, the situation appears to us to be quite different. We have pointed out that the arbitrators in their award of the 23rd December 1885 stated that the descendants of Sughar Singh could obtain possession of a half share of the remaining 9 pie 15 *karants* on payment of the sum of Rs. 150 to Arjun Singh.

There is nothing on the record to show how this sum of money came to be payable to Arjun Singh or what was the nature of Arjun Singh's claim against this property which the arbitrators recognized by their award, but it seems to us that the award on this part of the case may properly be treated as declaring that Arjun Singh was entitled to retain possession of a half share in 9 pies 15 *karants* as security for the sum of Rs. 150.

In their plaint the plaintiffs admit that they have never paid this sum of Rs. 150 to Arjun Singh but they claim their right

(1) 14 A. 1; A. W. N. (1891); 211; 11 A. 423; 7 Ind. Dec. (N. S.) 373.

to pay it now and obtain redemption saying that they are mortgagors of this portion of the property while Arjun Singh is the mortgagee. If that were a correct statement of the relations between the parties, then no doubt the suit brought by these plaintiffs, so far as this portion of the property is concerned would be well within time. But we are unable to find in the plaintiffs' favour that they are the mortgagors and that Arjun Singh or his representatives are the mortgagees of this portion of the property. We have said already that all we can find is that Arjun Singh was declared to have a possessory charge of this portion of the property on the basis of the award which was made on the 23rd December 1885. Therefore, the plaintiffs had a right to redeem this charge and the period for redemption of a charge is 12 years and not 60 years as in the case of a mortgage.

Both the Courts below in dealing with the question of limitation have treated the case as if it were one which is governed by Art. 113 of the Schedule to the Limitation Act. That Article provides the period of limitation for specific performance of a contract. In our opinion this has got nothing whatever to do with the present case. The award which declared the rights of the parties is in no sense a contract between the parties for which specific performance could be sought. It follows, therefore, that this appeal must succeed in part. We are clearly of opinion that as regards the property referred to in paragraph 5 (*b*) of the plaint the claim of the plaintiffs is time-barred. As regards the other property, for the reasons we have already given, the claim was within time and the decree of the Court below is affirmed. We, therefore, allow the appeal in part and direct the plaintiffs' claim to be dismissed with regard to the property specified in clause (*b*) of paragraph 11 of the plaint. The parties will bear their own costs in all three Courts.

Appeal partly allowed.

Z. K.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 135 OF 1922.

December 12, 1922.

Present:—Mr. Daniels, A. J. C.

BINDA PRASAD—DEFENDANT—APPLICANT

versus

BANARSI DAS AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115—Revision, application for—Inordinate delay.

An application for revision made more than a year after the order complained of was passed, cannot be entertained unless some good reason can be shown for the delay.

Application for revision of an order of the Subordinate Judge, Hardoi, dated the 25th August 1921.

Messrs. *Ram Prasad* and *Girja Saran Lal*, for the Applicant.

Mr. *A. P. Sen*, for the Opposite Party.

JUDGMENT.—This is an application for revision of an order rejecting objections to an award made in a pending suit on the ground mainly that the Court did not grant an adjournment to the applicant to produce his evidence. The order rejecting these objections was passed on 31st August 1921. The present application was filed on 23rd September 1922, more than a year afterward and after the decree based on the award had been passed and executed. The applicant offers no explanation whatever for the inordinate delay with which the application has been filed, and this alone is a sufficient reason for dismissing it without entering into the merits. I am not prepared to entertain an application for revision made more than a year after the order complained of was passed unless some good reason can be shown for the delay and I accordingly dismiss this application with costs.

Revision rejected.

W. C. A.

MOLAR *v.* KANAHAYA LAL.

LAHORE HIGH COURT.

MISCELLANEOUS APPLICATION No. 500 OF 1921 IN
CIVIL APPEAL NO. 2480 OF 1921.
March 24, 1922.
Present:—Mr. Justice LeRossignol.
MOLAR—PLAINTIFF—APPELLANT
—PETITIONER
versus
KANAHAYA LAL AND OTHERS—
DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIX, r. 6, O. XLI, r. 6—Attachment in execution—Suit for declaration—Dismissal—Appeal—Stay of sale—Injunction.

Where the suit of a person for declaration of title to property attached in execution of a decree between third parties is dismissed and he prefers an appeal, he cannot ask for stay of sale under O. XLI, r. 6 of the Civil Procedure Code as that provision is applicable only where the appeal is pending against the decree which is to be executed. Such a person can, however, take action under O. XXXIX of the Code and pray for a temporary injunction.

Application under O. XLI, r. 5, Act V of 1908, for stay of execution proceedings, in Case No. 144 of 1918, in the Court of the Senior Subordinate Judge, Delhi, and in Case No. 4 of 1915, in the Court of the District Judge, Delhi, pending the decision of the appeal case noted above by the High Court.

Lala *Balwant Rai*, for the Petitioner.
Mr. *Badr-ud-din Qureshi* and Lala *Sardha Ram*, for the Respondents.

ORDER.—The petitioner claimed a portion of a house against which two sets of plaintiffs had obtained decrees on mortgages executed by the ostensible owners.

The petitioner lodged objections in execution and on their failure instituted a suit for declaration of his title, failing in that, he has lodged an appeal in this Court and now asks for stay of sale in the decrees to which he is not a party.

His Counsel relies on O. XLI, r. 6 but that applies not to the present case, but only to cases where an appeal is pend-

ing from the decree which is to be executed.

Such is not the case here. The petitioner could have taken action under O. XXXIX and prayed for a temporary injunction, but he has not taken that course and if he had, I do not think, having regard to the convenience of both sides, that the balance would incline in favour of stay of sale.

The petitioner's case is *prima facie* a very weak one and respondents are willing to risk the success of his appeal and all that that implies.

I dismiss the petition with costs.

Petition dismissed.

N. H.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL NO. 29 OF 1922.
October 5, 1922.
Present:—Mr. Daniels, A. J. C.
BINDA PRASAD—DECREE HOLDER—
APPELLANT
versus
Babu BANARSI DAS—JUDGMENT-DEBTOR
—RESPONDENT.

Pre-emption—Decree in pre-emption suit—Deposit of pre-emption money—Costs deposited beyond time—Compliance with pre-emption decree—Oudh Laws Act (XVIII of 1876), s. 15.

A obtained a pre-emption decree with costs subject to payment of pre-emption money, which he deposited duly, but later attached and withdrew out of it the amount awarded to him on account of costs. The Appellate Court increased the amount of pre-emption money ordering the parties to bear their own costs in the suit and gave fresh period to *A*, to deposit the balance of the pre-emption money fixed by it, deducting the amount already deposited. *A* complied with the order within time as regards the balance of pre-emption money but the amount which he had withdrawn on account of his costs was deposited

by him after time when the discrepancy was brought to his notice:

Held, that it was sufficient compliance with the decree to entitle *A* to be put in possession of the property.

Ali Husain v. *Amin Ullah*, 15 Ind. Cas. 337; 34 A. 596; 10 A. L. J 153 and *Bhagwana* v. *Goru* 6 Ind. Cas. 954; 56 P. R. 1910; 133 P. L. R. 1910, referred to.

Appeal against an order of the Additional Subordinate Judge, Hardoi, dated the 17th May 1922, confirming that of the Munsif, Bilgram, dated the 1st September 1921.

Mr *Girja Saran Lal*, for the Appellant.

Mr. *Ram Bharose Lal*, for the Respondent.

JUDGMENT.—This is a second appeal in connection with an application under section 144, Civil Procedure Code. The respondent obtained a pre-emption decree subject to payment of Rs. 80 which he duly deposited. He was awarded his costs by the Court of first instance and he subsequently attached and withdrew on account of the amount due to him for costs a sum of Rs. 22 out of the amount he had deposited. An appeal was filed against the decree and the final decree of this Court increased the amount payable for the property to Rs. 106-6-0 and directed "that the plaintiff do pay into Court the balance within one month from the date of this decree after deducting what had already been deposited by him in compliance with the decree of the Court below." He accordingly paid the balance of Rs. 26-6-0 and obtained possession of the property. The appellant's contention is that this was not a sufficient compliance with the decree, that the whole suit should stand dismissed with costs and that the appellant is entitled to recover possession of the property. It may be noted that under the decree both parties were to pay their own costs in the event of the plaintiff complying with the decree. On the matter being brought to notice the plaintiff paid in the amount of Rs. 22 which he had withdrawn but not within the one month allowed by the decree. Both the Courts below have held that there was a sufficient compliance with the decree to entitle the plaintiff to be put in possession of the property. They cite a number of authorities in support of this view. Two later authorities on the same side have also been cited before me, namely, *Ali Husain* v. *Amin Ullah* (1) and *Bhagwana* v *Goru* (2). No authority to the contrary has been shown. There is I believe no case of this Court directly in point but I agree with the Courts below in accepting the view which has been consistently taken on this point by the Allahabad High Court. The appellant seeks to differentiate these rulings by the fact that in Oudh the right of pre-emption is a statutory right and payment is made in accordance with section 15 of the Oudh Laws Act. This, however, does not affect the question. Section 15 says that the amount due must be paid into Court. In fact it was paid into Court although the plaintiff treating it as money in deposit to the credit of the defendant subsequently withdrew part of it on account of costs due to him in the same case.

The appeal fails and it is accordingly dismissed with costs.

N. H.

Appeal dismissed.

(1) 15 Ind. Cas. 337; 34 A. 596; 10 A. L. J. 153.
(2) 6 Ind. Cas. 954; 56 P. R. 1910; 133 P. L. R. 1910.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 486 OF 1920.

April 3, 1922.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Shah.

YEKNATH NARAYAN KULKARNI—PLAINTIFF—APPELLANT

versus

LAXMIBAI KESHO GOPAL—DEFENDANT—RESPONDENT.

Hindu Law—Bombay, Presidency — Widow

YEKNATH NARAYAN KULKARNI v. LAXMIBAI KESHO GOPAL.

succeeding as gotraja sapinda— *Adoption, power of.*

In the Bombay Presidency a Hindu widow who succeeds to an estate not her husband's but as a *gotraja sapinda* of the last male holder, and in consequence of the absence of nearer heirs, cannot make a valid adoption so as to defeat the rights of reversioners. [p. 120, col. 2.]

Ramkrishna v. *Shamrao*, 26 B. 526; 4 Bom. L. R. 315, *Madana Mohana Ananga Bheema Deo* v. *Purushothama Ananga Bheema Deo*, 46 Ind. Cas. 481; 20 Bom. L. R. 1041 at p. 1046; 35 M. L. J. 138; 5 P. L. W. 179; 8 L. W. 167; 16 A. L. J. 725; (1918) M. W. N. 621; 24 M. L. T. 231; 28 C. L. J. 403; 41 M. 855; 23 C. W. N. 177; 45 I. A. 156 (P. C.), *Datto Govind Kulkarni* v. *Pandurang Vinayak*, 32 B. 499; 10 Bom. L. R. 692 and *Lallubhai Bapubhai* v. *Cassibai*, 7 I. A. 212; 5 B. 110; 4 Sar. P. C. J. 164; 3 Suth. P. C. J. 795; 4 Ind. Jur. 533; 3 Shome L. R. 245; 7 C. L. R. 445; 3 Ind. Dec. (N. S.) 75 (P. C.), followed.

Yadao v. *Namdeo*, 64 Ind. Cas. 536; 48 I. A. 513; 24 Bom. L. R. 609; 17 N. L. R. 145; 30 M. L. T. 53; 26 C. W. N. 393; 42 M. L. J. 219; 15 L. W. 565; 20 A. L. J. 481; 49 C. 1; (1922) A. I, R. (B.) 216 (P. C.) and *Mallappa* v. *Hanmappa*, 55 Ind. Cas. 814; 44 B. 297; 22 Bom. L. R. 203, distinguished.

First appeal from the decision of the First Class Subordinate Judge at Satara, in Suit No. 115 of 1919.

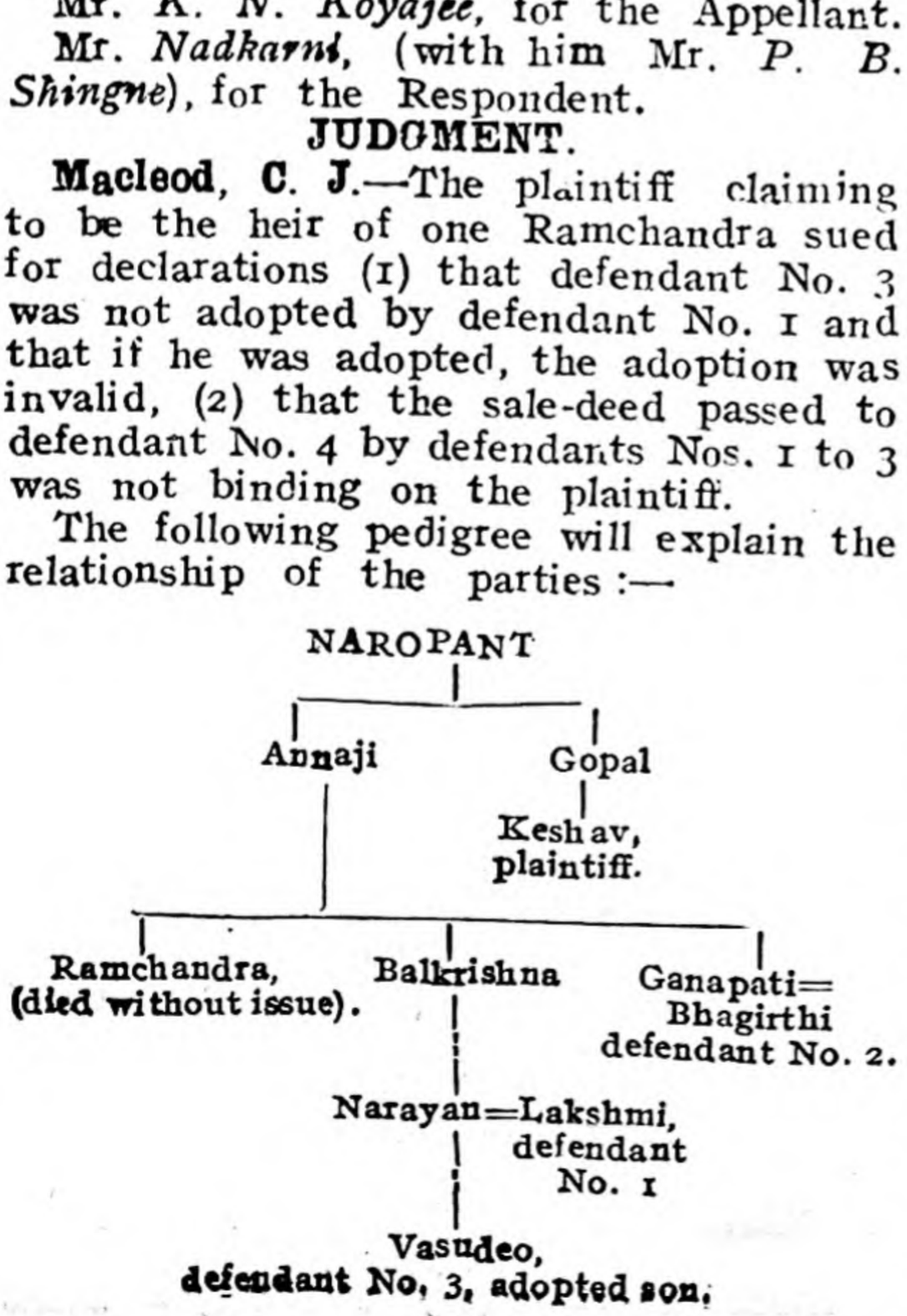
Mr. *K. N. Koyajee*, for the Appellant.

Mr. *Nadkarni*, (with him Mr. *P. B. Shingne*), for the Respondent.

JUDGMENT.

Macleod, C. J.—The plaintiff claiming to be the heir of one Ramchandra sued for declarations (1) that defendant No. 3 was not adopted by defendant No. 1 and that if he was adopted, the adoption was invalid, (2) that the sale-deed passed to defendant No. 4 by defendants Nos. 1 to 3 was not binding on the plaintiff.

The following pedigree will explain the relationship of the parties :—



Annaji died in the first half of 1899 leaving him surviving his son Ramchandra, his grandson Narayan by a predeceased son Balkrishna and Bhagirthibai the widow of a predeceased son Ganapati. Ramchandra and Narayan died on the 1st of November 1899. If Narayan survived Ramchandra then he would be the last male holder of the family property, and his widow Lakshmibai would have taken a widow's estate. In 1915, she adopted the present defendant No. 3. The plaintiff who was a separated nephew of Annaji filed this suit in 1919 against Lakshmibai, Bhagirthibai, the third defendant and the fourth defendant, an assignee from the third defendant. He contended that the property belonged to his cousin Ramchandra; that on Ramchandra's death Bhagirthibai as the widow of Ganapati, a *gotraja sapinda*, succeeded, while Lakshmi had only a right to maintenance, and had, therefore, no right to adopt the third defendant.

The learned Judge who decided the case unfortunately did not see the witnesses as the evidence was recorded by his predecessor. Therefore, in dealing with the question of fact he was in no better position than we are, as we have the same written record before us as the learned Judge. He came to the conclusion on the evidence that Ramchandra died last. The evidence of Exhibit 53 and Exhibit 55 supports the story that Ramchandra died last while the evidence of Exhibits 61, 62, 64, 66 and 67 supports the defendants' case. It must be remembered that all these witnesses were talking of what happened twenty years ago, and all of them were likely to make mistakes quite honestly. But the plaintiff placed great reliance on the Village Death Register which showed that Narayan died on the 1st November and Ramchandra on 2nd November. Now it is admitted that both of them died on the 1st, one early in the morning, the other in the afternoon, and the evidence of the defendants' witnesses shows that they were both cremated on the same day, so that in any event the Register is incorrect. I do not see any reason why the Court should attach such importance to the Register, as to hold that what it states must be absolutely correct. When a village has been attacked by an

epidemic of plague, it is probable that all the officials would be fully occupied, and it may very well be that the information they received with regard to births and deaths would not be accurately recorded.

On a careful perusal of the evidence, therefore, I do not see any reason why we should believe the witnesses for the plaintiff rather than the witnesses for the defendants, while I may point out that one of the witnesses, Exhibit 55, for the plaintiff actually went so far as to say that Ramchandra died at least two days after Narayan. Thereafter, the name of Lakshmibai was entered in the Vatan Register, but the suggested explanation of the preference given to her is not sufficiently convincing. It is just as probable that Lakshmi was considered by the authorities to be the rightful heir as the widow of the last male holder, as that the daughter-in-law of the senior son was preferred to the widow of the junior son. It seems to me, therefore, that as we are in the same position with regard to the appreciation of evidence as the learned Judge, there is no sufficient reason for holding on the evidence that Ramchandra died last. I think, that some importance must be given to the fact that Narayan was considerably the younger man. He was only eighteen compared with Ramchandra who was sixty—therefore, when the evidence on the question who died first is so evenly balanced I think, we are entitled to say that the probabilities are in favour of the younger man surviving the elder.

That is also a desirable conclusion to arrive at as otherwise the property would go away from the family. Our finding that Narayan died last is sufficient to dispose of the case. But an interesting question was raised, whether if Ramchandra died last, the adoption of the third defendant by Lakshmi could defeat the rights of the plaintiff. In *Ramkrishna* v. *Shamrao* (1) it was decided that where a Hindu dies leaving a widow and a son, and that son himself dies leaving a natural born or adopted son or leaving no sons but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and can never afterwards be revived. That decision was approved by the Privy Council in *Madana Mohana Ananga Bheema Deo* v. *Purushotha ma Ananga Bheema Deo* (2).

Then in *Datto Govind Kulkarni* v. *Pandurang Vinayak* (3) it was held, that a Hindu widow who succeeds to an estate not her husband's but as a *gotraja sapinda* of the last male holder under the rule established by *Lallubhai Bapubhai* v. *Cassibai* (4), and in consequence of the absence of nearer heirs, cannot make a valid adoption.

That decision would be binding upon us unless it has been reversed. But that decision was based on the decision in *Ramkrishna* v. *Shamrao* (1) which, as I have already stated, has since been approved by the Privy Council.

The appellants, however, relied on the case of *Yadao* v. *Namdeo* (5). There was a joint Hindu family consisting of Pundlik, his cousin Namdeo, and the two sons of Namdeo. On Pundlik's death his senior widow, Champabai, acting under the authority of her husband, adopted Pandurang, one of Namdeo's sons. Pandurang died in childhood unmarried, but it was held that at the time of his adoption there was a separation between Pandurang on the one hand, and Namdeo and his remaining son on the other. On his death, therefore, his estate vested in Champabai who then adopted the plaintiff. Namdeo disputed the capacity of Champabai to adopt but it was held that, as her husband had not forbidden her to adopt if the boy named was not available or died, she had the power to adopt the plaintiff. The head-note to the case says:

"In the Maratha country of the Bombay

(1) 26 B. 526; 4 Bom. L. R. 315.

(2) 46 Ind. Cas. 481; 20 Bom. L. R. 1041 at p. 1046; 35 M. L. J. 138; 5 P. L. W. 179; 8 L. W. 167; 16 A. L. J. 725; (1918) M. W. N. 621; 24 M. L. T. 231; 28 C. L. J. 403; 41 M. 855; 23 C. W. N. 177; 45 I. A. 156 (P. C.).

(3) 32 B. 499; 10 Bom. L. R. 692.

(4) 7 I. A. 212; 5 B. 110; 4 Sar. P. C. J. 164; 3 Suth. P. C. J. 795; 4 Ind. Jur. 533; 3 Shome L. R. 245; 7 C. L. R. 445; 3 Ind. Dec. (N. S.) 75 (P. C.).

(5) 64 Ind. Cas. 536; 48 I. A. 513; 24 Bom. L. R. 609; 17 N. L. R. 145; 30 M. L. T. 53; 26 C. W. N. 393; 42 M. L. J. 219; 13 L. W. 565; 20 A. L. J. 481; 49 C. 1; (1922) A. I. R. (P.) 216 (P. C.).

Presidency and in Gujarat a Hindu widow whose husband has not expressly forbidden her to adopt a son to him, has power to do so, without the consent of her husband's kinsmen, whether or not her husband's estate is vested in her, and whether he died joint or separate in family."

The Bombay Full Bench decisions in *Ramji* v. *Ghamau* (6) and *Dinkar Sitaram Prabhu* v. *Ganesh Shivram Prabhu* (7) were disapproved. In those cases the widow of a deceased co-parcener who had not the family estate vested in her and whose husband was not separated at the time of his death sought to adopt without the authority of her husband and without the consent of the surviving co-parceners. The case of an adoption by a widow who has succeeded to the estate of her son, and she can only do so, if he was separated from the family, would appear to be different. By such an adoption the widow does not bring a new member into the family, she merely endangers the expectations of the reversioners. Their Lordships, however, appear to have considered the question of the validity of an adoption by a Hindu widow made as a religious duty to her husband apart from the question whether the adopted son would acquire thereby any rights to property, so that in the event of a case coming before this Court in which surviving co parceners dispute an adoption by the widow of a deceased co-parcener, the question at issue will probably be, whether the adopted son acquired, by virtue of his adoption, any rights in the joint family property and not whether the adoption was valid.

In *Mallappa* v. *Hanmappa* (8) the facts were very similar to the facts in *Yadao* v. *Namdeo* (5) except that the deceased son was the natural son of the husband and not an adopted son. It was decided that the rights of the widow to adopt did not definitely come to an end, because a natural son was born, so that if that natural son died without leaving a son or a widow and the mother succeeded as his heiress, her rights to adopt to her husband which had been in suspense revived. Then in *Dattatraya Bhimrao* v. *Gangabai Ganeshbhat* (9) my brother Shah expressed the opinion, that the principle underlying the ruling in *Ramkrishna* v. *Shamrao* (1), and *Datto Govind Kulkarni* v. *Pandurang Vinayak* (3) was not in any way affected by the observation in *Yadao* v. *Namdeo* (5).

It cannot be said, therefore, that the decision of this Court that a widow of a *gotraja sapinda* cannot adopt *so as to defeat the rights of the reversioners* has in any way been shaken by the decision in *Yadao* v. *Namdeo* (5).

If, therefore, Bhagirathi, though she took a life-estate as a widow of a *gotraja sapinda*, had no power to adopt so as to defeat the rights of the reversioners, it equally follows that Lakshmi, who in the lifetime of Baghirathi had only a right of maintenance, had no power to adopt so as to exclude the reversioners. The question whether these widows could have adopted so as to secure religious benefit to their husbands is an entirely different question from the one whether by such adoption they could defeat rights of inheritance. We think, therefore, that the appeal must be allowed and the plaintiff's suit dismissed with costs throughout.

Shah, J.—I concur.

N. H. *Appeal allowed.*

(6) 6 B. 498; 6 Ind. Jur. 587; 3 Ind. Dec. (N. S.) 787 (F. B.).

(7) 6 B. 505; 3 Ind. Dec. (N. S.) 792 (F. B.).

(8) 55 Ind. Cas. 814; 44 B. 297; 22 Bom. L. R. 203.

(9) 77 Ind. Cas. 17; 24 Bom. L. R. 69 at p. 72; 46 B. 541; (1922) A. I. R. (B.) 321.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 310 OF 1922.

July 4, 1923.

Present:—Mr. Wazir Hasan, A. J. C.

Babu RAM NARESH SINGH—PLAINTIFF —APPELLANT

versus

DALPAT SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Oudh Rent Act (*XXII of* 1886), *ss.* 3 (10), 48—*Tenant, who is*—"*Heir of tenant*", *whether includes heir of successor of tenant;*

RAM NARESH SINGH v. DALPAT SINGH.

The heir of a tenant who succeeds the tenant becomes "tenant" within the definition of the term in section 3 (10) of the Oudh Rent Act. Therefore when the heir of a tenant has succeeded to the tenancy, his heir becomes "the heir of a tenant" within the meaning of section 48 of the Act and is entitled to the protection of that section.

The expression the "heir of a tenant" in section 48 of the Oudh Rent Act does not exclude the heir of the heir of a tenant. The word "heir" is used to denote the sense of representation of the first tenant through his successors in inheritance for the whole term of the tenancy.

Second appeal against a decree of the Subordinate Judge, Sultanpur, dated the 17th August 1922, reversing a decree of the Munsif, Sultanpur, dated the 29th November 1921.

Mr. *A. P. Sen*, for the Appellant.

Messrs. *Bisheshar Nath* and *Radha Krishna Srivastava*, for the Respondents.

JUDGMENT.—This is an appeal from the decree of the Subordinate Judge of Sultanpur dated the 17th August 1922, which reversed the decree of the Munsif of the same place dated the 29th November 1921. The appellant's suit was decreed by the last mentioned Court. The suit was one for possession of a cultivatory holding which was originally under the tenancy of one Sukhdeo Singh. He died in November 1919. It is common ground that Sukhdeo Singh died during the currency of the tenancy and a portion of the 7 years term still remained unexpired at his death. It is also common ground that he was succeeded by his son, Bikramajit Singh. Bikramajit Singh died within a month of the death of his father. The holding was since the death of Bikramajit Singh in the possession of Dalpat Singh and Pirthi Singh, the defendants to the suit out of wich this appeal has arisen.

The plaintiff's case was that the defendants were trespassers. The defence with which I am now concerned in this appeal was to the effect that they or at least one of them was in occupation of the holding as a matter of right in virtue of the provisions of section 48 of the Oudh Rent Act (XXII of 1886.) Dalpat Singh and Pirthi Singh were collateral relations of Sukhdeo Singh. The finding of the lower Appellate Court is that Pirthi Singh was joint in cultivation both with Sukhdeo Singh and his son Bikramajit Singh. This being so, the conclusion of law arrived at by the Court below is that Pirthi Singh was lawfully in possession of the holding under the provisions of section 48 of the Oudh Rent Act. For the purpose of this appeal we must take the finding of fact arrived at by the lower Appellate Court as limited to this that Pirthi Singh was sharing in the cultivation of the holding with Bikramjit Singh, son of Sukhdeo Singh.

The learned Counsel for the appellant argued that Pirthi Singh was not entitled to the occupation of the holding because Bikramajit Singh, with whom he was sharing in the cultivation of the holding was not a tenant but only the heir of a tenant. I do not agree with this construction of section 48. The word tenant is defined in sub-section (10) of section 3 of the Oudh Rent Act as meaning any person, not being an under-proprietor, who is liable to pay rent. The heir who succeeds under section 48, is clearly a person who is liable to pay rent as is indicated by the terms of the section itself. Bikramajit Singh, therefore, when he succeeded to the tenancy as an heir of his father became a tenant in his relation to the landlord of the holding by virtue of his liability to pay rent for it. Pirthi Singh was, therefore, the heir of Bikramajit Singh, who was a tenant as I have just now stated, and entitled to retain occupation of the holding for the unexpired portion of the period of the tenancy. This construction is borne out by reference to several sections of the Act, particularly the sections relating to the ejectment of the tenants. I am, therefore, of opinion that the expression "the heir of a tenant" does not exclude the heir of the heir of a tenant. In my opinion the word 'heir' is used to denote the sense of representation of the first tenant through his sucessors in inheritance for the whole term of the tenancy.

Pirthi Singh died during the pendency of the appeal in the Court below. His sons were brought on the record in his place. The learned Counsel for the appellant has argued that whatever might have been the rights of Pirthi Singh, his sons are not entitled to claim the advantage of the provisions

of section 48. This argument is answered by the observations which I have just now made. When Pirthi Singh died he was a tenant, within the meaning of the Act, of the holding in dipute. His sons are therefore clearly entitled to come in under section 48 in the occupation of the holding for the unexpired portion of the period of the tenancy and consequently they are not tres-passers. In support of his argument the learned Counsel for the appellant repeatedly referred to the recent amendments made by the Local Legislature in the Oudh Rent Act particularly dealing with the subject-matter of section 48. I do not think I can legitimately use the amendments as aid in interpreting the law as it stood before the amendment and with which only I am concerned in the present appeal.

The appeal fails and is dismissed with costs.

N. H. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 165 OF 1920.

June 21, 1922.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Piggott.

MAHADEO PRASAD AND OTHERS—DEFENDANTS—APPELLANTS

versus

DHIRAJ SINGH—PLAINTIFF—RESPONDENT.

Mortgage—Mortgage by conditional sale—Post diem *interest—Construction of deed.*

A mortgage by way of conditional sale contained the following covenant:—

It is covenanted that I shall continue to pay interest at the rate of 11 annas per cent. per mensem annually. In case of default in payment of interest, it shall be added to the principal, and I shall pay interest thereon as well at the aforesaid rate. I, or my heirs, or representatives, shall have no objection to it, nor shall I mortgage or sell the property to any other person until the payment of the mortgage-money. In case of breach of promise and expiry of the stipulated period, the mortgagee shall become the absolute owner of the property mortgaged, and, I, or my heirs, or representatives, shall have no objection whatever:

Held, that having regard to the terms of the whole document, its general tenor implied an obligation on the part of the borrower on the making of default to be liable for the subsequent interest at the rate mentioned in the bond up to the date of payment or suit. [p. 124, col. 2.]

Mathura Das v. *Raja Narindar Bahadur*, 19 A. 39; 23 I. A. 138; 1 C. W. N. 52; 6 M. L. J. 214; 7 Sar. P. C. J. 88; 9 Ind. Dec. (N. S.) 25 (P. C.); *Bindesri Naik* v. *Ganga Saran Sahu*, 20 A. 171; 2 C. W. N. 129; 25 I. A. 9; 7 Sar. P. C. J. 273; 9 Ind. Dec. (N. S.) 471 (P. C.) and *Sarala Dasi* v. *Jogendra Narayan Basu*, 25 C. 246; 13 Ind. Dec. (N. S.) 165, relied on.

The question whether under a mortgage by way of conditional sale the mortgagor is or is not liable to pay *post diem* interest must primarily be decided on the terms of the deed.

First appeal from a decree of the Additional Subordinate Judge, Cawnpore, dated the 28th of February 1920.

Dr. *Surendra Nath Sen*, for the Appellants.

Munshi *Girdhari Lal Agarwala* (with him Mr. *B. E. O'Conor*), for the Respondent.

JUDGMENT.—The question which is in controversy between the parties in this appeal is whether in a mortgage by way of conditional sale the mortgagor is bound to pay interest at the agreed rate from and after the day upon which he should have discharged his obligations under the deed. In other words, is interest during the *post diem* period, though not expressly provided for, to be calculated under the particular provisions of the deed at the same rate as that stipulated for during the agreed period of the currency of the bond?

The position very shortly is as follows:—The borrower should have re-paid, but did not re-pay, the principal and interest in December 1907, and though certain payments of interest were made, the account at the commencement of this action on the 20th of October 1919, showed that Rs. 8,000 principal and Rs. 10,581 interest were due. This was based upon the calculation that the express stipulation as to interest covered the whole period from the 8th of December 1902, down to the date of the institution of the suit. Whilst it is, of course, proper that we should refer to and pay regard to decided cases; the main and important matters

for our consideration are the exact terms of the document itself. When those have been considered, it is proper to see whether there are any decided cases so similar in their terms that the canons of construction that have been used by other Courts will be of assistance to us. If so, it is our duty to avail ourselves of them.

The document, dated the 8th of December 1902, was executed by Mathura Prasad, who was the father of the defendants (appellants). It stated that he had for a period of five years mortgaged without possession a certain property in lieu of Rs. 8,000 to Raja Dhiraj Singh, that the money was to be applied in satisfaction of a decree, and then follow the words which have given rise to this question :—

"It is covenanted that I shall continue to pay interest at the rate of 11 annas per cent. per mensem annually. In case of default in payment of interest, it shall be added to the principal, and I shall pay interest thereon as well at the aforesaid rate. I, or my heirs, or representatives shall have no objection to it, nor shall I mortgage or sell the property to any other person until the payment of the mortgage-money....In case of breach of promise and expiry of the stipulated period, the mortgagee shall become the absolute owner of the property mortgaged, and, I, or my heirs, or representatives, shall have no objection whatever....But if in any year I pay something towards principal in addition to the amount of interest, it will be not less than Rs. 500. I have, therefore, executed these few presents by way of a mortgage-deed by conditional sale, so that they may stand as authority and be of use when required."

The first point which stands out clearly is that for five years the rate of interest was defined with precision. Nowhere in the document is there any direct reference to what was to happen as regards interest if the mortgagor did not pay punctually or if in that event the mortgagee abstained from taking any proceedings for foreclosure. As regards default in payment of interest during the period between 1902 and 1907, he stipulates that he will not offer objection to interest being added to principal, and interest being paid on both, and in the same sentence he couples up a promise not to mortgage or sell the property to any other person until the payment of the mortgage-money. A few lines above he had agreed to "continue" to pay interest at the rate of 11 annas per cent. per mensem annually.

It is difficult to believe that the parties could have had any other intention than that if the mortgagor failed to pay in December 1907, the stipulations in the deed would remain in force and that the mortgagor would be bound to continue to pay interest at the agreed rate, calculated up to the time of tender or payment of principal and interest or the institution of a suit by the mortgagee. There is no suggestion that any lesser rate was agreed upon to come into force upon default. Nor is there any logical reason to think that the mortgagee would be willing for his money after 1907 to bear a smaller rate of interest. He could, on default have commenced a suit, but he was not bound to do so. Dr. Sen, however, contends that on the 8th of December 1907, the agreed interest at once stopped running and that there was, as between mortgagor and mortgagee, a definitely ascertainable debt, and that from that date the lender acquired a new and different right, namely, the right to bring a suit for foreclosure. We do not agree with this interpretation of the document and we are of opinion that the mortgagee's rights as regards principal and interest, as apart from proceedings against the property, continued. The first case to which we may refer is that of *Mathura Das* v. *Raja Narindar Bahadur* (1). In that case the material words of the deed were that the amount of the loan in full, principal as well as interest, would be paid within a year. It is said in the deed :

"Until the payment in full of this amount, principal and interest, I shall not transfer either directly or indirectly the mortgaged property to any one else ; and if I do, such a transfer should be deemed to be false and inadmissible."

(1) 19 A. 39; 23 I. A. 138; 1 C. W. N. 52; 6 M. L. J. 214; 7 Sar. P. C. J. 88; 9 Ind. Dec. (N. S.) 25 (P. C.).

MAHADEO PRASAD v. DHIRAJ SINGH.

No payment was made, and some eight years after the deed the suit was commenced for the usual mortgage-decree. The Subordinate Judge passed a decree for the sum of Rs. 22,813. It was the amount of the principal alone with one year's interest; and, therefore, he disallowed the claim of the plaintiff to the remaining seven years' interest at the rate stipulated in the deed. The plaintiff came to the High Court and the decision of the Subordinate Judge was affirmed, and in that state of the case the plaintiff appealed to the Privy Council. Their Lordships held without hesitation, that although there was no express term carrying on the obligation to pay interest at the agreed rate of 1-6 per cent. per mensem, that, nevertheless there was an obligation upon the defendant to make that payment and that on the ordinary construction of the words, they were in accordance with the usual intention of the parties to a simple mortgage. If, in the present case under consideration, on the ordinary construction of the words they are in accordance with the usual intention of the parties to a simple mortgage, as we believe them to be, we shall be coming to a right decision in holding that the defendants (appellants) must pay after the 8th of December 1907, interest at the same rate as they had agreed to pay before that date. We are of opinion that this case of *Mathura Das* v. *Raja Narindar Bahadur* (1) is a very useful authority, which gives us clear and distinct guidance.

Now we come to the case of *Bindesri Naik* v. *Ganga Saran Sahu* (2), another Privy Council case, and again from a decision of this High Court. It possesses this additional advantage that the documents which came up for consideration were mortgages by way of conditional sale. When referring to the decision of this Court, their Lorships of the Privy Council said:

"Their Lordships do not think that, according to the tenor of the mortgage-deeds, it was intended that the capital sums should cease to bear interest, upon the arrival of the time stipulated for their payment."

Then after stating that the Judges of this High Court had confined their attention to a single passage in the document rather than taking into consideration the whole provisions of the deeds, their Lordships continued:—

"In the present case, by the deed of the 21st of August 1875...it is stipulated in general terms that interest at 18 per cent. per annum is to run upon the principal sums advanced, without any limitation as to the period of its currency. And it is also stipulated that in default of punctual payment at the end of each year the creditors are to be at liberty to treat interest as principal and to recover it from the mortgaged property."

Therefore, in that case there being no express provision as to what were to be the mutual rights and obligations after the date fixed for payment, the rate of interest was held to continue throughout the currency of the whole liability.

Finally, we may refer to the case of *Saral Desi* v. *Jogendra Narayan Basu* (3). In that case a mortgage-deed contained a covenant to pay principal and interest at a fixed rate in two years, and a further covenant not to transfer the mortgaged property until payment of principal and interest, and also on failure of payment of interest for one year to treat the amount after the lapse of that year as principal. The Calcutta High Court held, following the case of *Mathura Das* v. *Raja Narindar Bahadur* (1) that the obligation continued so long as mortgage subsisted.

We are therefore of opinion that having regard to the terms of the whole document, its general tenor implies an obligation on the part of the borrower on the making of default to be liable for subsequent interest of the rate mentioned in the bond. There being no dispute as to the amount, we dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

(2) 20 A. 171; 2 C. W. N. 129; 25 I. A. 9; 7 Sar. P. C. J. 273; 9 Ind. Dec. (N. S.) 471 (P. C.).

(3) 25 C. 246; 13 Ind. Dec. (N. S.) 165.

JAI GOBIND SINGH *v.* ABHAIRAJ SINGH.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 164 OF 1922.

February 26, 1923.

Present:—Mr. Dalal, A. J. C. and Mr. Simpson, A. J. C.

JAI GOBIND SINGH—PLAINTIFF—APPELLANT

versus

ABHAIRAJ SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Adverse possession—Equity of redemption, adverse possession of—Usufructuary mortgagor's interest, nature of—Mortgage—Several mortgagors—Integrity of mortgage broken—Redemption.

There can be adverse possession of the interest of a usufructuary mortgagor and it will depend on the facts of each case whether the person claiming title through such adverse possession has established his claim or not. [p. 127, col. 2.]

Case-law reviewed.

The right of ownership in usufructuarily mortgaged property does not pass to the mortgagee, leaving only the equity of redemption to the mortgagor. The right of ownership together with the right of redemption remains with the mortgagor, and until the property is actually foreclosed and the sale becomes absolute, the right of ownership does not pass. The doctrine is equally applicable to conditional sales and usufructuary mortgages. [p. 127, col. 2.]

Suadut Alee Khan v. *Collector of Saran*, (1858) Beng. S. D. A. 841; 17 Ind. Dec. (o. s.) 617, approved;

Although the possession of usufructuarily mortgaged property by a trespasser can be adverse to the mortgagor, the burden of proving when it became so rests on the former. *Prima facie*, by his act of possession the trespasser merely ousts the mortgagee who is entitled to hold the property. [p. 128, col. 1.]

Peria Aiya Ambalam v. *Shunmuga Sundaram*, 22 Ind. Cas. 615; 38 M. 903; 15 M. L. T. 122; 26 M. L. J. 140; 1 L. W. 119; (1914) M. W. N. 417, approved.

In the case of a mortgage by several persons, where the mortgagee purchases the equity of redemption in a portion of the mortgaged property, the integrity of the mortgage is broken up and any one of the mortgagors cannot redeem any portion of the mortgaged property besides his own against the wishes of the mortgagee. [p. 129, col. 1.]

Munshi v. *Daulat*, 29 A. 262; 4 A. L. J. 74; A. W. N. (1907) 49, followed.

Per *Simpson, A. J. C.*—There can be prescription against a mortgagor, but ordinarily there can be no prescription against him unless he is entitled to immediate possession. *Contra non valentem agere nulla currit praescriptio.* The fact that he would be entitled to bring a suit for declaration is of no consequence. A party is never bound to bring a suit for declaration. [p. 129, col. 2.]

Appeal from a decree of the District Judge, Gonda, dated the 31st January 1922, reversing that of the Munsif, Utraula, dated the 13th September 1920.

Messrs. *Haider Husain* and *Bisheshwar Nath Srivastava*, for the Appellant.

Mr. *A. P. Sen*, for Respondent No. 1.

ORDER OF REFERENCE TO THE BENCH.

Wazir Hasan, A. J. C.—I am desired by the Counsel for both the parties in the case to refer the appeal to a Bench of two Judges for decision. It is said that, on the point of law involved in the case there is a conflict of opinion between a Single judge ruling of this Court in the case of *Hubdar Khan* v. *Gajahar Chaute* (1) and the decision arrived at by the Allahabad High Court in the case of *Kunwar Sen* v. *Darbari Lal* (2). The broad question of law is whether the equity of redemption which legally vested in the plaintiff-appellant in respect of the property in suit on the death of a Hindu widow, *Musammat* Hardei, in the estate of her husband was lost by the adverse possession of one *Musammat* Lagandei, who was *Musammat* Hardei's daughter-in-law, and who had no title to the estate.

The facts of the case are few and simple. *Musammat* Hardei had on the 30th September 1891 mortgaged the property in suit to the predecessor-in-interest of the defendant No. 1. The mortgagee entered into possession. The mortgage was redeemable in 1907. On the 5th November 1898 *Musammat* Lagandei executed another deed of mortgage with regard to this property in favour of the same mortgagee superseding the earlier mortgage of the 30th September 1891. On the 22nd September 1911 *Musammat* Lagandei sold the equity of redemption to the son of the defendant No. 1. Thereupon the defendant No. 1 brought a suit for pre-emption and obtained a decree. The suit out of which the present appeal arises is one for redemption. The defence is that the article applicable to the case is Art. 144 of Schedule I of the Indian Limitation Act and that under that Article the claim is time barred. The Court of first instance following the decision in the case of *Kunwar Sen* v. *Darbari Lal* (2) overruled the defence and

(1) 25 Ind. Cas. 600; 17 O. C. 294.
(2) 34 Ind. Cas. 171; 14 A. L. J. 498; 38 A. 411,

gave a decree for redemption. The lower Appellate Court following the decision in the case of *Hubdar Khan* v. *Gajadhar Chaube* (1) reversed the decree of the Court of first instance and dismissed the plaintiffs' suit. I agree with the learned Counsel for the parties that the question involved in this appeal is one of general importance and the case is a fit one to be decided by a Bench of two Judges. I certify accordingly.

JUDGMENT.

Dalal, A. J. C.—This was a suit for redemption in the Court of the Munsif of Utraula. It was decreed by that Court but dismissed on appeal to the District Judge of Gonda. The second appeal has been heard by a Bench of two Judges on a certificate granted by a learned Judge of this Court under section 8 of the Oudh Courts Act (XIV of 1891).

The mortgage sought to be redeemed was executed by *Musammat* Hardei and Jai Sri Singh on 30th September 1891; half the property belonged to Sarju, deceased husband of *Musammat* Hardei, and half to Jai Sri Singh. The following pedigree will show the relationship between the mortgagors, the plaintiff, and their relations whose names appear on the record as *pro forma* defendants. *Musammat* Lagandei was widow of a predeceased son of Sarju; She is still alive.

ANUP SINGH

Sheoratan Singh	Thakur Bakhsh	Harihar Bakhsh	Sarju = *Musammat* Hardei widow
Jai Gobind (plaintiff.)	Raghuraj	Jai Sri Singh	Kashi Bakhsh = *Musammat* Lagandei.
	(defendants Nos. 7 to 9.)	(defendants Nos. 4 to 6.)	

After the death of *Musammat* Hardei, Lagandei and Jai Sri Singh mortgaged the same property on 5th November 1898, paying off the prior mortgage of 1891 out of the consideration of the second mortgage. On the death of *Musammat* Hardei the name of the plaintiff Jai Gobind was entered in the village records as owner of the equity of redemption, but on 9th June 1899 his name was removed under the orders of the Revenue Court and that of *Musammat* Lagandei substituted on an application made by *Musammat* Lagandei for mutation. On 22nd September 1911. *Musammat* Langandei and Jai Sri Singh sold the equity of redemption to a son of the mortgagee whereupon the mortgagee pre-empted this interest in the property on 30th November 1911. The contesting defendants to this suit are sons of the original mortgagee.

Their defence was that they had been in adverse possession of the equity of redemption since 9th June 1899 and that therefore the plaintiff's suit for redemption instituted on 18th March 1920 was time-barred under Art. 144 of the Limitation Act.

The learned Judge who made the reference was of opinion that there was conflict of authority between this Court and the Allahabad High Court as regards the acquisition of title to equity of redemption by prescription. In our opinion the conflict is confined to the amount of evidence necessary to establish adverse possession in a case of this nature, In the case of this Court, *Hubdar Khan* v. *Gajadhar Chaube* (1), it was held that adverse possession can legally exist over a right of equity of redemption and similarly in the Allahabad Bench case, *Kunwar Sen* v. *Darbari Lal* (2) the learned Judges stated in the judgment. "There can be no doubt that an equitable estate, as distinct from a legal estate, can be bound by time."

The distinction between the two cases is noticeable when we come to examine the evidence on which the two Courts came to different findings on the two cases before them. In the Oudh case the facts do not appear to us to be correctly reported. The property in suit in that case was that of Manorath, Kalka and Chhutkau. In 1891 Manorath and the heir of Chhutkau transferred the entire interest of all the three mortgagors in the equity of redemption to one Hubdar Khan who redeemed the mortgage and claimed to be owner of the equity of redemption by adverse possession when

Gajadhar brought a suit to redeem the mortgage in 1912. It is stated in the report that Gajadhar was a son of Manorath, but that appears to us to be a mistake. In that case questions of Hindu Law, such as legal necessity, etc., would have arisen when the managing member of a Hindu family made the transfer and the son came to Court to redeem the mortgage. No such questions are discussed in the judgment. Kalka has been frequently mentioned in the judgment. It appears to us therefore that Gajadhar was the son of Kalka. The learned Judge himself was not certain whether Kalka was alive or not in 1891. If Kalka had been alive and had notice of the transfer there would be sufficient evidence to start adverse possession in 1891. If, however, the learned Judge held that the mere transfer of the equity of redemption under a registered instrument without notice to the mortgagor was sufficient to establish adverse possession as against Gajadhar we are not prepared to go so far.

In the Allahabad case the plaintiffs, who claimed ownership by right of adverse possession alleged that mutation was made in their favour on the death of the mortgagor Dula Rai and that they had made collections of rent from the mortgagee according to the condition of the mortgage. The learned Judge examined the evidence in the case and held that the allegation regarding collection of rent was false. In their opinion mere mutation of names was not sufficient to start adverse possession in favour of the plaintiffs. Possibly the enunciation of the law to the effect that it seems to them impossible that any person could be in possession of the right to redeem a mortgage, where under the terms of the mortgage the mortgagee is entitled to the actual possession and is in fact in possession thereunder, is too wide. The learned Judges themselves inquired into the fact whether the plaintiffs had or had not received rent from the mortgagee, and possibly if they had held that he had, the result of the appeal would have been different. We think that the principle of law has been correctly stated in *Chinto* v. *Janki* (3). In that case land was mortgaged usufructuarily to *A*. In 1856 *A* was ousted from possession by *B* a trespasser, who subsequently held the land and dealt with it as his own for 40 years. The mortgagor sued both *A* and *B* for redemption. In appeal on a plea of adverse possession by *B*, the plaintiff contended that *B*'s possession was not adverse to him, because he as mortgagor had no right to possession during the term of the mortgage. The learned Judges held that the suit fell under Art. 144 of the Limitation Act and that it lay upon B to prove that his possession for twelve years prior to the suit was adverse to the plaintiff mortgagor. The case was thereupon remanded for a finding on the question whether B's possession had become adverse to that of the plaintiff twelve years prior to the institution of the suit.

This view accords with the accepted notion of the interest of a mortgagor who has mortgaged his property with possession. As far back as 1858 in a decision of the Bengal Sadar Dewani Court these were the observations made in speaking of usufructuary mortgages:—"The right of ownership in the mortgaged property does not pass to the mortgagee, leaving only the equity of redemption to the mortgagor. The right of ownership together with the right of redemption remains with the mortgagor, and until the property is actually foreclosed and the sale becomes absolute, the right of ownership does not pass. The doctrine is equally applicable to conditional sales and usufuctuary mortgages; it follows that the mortgagees in the present case, who, whatever the nature of the mortgage, were in possession, were simple usufructuaries and as such enjoyed no right of ownership." *Saadut Alee Khan* v. *Collector of Sarun* (4). There can be adverse possession of such an interest and it will depend upon the facts of each case whether the person claiming title through such adverse possession has established his claim or not.

The ruling in the case *Chinto* v. *Janki* (3) was explained in a ruling of the same High Court. *Tarubai* v. *Venkatarao* (5).

(3) 18 B. 51; 9 Ind. Dec. (N. S.) 542.

(4) (1858) Beng. S. D. A. 841; 17 Ind. Dec. (o. s.) 617.

(5) 27 B. 43; 4 Bom. L. R. 721.

After an examination of various decisions Batty, J., observed. "It does not follow that so long as the mortgagor is entitled only to equity of redemption, there can be no invasion of his interest."

This view has been adopted by the Calcutta and Madras High Courts and recently by the Allahabad High Court as well. In *Lalla Kanhoo Lal* v. *Manki Bibi* (6) the Court held the possession of a trespasser to be adverse to the mortgagor where the trespasser recovered rent from the mortgagee in possession. In *Gobinda Nath Shaha Chowdhry* v. *Surja Kanta Lahiri* (7) this principle was approved. In the Madras High Court the cases are reported as *Ittappan* v. *Manavikrama* (8) and *Peria Aiya Ambalam* v. *Shunmugasundaram* (9). In the former case *Ittappan* v. *Manavikrama* (8) Subramania Ayyar, J., discussed the Bombay ruling at page 165 of the report and after referring to other rulings held that the possession would not be adverse to the mortgagor unless and until the mortgagor had notice of it. In the latter case *Peria Aiya Ambalam* v. *Shunmugasundaram* (9) Sankaran Nair, J, quoted with approval from the judgment of Fulton, J. in the Bombay case "I think that, although the possession of a trespasser may undoubtedly be adverse to the mortgagor, the burden of proving when it became so rests on the former. *Prima facie* by his act of possession he merely ousts the mortgagee who is entitled to hold the property." In the Allahabad High Court the view prevailed at first that there could be no adverse possession where the mortgagor is not entitled to immediate possession. *Muhammad Husain* v. *Mul Chand* (10). In *Nandan Singh* v. *Jumman* (11) the Court quoted the observation of Mr. Justice Markby that by adverse possession is meant possession by a person holding the land on his own behalf or on behalf of some person other than the true owner, the true owner having a right to immediate possession, and held that there could be no adverse possession where the person against whom it is pleaded has no right of immediate possession. In 1920 however that principle of the Bombay ruling was followed. In *Ram Piari* v. *Budhsain* (12) the learned Judges observed "In *Chinto* v. *Janki* (3) it was similarly held that where the land was mortgaged with possession to a certain person, and that person was ousted from possession by another who remained in possession of the said land and dealt with it as his own for 40 years, a suit for redemption brought by the mortgagor or his legal heirs, would not fall under Art. 148, but will be governed by Art. 144 of the Limitation Act, and would fail if the person in possession succeeded in proving that his possession was adverse to the mortgagor for more than twelve years prior to the suit."

We have now to examine whether in the present case the mortgagee-defendants have succeeded in proving adverse possession. The sale of the equity of redemption by *Musammat* Lagande was within twelve years of the institution of the present suit. The incidents pointed out as starting adverse possession were the the mortgage of 1898 and the mutation proceedings of 1899. There is no evidence that the plaintiff had any information of the mortgage of 1898. There are on the record copies of the order in the mutation case and of the statement of the plaintiff Jai Gobind. They indicate the reason why Jai Gobind permitted the substitution of the name of *Musammat* Lagandei in place of his own in the village records. His impression was that *Musammat* Lagandei being the daughter-in-law of *Musammat* Hardei had a life-interest in the equity of redemption and he explained that he had obtained mutation at first because he desired to safeguard the equity of redemption and prevent *Musammat* Lagandei from transferring it.

(6) 6 C. W. N. 601.
(7) 26 C. 460; 13 Ind. Dec. (N. S.) 897.
(8) 21 M. 153; 8 M. L. J. 92; 7 Ind. Dec. (N. S.) 465.
(9) 22 Ind. Cas. 615; 38 M. 903; 15 M. L. T. 112; 26 M. L. J. 140; 1 L. W. 119; (1914) M. W. N. 417.
(10) 27 A. 395; A. W. N. (1905) 41; 1 A. L. J. 725.
(11) 17 Ind. Cas. 632; 34 A. 640; 10 A. L. J. 278.
(12) 61 Ind. Cas. 546; 43 A. 164; 18 A. L. J. 995; 2 U. P. L. R. (A) 332.

Thus in the mutation proceedings Jai Gobind did not set up any title to the interest of the equity of redemption and acted under the mistaken belief that *Musammat* Lagandei had a life interest therein. Under the circumstances there was no occasion for him to bring a suit for declaration against her. If the transfer by *Musammat* Lagandei had been made to the knowledge of the plaintiff more than twelve years prior to the institution of the suit there would have been reason for holding that the present suit was time-barred. We hold that the mortgagees have not been in adverse possession for over twelve years prior to the institution of the suit.

One point remains to be decided. The share of Jai Gobind in the mortgage is one sixth and the Court of first instance permitted him to redeem the shares of the two other branches of the family making up one-half in all.

It was argued here on behalf of the mortgagee-respondents that the plaintiff can redeem only his share of the mortgage, that is one-sixth, because the integrity of the mortgage has been broken. It will be remembered that the mortgagors were Jai Sri Singh and *Musammat* Hardei and the transfer of the equity of redemption by Jai Sri Singh of his own one-half share on 22nd September 1911 was valid. As the mortgagee purchased the equity of redemption in a portion of the mortgaged property the integrity of the mortgage has been broken up. The Allahabad High Court in *Munshi* v. *Daulat* (14) held that under such circumstances the mortgagor cannot redeem any portion of the mortgaged property besides his own against the wishes of the mortgagee. The learned Judges relied on the Privy Council ruling of *Nawab Azimut Ali Khan* v. *Jowahir Singh* (15) in which their Lordships held that co-mortgagors who were entitled to a portion of the mortgaged property could not redeem against the will of the mortgagee any portion of the mortgaged property save their own village. We think that we should follow the principles laid down in the Allahabad case and hold that the plaintiff is entitled to redeem only one-sixth of the property in suit.

In the result we set aside the decree of the lower Appellate Court and decree the plaintiff's suit for redemption of the one-sixth of the property in suit on payment of Rs. 154-2-8. A decree in the usual form under O. XXXIV, r. 7, Civil Procedure Code, shall be passed. Six months' time from to-day shall be given for deposit of money in the lower Court and on non-deposit the portion of the property shall be sold. The plaintiff shall receive proportionate costs of all the Courts.

Simpson, A. J. C.—I agree and have very little to add. There can be prescription against a mortgagor, but ordinarily there can be no prescription against him unless he is entitled to immediate possession. *Contra non valentem agere nulla currit præscriptio*. The fact that he would be entitled to bring a suit for declaration is of no consequence. A party is never bound to bring a suit for declaration. I wish to express my adherence to the pinciples laid down in the Allahabad Bench case; *Kunwar Sen* v. *Darbari Lal* (2). If the case *Hubdar Khan* v. *Gajadhar Chaube* (1) lays down any different principle I am not prepared to agree with it, but apparently there is a donbt as to what the facts were in that case.

Appeal allowed.

N. H.

(14) 29 A. 262; 4 A. L. J. 74; A. W. N. (1907) 49.
(15) 13 M. I. A. 404; 14 W. R. P. C. 17; 2 Suth. P. C. J. 346; 2 Sar. P. C. J. 573; 20 E. R. 602.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1527 OF 1921.

June 12, 1922.

Present:—Mr. Justice Piggott and Mr. Justice Sulaiman.

BADR-UD-DIN—OBJECTOR—APPELLANT

versus

MUHAMMAD HAFIZ AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Limitation Act (IX of 1908), Sch I, Art. 182 (5), Expl. I—Civil Procedure Code (Act V of

BADR-UD-DIN v. MUHAMMAD HAFIZ.

1908), s. 145—*Execution of decree—Sureties—Application against judgment-debtor, whether saves limitation against surety.*

Where a surety undertakes to satisfy a decree in the event of the judgment-debtor failing to satisfy it, an application for execution of the decree by the arrest of the judgment-debtor operates to save limitation against the surety also either under Explanation I or under clause (5) of Art. 182 of the Schedule I to the Limitation Act.

Cholappa v. *Ramchandra Anna Pai*, 53 Ind. Cas. 187; 44 B. 34; 21 Bom. L. R. 861, referred to.

Second appeal from a decree of the District Judge, Agra, dated the 10th August 1921, confirming a decree of the Subordinate Judge, Agra, dated the 11th July 1921.

Munshi *Sarkar Bahadur Johari*, for the Appellant.

Munshi *Narain Prasad Asthana*, for the Respondents.

JUDGMENT.—This appeal represents a further stage in certain execution proceedings which have been once already before this Court, *vide* the case of *Mohammad Hafiz* v. *Mohammad Ibrahim* (1). The appellant now before us, Sheikh Badr-ud-din Khan Bahadur, is one of the two sureties who bound themselves for the satisfaction of a certain decree. One of the points taken in appeal before us is as to the interpretation of the security bond and the nature of the obligations thereby undertaken by the sureties. We do not say, for a moment, that Sheikh Badr-ud-din Khan Bahadur, who was not a party to the appeal before the Court in the reported case referred to, is not entitled to be heard on this point, but, having heard him, we are still of opinion that the terms of the security bond were rightly interpreted by this Court when delivering the aforesaid judgment. The result is that one of the obligations, jointly and severally assumed by the two sureties, was the satisfaction of the entire decree, in the event of the judgment-debtor, Muhammad Ibrahim, failing to satisfy it. The only further question that can be raised is one of limitation. It has been pointed out to us that the first time when proceedings were taken against the present appellant was in the month of October 1920. We have already decided in the reported case that an application for execution, dated the 6th of March 1918, where execution was sought by arrest of the person of the judgment-debtor, was not barred by limitation on the date on which it was made. We are still of the same opinion. Now the question is whether that application saves limitation for the application of the 25th of October 1920, in which the prayer was for recovery of the amount of the decree by arrest of the judgment-debtor in the first place, or, failing satisfaction by that means, by proceedings against the persons of the two sureties. If that application was in time, then the application now before us is also in time. The question really depends on the manner in which the provisions of section 145 of the Civil Procedure Code are to be applied to those of Art. 182 of the Schedule to the Indian Limitation Act (IX of 1908). We are of opinion that the view taken in the reported case was correct and that it practically governs also the case now before us. It has been noted by us that the learned Judges of the Bombay High Court have since then, in the case of *Cholappa* v. *Ramchandra Anna Pai* (2), distinguished against the previous decision of the same Court which has been referred to before us in argument as supporting the case for the appellant. The case against the appellant really admits of being stated in the form of a dilemma. Either the effect of section 145 of the Code of Civil Procedure is to make the decree, in a case like the present, equivalent to a decree passed jointly against the original judgment-debtor and the surety or the sureties, or it has not that effect. If it has, then the case is covered by the closing words of Explanation (1) to Art. 182 of the Schedule, and an application for execution against a judgment-debtor or against any one of the sureties affords a starting point for a fresh period of limitation, even though the application next made be against a

(1) 58 Ind. Cas. 794; 43 A. 152; 18 A. L. J. 988; U. P. L. R. (A.) 376.

(2) 53 Ind. Cas. 187; 44 B. 34; 21 Bom. L. R. 861.

different surety. On the other hand, if the effect of section 145 of the Civil Procedure Code be not as suggested above, then the words of Explanation (1) aforesaid have no application whatsoever to a case like the one now before us and must altogether be excluded from consideration. In that case we are driven back to the words of clause (5) of Art. 182 itself. The point we have to decide is whether the application of the 6th of March, 1918, was or was not an application in accordance with law to the proper Court for execution of the decree, or to take some step-in-aid of execution of decree. We cannot answer that question otherwise than in the affirmative. We think the appeal fails and it is dismissed with costs.

Z. K.

Appeal dismissed.

BOMBAY HIGH COURT.

LETTERS PATENT APPEAL NO. 5 OF 1920.

February 23, 1923

Present:—Mr. Justice Pratt and Mr. Justice Fawcett.

BABAJI RAMLING GURAV AND OTHERS—DEFENDANTS—APPELLANTS

versus

APPA VITHAVJA SUTAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Easements Act (V of 1882), ss. 7, 17, 27—Evidence Act (I of 1872), s. 114—Underground channel—Presumption—Easement, infringement of.

Defendants constructed an underground drain fourteen feet from the outlet of certain springs in respect of which the plaintiffs enjoyed a right of easement and thus diminished the supply of water in the spring:

Held, that from the proximity of the drain to the outlet of the springs the Court was entitled to presume that there was a direct channel between the top of the drain and the outlet and that the construction of the drain, therefore, amounted to an infringement of the plaintiffs' right of easement. [p. 132, col. 1.]

Case-law discussed.

Letters Patent Appeal from the decision of Macleod, C. J., in Second Appeal No. 663 of 1918, confirming a decree passed by the Assistant Judge, Ratnagiri, in Appeal No 135 of 1907, confirming a decree passed by the Subordinate Judge at Rajapur, in Suit No. 69 of 1915.

Mr. *S. R. Bakhale*, for the Appellants.

Messrs. *G. S. Rao* and *B. V. Desai*, for Respondents Nos. 2 to 5, 7 to 9 and 11 to 17.

JUDGMENT.

Pratt, J.—The plaintiffs are held to have acquired an easement to water flowing from springs in defendants' land through the small watercourse S O T into the larger watercourse L J M and thence to their own lands.

Defendants had obstructed this easement by daming the mouth of S O T at A B and by cutting a channel A C whereby the water held up behind the dam was conducted to their fields on the other side of the main watercourse.

The easement is admitted before us and there is no complaint as to injunction granted as regards the dam A B and the channel A C.

Two points, however, are raised in this appeal (1) as to the trench H I G, (2) the underground drain F E D.

Now I do not understand why there should be any complaint about H I G. When defendants dammed the small watercourse S O T at A B, it was necessary to provide another outlet. Otherwise the accumulated water in S O T might have overflowed. With this object the trench H I G was cut. Now that the dam A B is removed the trench H I G must be useless. This was an unauthorized diversion of S O T and merely a work ancillary to the illegal dam A B. The injunction as to H I G must stand.

But as to the underground drain F E D the case is more difficult. This was constructed by the defendants during the hearing of the suit. This underground trench takes off from a point fourteen feet away from the outlet of the springs which pour into S O T.

The learned Chief Justice treats the construction of this drain as an interference with the easement of water prohibited by section 27 of the Indian Easements Act. This was so held in

Dudden v. *Guardians of Clutton Union* (1) and *Mostyn* v. *Atherton* (2), where water was taken at the springhead although it had not entered the channel from the top of the spring.

It is, however, contended that as the drain takes off fourteen feet from the outlet of the spring the defendants have merely tapped subterranean water not flowing in a defined channel which cannot be the subject of an easement under section 7 of the Indian Easements Act. If this were so, then under *Chasemore* v. *Richards* (3) and *Mayor &c. of Bradford* v. *Pickles* (4), the owner of the soil may do as he pleases and if in constructing a drain he intercepts water which would have otherwise reached a spring he cannot be made responsible.

But the drain takes off so very near the outlet that even if it is not the actual water of the spring as in *Dudden* v. *Guardians of Clutton Union* (1) yet there can be little doubt that there must be a direct channel between the top of the drain and the outlet. This is an underground continuation of the watercourse which is the subject of plaintiffs' easement and, therefore, an infringement of right. That the existence of this subterranean channel was known to the defendants is proved by the furtive manner in which they constructed the drain.

I, therefore, think the judgment of Macleod, C. J. is right and would confirm it and dismiss this appeal with costs.

Fawcett, J.—I concur.

The principle on which water percolating through the soil under the surface in unknown or undefined channels cannot be the subject of an easement is clearly laid down in *Acton* v. *Blundell* (5). I refer to the part of the judgment commencing "But in the case of a well sunk by a proprietor in his own land, the water which feeds it from a neighbouring soil does not flow openly in the sight of the neighbouring proprietor, but through the hidden veins of the earth beneath its surface". It depends ultimately on the absence of knowledge enabling the Court to say to what extent, if at all, the supply of water to a well, spring or stream, is affected by any water percolating from one piece of land to another (*cf.* the opinion of the Judges in *Chasemore* v. *Richards* (3). This principle clearly applies to cases like those dealt with in the last named case, and *Mayor &c. of Bradford* v. *Pickles* (4) where the diversion complained of was a considerable distance off the spring or stream, whose water was said to be diminished by the diversion. But, when the diversion takes place at or in close proximity to the source of a spring, there arises a different case altogether, as is shown by the authorities cited in my learned brother's judgment. In the present case the abstraction of water begins only fourteen feet from the sources of five springs, and there is clear justification for presuming under section 114 of the Indian Evidence Act that there is a direct and defined channel by which the water sought to be tapped finds its way to the adjacent springs. The close proximity favours a direct connection between the flow tapped by the defendants and the springs, and there is no room for the uncertainty and indefiniteness, which underlie the principle followed in *Mayor &c. of Bradford* v. *Pickles* (4). It may be added that the Indian Easements Act, sections 7 and 17, only speak of underground water not passing "in a defined channel." There is, therefore, no occasion to apply the rule laid down in *Bradford Corporation* v. *Ferrand* (6) that the course of the channel must also be "known" and that if this cannot be ascertained except by excavation, the water (though flowing in a defined channel) must be treated as in the same

(1) (1857) 1 H. & N. 627; 26 L. J. Ex 146; 156 E. R. 1353; 108 R. R. 752.
(2) (1899) 2 Ch. 360; 68 L. J. Ch. 629; 81 L. T. 356; 48 W. R. 168.
(3) (1859) 7 H. L. C. 349; 29 L. J. Ex 81; 5 Jur. (N. S.) 873; 2 W. R. 685; 11 E. R. 140; 115 R. R. 187.
(4) (1895) A. C. 587; 64 L. J. Ch. 759; 11 R. 286; 73 L. T. 353; 44 W. R. 190; 60 J. P. 3.
(5) (1843) 12 M. & W. 324 at p. 350; 13 L. J. Ex. 289; 152 E. R. 1223; 67 R. R. 361.
(6) (1902) 2 Ch. 655; 71 L. J. Ch. 859; 51 W. R. 122; 87 L. T. 388; 18 T. L. R. 890; 67 J. P. 21.

position as water percolating through the soil. That is a strictness of view which is not, I think, authorized by anything in the Indian Law of easements. And in any case there would be ground here for saying that the places concerned are so close to one another, that knowledge of the course of the channel can be presumed, just as it is in a case like that of the river Mole (see at page 665 of the report).

Appeal dismissed.

Z. K.

ALLAHABAD HIGH COURT.

MATRIMONIAL REFERENCE NO. 9 OF 1922.

June 12, 1922.

Present:—Sir Grimwood Mears, KT., Chief Justice, Mr. Justice Piggott and Mr. Justice Walsh.

A. A. GARLINGE—PETITIONER

versus

IRENE REBECCA GARLINGE—RESPONDENT AND ANOTHER—CO-RESPONDENT.

Divorce Act (IV of 1869), s 10—Divorce proceedings—Petition of divorce—Particulars—Procedure—Costs of defence—Husband, liability of—Court, duty of.

Where a petition for divorce is filed by the husband, and the wife enters an appearance and denies the allegations against her, she has an absolute right to require her husband to furnish her with funds sufficient to enable her to make a full and satisfactory defence, and to obtain such assistance from Counsel as is reasonable under the circumstances, and the Court should take upon itself the duty of seeing that this is done. [p. 134, col. 1.]

General allegations of misconduct against the wife in a petition for divorce should not be allowed to remain on the record, and if the petitioner is unable to furnish particulars the allegations ought to be struck out. [p. 134, col. 1.]

Mr. *C. Thompson*, for the Petitioner.

Babu *Saila Nath Mukerji*, for the Respondent.

JUDGMENT.—This is a reference from the Court of the District Judge of Ajmer-Merwara, under section 17 of the Indian Divorce Act No. IV of 1869. The petitioner is Alfred A. Garlinge, described as a guard in the employment of the Bombay, Baroda and Central India Railway. The respondent is his wife, Irene Rebecca Garlinge, and the co-respondent is Joseph William Prior, employed in the Locomotive Shops at Ajmer.

The fact that the petitioner and the respondent were married on the 16th day of May 1910, and the further fact that one child was born of the marriage, a daughter, in the month of December 1910; are admitted. The said daughter is still living and is referred to by the name of Dorothy in the evidence.

In the third paragraph of the petition it is alleged in general terms that soon after the marriage the respondent began to misconduct herself and continued in her evil conduct in spite of repeated promises to reform. A general allegation of this kind should have been struck off the record, nor should the Judge have permitted the petitioner, when giving evidence, to mention the names of two men with whom the respondent was said to have committed adultery in 1912, when he had not made that charge against her in the petition. Again, the Judge ought to have struck out the latter part of paragraph 4 where he says that by his absence in Mesopotamia his wife "found further opportunities for her misconduct."

These general allegations are unfair and the Court should have protected the respondent by an order in these words:—"Paragraph 3 and the last eleven words of paragraph 4 to be struck out, unless within seven days the petitioner gives particulars in writing of the alleged misconduct, stating when, where and with whom the said misconduct took place."

From 1915 to 1920 the petitioner was on active service in Mesopotamia and returned to India in January 1920, and admittedly came to Ajmer about the 27th of that month. There was a difference of opinion between the parties as to whether or not the wife should go and live with the husband when he received an appointment which made his headquarters station Abu Road, whereas the wife, the respondent, desired to remain at Ajmer. A suggestion has been put forward on her behalf that her only reason for refusing to go to Abu Road was that she was able to make better arrangements at

Ajmer for the education of the daughter. This, however, along with many other circumstances in the case, has not been subjected to any satisfactory or adequate inquiry. The petitioner's own evidence on the point is inconsistent with the pleading set forth in the fifth paragraph of his petition. He there distinctly said that, in consequence of facts discovered by him within a week of his arrival at Ajmer, and, therefore, early in the month of February 1920, he (the petitioner) left Ajmer and began to work at Abu Road, from whence he wrote to tell his wife that under no circumstances could he live with her any longer. Mr. Garlinge's evidence at the trial in the Court below is quite inconsistent with this plea. What he says is that on his return from field service, about the end of January, he was posted to Abu Road, whereupon his wife refused to accompany him there. During the months that followed, the petitioner's work took him backwards and forwards between Abu Road and Ajmer and he was continually pressing his wife to come to him at Abu Road, a request which she continued to refuse. The petitioner should not have been allowed to make a statement of this sort without being confronted with his own pleadings and asked to explain the discrepancy.

This makes it necessary for us to comment at once upon another most unsatisfactory feature of the trial in the Court below. The wife had entered an appearance, she denied the allegations against her and she did, as a matter of fact, go into the witness-box and give evidence on oath. She was not represented by Counsel, and it was the duty of the Court to have seen that she was so represented. Where a petition of this nature is filed by the husband, and the wife enters an appearance and denies the allegations against her; she has an absolute right to require her husband to furnish her with funds sufficient to enable her to make a full and satisfactory defence, and to obtain such assistance from Counsel as is reasonable under the circumstances, and the Court should have taken upon itself the duty of seeing that this was done.

As a matter of fact the petition itself is, as we have already pointed out, full of vague and unsatisfactory allegations, although in the fifth paragraph it is distinctly alleged that the petitioner discovered that his wife was carrying on adulterous intercourse with the co-respondent Joseph Prior; no particulars are given, and on the wording of the paragraph the Court is left to infer that the petitioner made this discovery early in the month of February 1920. If that were the petitioner's case it would be a case unsupported by any shred of evidence.

We ought not, however, to bear hardly upon the petitioner, or to decide anything against him, merely because he was badly advised by his Counsel in the Court below. The best thing we can do for him is to take up, not the petition, but his own sworn testimony at the trial and to see what he asserted against his wife and what evidence was produced in support of his assertions, or on the other side, by way of rebutting the same.

We return, to the end of January 1920, when the petitioner came back to Ajmer. We have already mentioned the difference of opinion between the parties as to whether or not the wife should take up her residence at Abu Road. In this connection much reliance seems to be placed upon a single phrase in a letter addressed by the respondent to the petitioner on the 20th June 1919, while the latter was in service in Mesopotamia. The letter, on the whole, is couched in affectionate terms. It is such a letter as a good wife might have written to a husband for whose safe return she was anxiously waiting, except for this one phrase. The writer is referring to certain matters between herself and her own family and she writes as follows :—

"I am sending two of mother's letters to you. I can assure you, Alf, if you work again this side, I will leave you. My God, my damn people, they have really treated me very badly."

In the petition, stress is laid upon this expression as embodying a definite refusal on the part of Mrs. Garlinge to live with her husband again in the event of his returning to his employment on the Abu

Road side. It is very difficult to attach any such meaning to the phrase if it is read with its context. Moreover, when Mrs. Garlinge was in the witness box, she was not cross-examined on the point, or asked to say what she really meant and whether she would have refused to resume marital relations with her husband on his return to employment on the Abu Road side of the Railway. As we shall show presently, the petitioner's own evidence is inconsistent with the assertion of any such refusal on the part of his wife, and there was produced at the trial in the Court below and placed on the record, a letter of the petitioner to his wife, dated the 20th of September 1919, in which, while expressing strong resentment at the news that his wife had chosen in his absence to become a member of the Roman Catholic Church, and also resenting certain expressions used by her in some other letter not upon this record, he certainly nowhere suggests that he understood his wife to have refused to live with him in the event of his return to work at Abu Road.

Now we have it that during the year 1920 the respondent was living with her own people at Ajmer. The petitioner was employed at Abu Road and visited his wife from time to time in Ajmer. About the end of October 1920, according to the petitioner, he came to the house which his wife was then occupying in Ajmer. (We note that he speaks of it as "my house," so that presumably she was not living with her people then). He arrived in the early morning, about 6-15 A. M., and he means the Court to understand that his arrival was unexpected. He says that he found his wife and the co-respondent together in a room in which there was no bed. The co-respondent was fully dressed and Mrs. Garlinge was wearing a dressing gown, but they were lying side by side on the floor. The petitioner wishes the Court to understand that what he then saw left no doubt whatever in his mind as to the nature of the relations between the two. Nevertheless he raised no alarm at the time and made no attempt to obtain there and then corroborative evidence. He says he kicked the co-respondent and told him that if he ever came near the house again he would be severely dealt with. Nevertheless, after this scene, the petitioner goes on to depose, that about Christmas time that very year he returned to Ajmer and lived with his wife during the holidays. Again, he says, in the month of February 1921 he lived with his wife for about one month. In the ordinary meaning of these words used in this connection, they imply that he had resumed marital relations with his wife; which would in the circumstances be a condonation of her adultery, if in fact she had been unfaithful. We have been told in argument that the petitioner did not mean to imply by the expression above quoted that he had resumed marital relations with his wife. We can only deal with the evidence as it stands upon this record and give the ordinarily accepted meaning to ordinary words. If our inferences are in any way unjust to the petitioner, it is only one further reason for regretting that the petitioner when giving evidence was not properly taken in hand by his Counsel or by the Court, and care taken to elicit the facts.

The rest of the evidence for the petitioner consists of certain letters, regarding which we have already said all that is necessary.

There remains the evidence of two household servants. A man named Ramzan, who is the petitioner's cook, and a woman named Jamini, who cooks for the respondent. The gist of Ramzan's evidence is to the effect that the co-respondent Prior paid frequent visits to Mrs. Garlinge at Ajmer while her husband was absent on duty. He deposes further that on two occasions at least he saw the co-respondent lurking in the *nala* behind the house at a late hour of the evening, or after nightfall and that on one occasion, at about midnight, he saw Mrs. Garlinge going out of the house in the direction of that *nala*. On that particular occasion he did not follow her and he does not know whether Mr. Prior was in the *nala*. He admits, moreover, that on the said night the petitioner was sleeping in the house, so that we are asked to believe that the respondent actually left the house, with

her husband inside, in order to go and meet her lover in the *nala* outside. The evidence of this witness seems to us flimsy and untrustworthy in the highest degree. We do not know when he informed his master of the facts which he had observed. He certainly did not do so at the time of their occurrence. The woman Jamini really proves nothing at all. She refers to a period of time during which Mrs. Garlinge was living in the same house with her own mother, her father, her brother, her sister and her own little daughter. During this time, the witness says, Mr. Prior frequently visited the house, and she found him drinking tea there four or five times when she arrived at 6 o'clock in the morning. At that time Mrs. Garlinge was in bed. Whether the witness intended the Court to believe that the co-respondent was drinking tea by the bed side of the respondent or in some other room was never cleared up. As a matter of fact the Trial Court has attached little or no importance to the evidence of these two witnesses. He has relied on the evidence of the petitioner, which he considers as practically uncontradicted. Both the respondent Mrs. Garlinge and the co-respondent Joseph Prior went into the witness-box and denied the allegations against them. Mrs. Garlinge's denial was not explicit as it no doubt would have been, if she had had the benefit of the most ordinary legal advice, but she undoubtedly meant to deny the allegations against her. She had another story to tell regarding an episode which undoubtedly did take place at Abu Road, in the month of July 1921. There was a violent quarrel between the petitioner and the respondent in that month at Abu Road, ending in the first rupture between them of which we can discover any real evidence on this record. We do not desire to go into the details of this matter as the name of another lady was dragged into the case, and she has had no opportunity of being heard in connection with the affair. But Mrs. Garlinge's statement that it was her husband who turned her out of the house which he was then occupying at Abu Road, and her further statement that she was at that time making allegation against her husband regarding his conduct with another woman are both corroborated by independent evidence.

This is the state of the evidence on record on which we are asked to assume the grave responsibility of confirming a decree for the dissolution of marriage.

The case has been tried in the most unsatisfactory manner conceivable. We have already commented upon the pleadings, the way in which evidence inconsistent with the pleadings was admitted and the absence of any provision for legal representation for the wife. We feel bound to add that the learned District Judge seems to have dealt with this matter without any adequate realisation of the seriousness of the decree which he was asked to pass, or the importance of the questions laid before him for adjudication. We certainly cannot take upon ourselves the responsibility of confirming the decree of the Court below on the materials on this record. We ought to note it as a point in favour of Mrs. Garlinge that at the earliest possible moment she filed a petition in the Court below by way of appeal against the decree of the learned District Judge. She had no right of appeal but the obvious intention of the Legislature as expressed in section 17 of the Act is that this Court, upon a reference for confirmation, should review the entire evidence and come to its own conclusion whether facts sufficient to justify a decree for the dissolution of marriage are or are not established by that evidence. We do not think that on the materials on this record there is any evidence upon which a Court ought to find, or ought to have found, that Mrs. Garlinge was guilty of misconduct with the co-respondent Joseph Prior, or with any other person.

The result is that we must refuse to confirm the decree of the Court below but on the contrary, we hereby set aside that decree and dismiss the petition. The petitioner must bear the costs of the opposite parties, throughout, including the fees for the Counsel, who has been

employed to act for the respondent Mrs. Garlinge at the hearing in this Court, which we fix at the sum actually certified by Counsel

z. k. *Petition dismissed.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 274 OF 1922.

February 21, 1923.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

THE GOVERNMENT OF BOMBAY—PLAINTIFF—APPELLANT

versus

KHANDERAO RAMCHANDRA TALPADE—DEFENDANT—RESPONDENT.

Land Acquisition—Toka *land*—*Rates of assessment and capitalisation.*

Where Toka lands are being acquired, Toka tenants are entitled to some consideration in fixing the rate of assessment on the value and the rate at which it should be capitalised, and they are not to be treated as if on the expiry of the period of their leases they would be rack-rented off their lands. [p. 138, col. 2.]

First appeal from the decision of the Tribunal of Appeal, Bombay, in Reference No. 29 of 1920.

Mr. *Kanga*, Advocate-General, (with him Mr. *J. C. G. Bowen*, Government Solicitor), for the Appellant.

Messrs. *B. J. Desai* and *Campbell*, (with them Messrs. *K. N. Koyajee*, instructed by *Ardeshir, Hormusji, Dinshaw and Co.*, for the Respondent.

JUDGMENT.—These are five appeals from the decision of the Tribunal of Appeal in References Nos. 29, 31 and 32 of 1920 and 78 and 79 of 1920, in which certificates have been given that they are fit cases for appeal to the High Court. Those certificates appear to have been granted on the ground that an important question of principle was involved, although as a matter of fact if a question of principle was involved, it had already been before the High Court on two different occasions, and the High Court, as far as it could, laid down what method should be followed with regard to the apportionment of the present value of Toka lands between Government and the Toka tenants. But it seems that each party wants this Court not only to lay down some uniform method of apportionment, but to go still further and fix the rate of assessment for arriving at the apportionment in all cases. No doubt that would be very desirable, but considering the varying nature of these Toka lands, it appears to us to be out of question to attempt to rule that in every case where Toka land is acquired by Government, the rate of assessment which it is expected Government would levy in 1929 when the fifty years' period expires, is a certain percentage of the present value of the land, because the rate to be now fixed on the present value of the land must be determined in each case according to the prospects which the land has of improving or decreasing in value, and other varying circumstances.

On that question it may be said that the lands in all these references were of very much the same nature, and their value was fixed at a time when the value of land had risen by speculation considerably beyond the usual rate, while there does not seem to be much prospect of those values increasing by the year 1929. It may even be that these lands by 1929 might decrease in value. However that may be, we have to fix a rate for the assessment and another rate for the interest at which the assessment should be capitalized. As was stated in *Madhavdas Gokuldas Pasta* v. *The Government of Bombay* (1912) First Appeal No. 147 of 1911, decided by Scott, C. J., and Batchelor, J., on April 10, 1912, (Unreported) which is known as *Pasta's case*:—

"In respect of lands held under the Toka tenure the right of Government to increase the Toka rent is not subject to any specific limitation. The present Toka rent for the land in question is Rs. 13-11-7. By a resolution of August 14, 1879, this rent was declared for a

period of 50 years. The next revision will therefore take place in 1929. It is agreed that the amount of rent receivable up to that time is of a present value of Rs. 213: the contest is as to the value of the subsequent interest of Government in Toka rents payable after that date. The question is one which cannot be settled with anything approaching to certainty but the claim formulated by Government and accepted by the Tribunal of Appeal is based upon two probabilities, first that Government will in 1929 adhere to their declared policy of demanding four per cent. of the estimated value of building land as the rent or assessment payable to them and secondly that the value of the land in question will certainly not be less than that fixed as its present value under the proceedings which have resulted in its acquisition by the Improvement Trust. Taking then Rs. 2-5-0 per square yard as the present value making a total value of Rs. 18,278, a four per cent rent in 1929 would produce Rs. 731 per annum. Although Rs. 731 is two-thirds of a six per cent. return on the capital value and would at present only leave two per cent for the tenant, the question to be determined is whether Rs. 731 is a rent charge greater than the property can reasonably be expected to bear in 1929 having regard to the prospective development of building land in the north of the Island. Upon this point the members of the Expert Tribunal entertain no doubt. They say, 'We have arrived at the view that it will be land ripe for building when that assessment comes to be levied, and land of this area and ripe for building in that locality and position will carry the assessment referred to.'"

There is no doubt the land in that case was valued as not ripe for building at a very low rate of Rs. 2-5-0 per square yard. Assuming that the land would be ripe for building in 1929 and would fetch anything between Rs. 5 to Rs. 15 per square yard, four per cent. on Rs. 2-5-0 would be a very much smaller rate on a value between Rs. 5 and Rs. 15. But it must also be remembered that the rate of Government Paper was 3½ per cent. at that time.

It seems to us that it is hopeless at the present moment to speculate on what the Government policy will be in 1929. An attempt was made to place before the Tribunal evidence that the present policy of Government was, in the case of Toka land which came into the possession of Government, to demand a six per cent. rate on the present value. But the letter of the Collector which was put in with the reply of Government was dated some time in 1921, and such a declaration of policy could not affect the apportionment to be made by the Court as of the date when the land was notified. It also appears to us useless to inquire into what a purchaser of Government rights in Toka land would give for such rights, or what a present owner of Toka land would put by at the present moment in order to secure his position in 1929 when the previous settlement came to an end. All such calculations are themselves purely fanciful, and do not in any way assist the Court in arriving at a conclusion which itself can only be based on pure speculation. They merely delude the Court into thinking that it has arrived at a conclusion, not on speculation, but on sound reasoning. We have to decide between the views of Government, and no doubt we have to consider that they are entitled at the end of the period to reassess the land at a rate entirely within their discretion, and the views of the claimants the present owners, who may consider that they have rights in the nature of occupancy rights, which would entitle them to pay something less than a rack rent, which otherwise Government would charge on the basis that the lands were liable to be resumed at the end of the period.

Whether in 1929 there will be any Toka tenants still left in Bombay is also problematical. But if there are any, it is quite possible that they may attempt to urge their claims in this Court, and naturally it is quite impossible for any one to place any value on such claims at the present moment. Still our own view is that Toka tenants are entitled to some consideration, and they are not to be treated at the present day as if in 1929 they would be rack-rented off

their lands. In these cases we have to fix the rate of assessment on the present value and the rate at which it should be capitalized; and on a consideration of all the arguments which have been placed before us by the Advocate-General for Government and Mr. Desai, we think we should fix four per cent. as the rate of assessment on the present value of the land and six per cent. as the rate for capitalization. The rate of capitalization can, we think, be laid down with absolute certainty. We have to take the present value of an annual payment to commence in 1929; six per cent. is the usual rate of interest, and has always been considered the usual rate of interest in this Court, so we see no reason why it should not be adopted in these cases, without considering whether the assessment of these lands in 1929 will be well-secured or unsecured. It is certainly desirable in all these cases that we should avoid as far as possible fanciful speculation which can be of no assistance towards fixing a figure which is itself a matter of speculation. For the purpose of apportionment between the rival claims of Government and the tenants we may say that it would not be fair in 1929 to fix the prospective rate of assessment higher than four per cent., while there may be cases in which it may be equitable to allow a lower rate. Therefore, calculations will be made in each of the references according to the rates which we have laid down, and the orders of the Tribunal of Appeal will be amended in accordance with our decision.

One cross-objection was urged on the part of the respondents in References 29, 31 and 32 of 1920 against the direction that they were to get only half their costs from Government. But Reference 26 was tried together with these References, and the claimant in Reference 26 got all his costs. We presume that the Tribunal considered that on a consideration of the facts in these References Nos. 29, 31 and 32 the fair order was to make costs payable only to the extent of half. That is entirely a matter within the discretion of the Tribunal and we cannot possibly interfere with it.

Z. K. *Order accordingly.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 45 OF 1921.

June 5, 1922.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Coku' Prasad.

RAM DAS AND ANOTHER—PLAINTIFFS —APPELLANTS

versus

DUBRI KOERI—DEFENDANT—RESPONDENT.

Res judicata—*Jurisdiction of Civil and Revenue Courts—Question tried in Revenue Courts, whether can be re-agitated in Civil Courts.*

Where a Revenue Court having jurisdiction to decide a matter has heard and finally determined it, a suit in the Civil Court to question the decision of the Revenue Court is not competent.

Plaintiff brought a suit in the Revenue Court to eject the defendant as his sub-tenant. It was held that the defendant was not a sub-tenant but a tenant-in-chief paying rent to the *zemindar* and the suit was dismissed. The plaintiff then filed a suit in the Civil Court to set aside the decree of the Revenue Court and to get possession of the land:

Held, that the suit was not maintainable.

Baljit v. *Mahpal*, 49 Ind. Cas. 118; 41 A. 203; 17 A. L. J. 60, followed.

Letters Patent Appeal against the judgment of Mr. Justice Stuart reversing that of the Additional Subordinate Judge, Ghazipur.

Mr. *A Sanyal*, for the Appellant.

Dr. *M. L. Agarwala*, for the Respondent.

JUDGMENT.—The plaintiff brought a suit in the Revenue Court to eject the defendant as his sub-tenant. The suit was fought out up to the Court of the Commissioner and it was held that the defendant was not a sub-tenant, but a tenant-in-chief paying rent to the *zemindar*.

After failing in the Revenue Court the plaintiff instituted the present suit in the Civil Court for setting aside the decree of the Revenue Court above-mentioned and for the possession of the land in dispute.

The defendant's contention was that he was the chief tenant and that such a suit did not lie and was barred by the rule of *res judicata*.

The Munsif decreed the suit, holding that the Revenue Courts were not competent to decide the question that the defendant was the chief tenant and not a sub-tenant of the plaintiff, and the

present suit, being between rival tenants, was one cognizable by the Civil Court. This decision was affirmed on appeal.

The defendant appealed to this Court and a learned Judge of this Court has allowed his appeal and dismissed the plaintiff's claim. No doubt it was the tendency of the Court in earlier cases to allow such suits to be brought in the Civil Court, but this view has now been departed from.

Mr. Justice Piggott has very clearly discussed and put the present point of view in *Baljit* v. *Mahipat* (1). We are in full agreement with his view. The plea of sub-tenancy has been heard and finally determined by the only Court capable of entertaining it, and the present suit of the plaintiff to have the decision of the Revenue Court set aside must fail.

For these reasons we agree with the decision of the learned Judge of this Court and dismiss the appeal with costs.

Appeal dismissed.

Z. K.

(1) 49 Ind. Cas. 118; 41 A. 203; 17 A. L. J. 60.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 61 OF 1921.

June 6, 1922.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Gokul Prasad.

BHOJ RAJ—PLAINTIFF—APPELLANT

versus

HARDEVA AND OTHERS—DEFENDANTS—RESPONDENTS.

Easements Act (V of 1882), s. 59—Licensee, whether can claim adversely—Transfer of property—License, whether cancelled.

A licensee cannot, by enjoying the license for any length of time, acquire rights adverse to the licensor.

Where a licensor transfers the property in respect of which the license has been enjoyed, the license ceases to exist.

Letters Patent Appeal against the judgment of Mr. Justice Stuart reversing that of the District Judge, Aligarh.

Munshi *Panna Lal*, for the Appellant.

Munshi *Gulzari Lal*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff (appellant) to recover a certain plot of waste land in the village from the defendants who, according to the plaintiff's allegation, have erected certain thatched sheds and cattle troughs without his permission a short time ago.

The defence raised was (1) that the sheds were 25 years old, (2) that the plaintiff had lost title because of want of possession for 12 years, and (3) that these constructions were necessary for the defendants' cultivation in the village, or, in other words, that they were appurtenant to their holding.

The First Court dismissed the suit on the ground that it was barred by time because the plaintiff had not proved his possession within 12 years of suit.

The lower Appellate Court found, in concurrence with the First Court, that the constructions were more than 20 years old and that the defendants were mere licensees; that the plaintiff having got the property from the original licensors by virtue of transfer, the license ceased to exist, having regard to section 59 of the Indian Easements Act (V of 1882), and the defendants were liable to ejectment. It accordingly decreed the plaintiff's suit.

The defendants came up in appeal and a learned Judge of this Court has dismissed the plaintiff's claim on the ground that a *zemindar* cannot revoke a license like this at his will after the tenant has enjoyed the privilege for more than twelve years. As a general proposition of the law, we cannot accept this statement of the law as correct. A licensee cannot by enjoying the licence for any length of time acquire rights adverse to that of the licensor. The question whether a certain class of land is appurtenant

to the holding of a tenant is one of fact depending upon the circumstances of each particular case. In this case, as we have stated above, the lower Appellate Court has found that the defendants did not hold the plot in suit or the constructions thereon as appurtenances to their holding. On this finding and the further fact that the plaintiff was a transferee from the original licensor, the license had ceased to exist by operation of law and the plaintiff was entitled to a decree. We, therefore, allow this appeal. As a claim based upon false allegations by a *zemindar* is one which does not meet with our approval, we refuse him his costs in all Courts. The result is that the judgment of the learned Judge of this Court is set aside and the plaintiff's claim is decreed, but without costs.

Appeal decreed.

Z. K.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

April 13, 1923.

Present:—Viscount Haldane, Lord Dunedin and Sir John Edge.

NABA KUMAR DAS AND OTHERS—APPELLANTS

versus

RUDRA NARAYAN JANA AND ANOTHER—RESPONDENTS.

Construction of document—Lease of jungle land by Government—Clearing land for cultivation, meaning of—Non-compliance with condition—Forfeiture.

Government granted a lease of a tract of jungle land to the plaintiff. One of the clauses of the lease provided that one-eighth of the entire area leased must be cleared and in a fit state for cultivation at the end of the fifth year, and that at any time thereafter an officer of Government might enter on the land and cause it to be measured for the purpose of ascertaining whether the condition had been fulfilled. In the event of failure to comply with the condition the lessee was liable to the forfeiture of all rights in the land under the lease. After the expiry of the period of five years an officer of Government proceeded to the spot and after an inspection of the land but without taking measurements, made a report that the condition had not been fulfilled. The lease was thereupon determined:

Held, (1) that the obligation in the lease to clear the land and to put it into a fit state for cultivation, extended to the extraction of the stumps of trees as well as to the cutting down of the timber; [p. 142, col. 2.]

(2) that the lease did not impose an obligation on the Government to take measurements, there was a right to do so but no duty; [p. 143, col. 1.]

(3) that the forfeiture was not invalid merely for the reason that the officer who made the report did not take measurements, especially in the absence of positive evidence showing that the condition had been complied with. [p. 143, col. 2; p. 144, ol. 1.]

Appeal from the judgment and decree of the Calcutta High Court, reversing that of the Subordinate Judge, Third Court, 24-Parganahs.

Messrs. *De Gruyther*, K. C., and *Bagram*, for the Appellant.

Messrs. *Dunne*, K. C., and *Ramsay*, for the Respondents.

JUDGMENT.

Viscount Haldane.—In this litigation the High Court at Fort William, as the Court of Appeal, reversed judgment and decree of the Subordinate Judge, Third Court, 24-Parganahs. The appellants had brought a suit in the latter Court for a declaration that forfeiture by the Government of a certain lease and agreement was invalid and that they, as plaintiffs, were entitled to possession of the land, the subject of the lease. The learned Subordinate Judge decided in favour of the plaintiffs, but the High Court allowed an appeal from his decision and dismissed the suit. The present appeal is brought by the plaintiffs, and it seeks to have the decision of the learned Judge of first instance restored. The only question now relevant for determination is whether the resumption by the Government in 1906 of Crown land in the Sunderbans, originally leased on the 7th December 1900, and a subsequent *pottah* by the Government dated the 27th July 1909, in favour of the respondent, Rudra Narayan Jana, were validly made.

The only material facts are not numerous. A lot called Monsadwip in Saugor Island, Sunderbans, was put up to auction by the Government for settlement, and the highest bidder was one Golak Chandra Das. At his request the Govern-

ment on the 7th December 1900, granted a lease in favour of Golak Chandra Das himself, Narayan Prashad Ballav, Prasanna Kumar Maiti, Narendra Nath Bhuiya, and Kabir Charan Patra. By partition deed the shares of the first three were declared to be of 4 annas each, and the shares of the last two of 2 annas each. These lessees, or their representatives, were the original plaintiffs and the appellants here. In August 1903 the first respondent, Rudra Narayan Jana, purchased from the successors-in-title of Golak Chandra Das, who had died, a 2 annas share of the 4 annas share to which the latter was entitled.

The lease of the 7th December 1900 gave an occupancy right for forty years from April 1901, of jungle land. Under the third clause of this lease one-eighth of the entire area leased was to be cleared and to be in a fit state for cultivation at the end of the fifth year, and at any time after the expiration of the fifth year the Sunderbans Commissioner or other officer appointed by the Government or any person authorised by him might enter on the land and cause it to be measured for the purpose of ascertaining whether this condition had been fulfilled. The fourth clause provided that on failure to comply with the above clearing condition, the lessees should be liable at the discretion of the Government to the forfeiture of all rights in land under the lease or to an annual penalty. The Government, if the lease was determined, was to have the right of immediate re-entry. There was also a provision for the construction by the lessees of "protective works" with a right in the Government to put an end to the lease in case these were not constructed within a time prescribed. In the view which their Lordships take of the case it is not necessary to consider this provision.

By an agreement of the same date with the lease, the 7th December 1900, the lessees covenanted that they would undergo the penalties set forth in "the clauses of the lease," provided that the Sunderbans Commissioner or other officer should give to them or their legal representatives fifteen days notice within which to show cause why the penalties should not be enforced. No question now arises on this covenant or proviso.

On the 12th April 1906 Mr. Sunder, who as Settlement Officer had taken over the duties of the Commissioner in the Sunderbans, an office which had been abolished, visited the property leased. He had previously made various intimations of visits which were not carried out, and he had, on the occasion on which he actually inspected, arrived three days before the time he had intimated. These circumstances, however, do not affect the question of his right. He appears to have gone to the property and to have looked at it with the aid of his binoculars both when he landed and subsequently from a boat. The property was stated by the Trial Judge to be "a vast tract of forest and swamp, comprised in the area of 7,532 miles, known as the Sunderbans," consisting of "a tangled region of estuaries, rivers and water-courses, enclosing a vast number of islands of various shapes and sizes." The property leased, was included in Chuck Monsadwip which is in Saugor Island, one of these islands. The Sunderbans is by nature a swampy jungle covered with trees. The soil is alluvial soil, formed by deposit from the Ganges at whose mouth it is. The Government had, for a long time past, been taking steps to re-claim it, and to convert the jungle from being the mere home of wild beasts into rice tracts. For this purpose it was necessary not only to cut down the trees but to take out their stumps, and improvement leases were being granted on terms, such as those in the lease in question, which should secure that this was done. It is, therefore, plain that the obligations in the lease to clear and to put into a fit state for cultivation, extended to the extraction of these stumps as well as to the cutting down of the timber.

Mr. Sunder appears first to have landed on the lot of the respondent, Rudra Narayan Jana. He subsequently got into a boat in order to have a view of other portions of the property, alighting on at least one spot. He was engaged for, at all events, two hours in looking at the property leased, which extended to about 3,000 acres. He did not take measurements. The learned Subordinate Judge speaks as though he was bound to do this, but it

is clear that there was no obligation to do so imposed by the lease. There was a right if the representative of the Government thought proper, to enter and make measurements, but no duty. What the Settlement Officer had to determine, as a matter of fact, was simply whether one-eighth of the entire area leased had been cleared and put into a state fit for cultivation within the stipulated time.

On the 23rd April Mr. Sunder reported to the Collector of the 24-Paraganahs at Alipur that he had inspected and had found only Rudra Narayan Jana and a few *raiyats* who held under him on the property. He stated that the clearing conditions had not been fulfilled, and that only a small portion had been cleared by Rudra, who had obtained some paddy from it. He also said that the "protective works" had been commenced. As to this, however, for reasons connected with the absence of a designation by the Government of the site for them, no question has been raised on the argument in the appeal. He recommended in his report that the lease should be determined and the estate brought under direct management by the Government.

It was contended for the appellants that the substance of this evidence was displaced by certain documents put in at the trial by the Government. These documents were in the nature of a rent-roll proceeding on measurements stated to have been made about the beginning of the year 1909. The rent-roll itself was prepared on the 11th January in that year. It was relied on by the Subordinate Judge as showing that the land must have been made fit for cultivation by 1906. The appellants offered evidence that there had been measurements made for the Government in 1907, but both Courts rejected the testimony of the witnesses as false. In the Court of Appeal it was pointed out that the entries in the rent-roll are ambiguous as to whether more than 942 *bighas* were stated to have been fit for cultivation on the 6th April 1906. If there was no more than this amount made fit by then, the eighth part of the whole, amounting to 1,250 *bighas*, could not have been made fit within the time stipulated. The rent-roll was prepared by a clerk, Mahesh Chandra Dutta, from material which appeared to have been furnished to him by other clerks. There is no reliable evidence as to the entries having been the work of anyone who had sufficient first hand knowledge.

The Court of Appeal, moreover, points out that there was ambiguity in the entries as to the dates at which the tenants were treated as actually being in possession of land that had been rendered fit for cultivation.

But however this may stand there is another objection which their Lordships think fatal to the entries in the rent-roll being relied on as evidence which could outweigh the direct testimony of the witnesses who say that the stipulated eighth part had not been adequately cleared by April 1906. Mr. Sunder went into the witness box and stated that he had seen the property and, as the result, had advised that, as he had found that the clearing stipulated for had not been performed, the Government should resume the property leased, as was actually done. Nothing was put to him in his cross-examination about the rent-roll or the entries in it. If, as was suggested at the Bar, this was because the document was tendered by the Government, a defendant at the trial, as part of its case, only after Sunder had been in the box, an application might have been made to re-call him for further cross-examination. There is, however, no suggestion that there was any such application. Sunder was not even cross-examined on the alleged perfunctory character of his inspection. The learned Subordinate Judge relied largely on the circumstance that he did not measure. But he was not bound to measure. His evidence was that he could see and saw that the proper quantity of land had not been cleared. If this statement was challenged it should have been challenged by cross-examination directed to the impracticability of forming a judgment by mere inspection, even with the aid of glasses, as to the proportion of area cleared.

After the forfeiture had been declared and an interval had elapsed, a fresh lease was granted to the respondent, Rudra, on the 27th July 1909 who, it was admitted, could not be said to have been in a fiduciary position. In consequence of this lease

to him he was joined as a defendant in the suit along with the Secretary of State.

The Trial Judge found that the defendants had failed to prove that the clearing conditions of the lease had been broken, and on this ground gave judgment against them. The Court of Appeal held that the learned Trial Judge had laid undue stress on jungle cutting alone. The stumps had to be extracted also before the land could be fit for cultivation. It was largely on the ground that this was proved not to have been done that they reversed the decision.

For reasons which they have already sufficiently indicated their Lordships concur in the view taken in the High Court at Fort William on the appeal from the Trial Judge, and they will humbly advise His Majesty that this appeal should be dismissed with costs.

Z. K. *Appeal dismissed.*

Solicitors for the Appellants:—Messrs. *Chapman, Walker* and *Shephard.*

Solicitors for the Respondents:—Messrs. *W. W. Box & Co.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 518 OF 1922.

June 1, 1923.

Present:—Mr. Justice Lindsay and Mr. Justice Sulaiman.

SHANKAR LAL—DEFENDANT—APPELLANT

versus

KIRARI MAL AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Custom — Pre-emption—Pre-emptor associating stranger in claim—Partial pre-emption whether permissible—Vendee acquiring position equal to pre-emptor during pendency of suit—Title defeasible.

Where property situate in two *mahals* is sold and a suit for pre-emption is brought by persons some of whom are co-sharers in both *mahals* and the others only in one of them, the suit of the former is liable to be dismissed, as, in respect of the property situate in the *mahal* in which they alone are co-sharers they disentitle themselves from pre-empting by associating with them in their claim persons who are strangers to the property, and in respect of the property situate in the other *mahal* they cannot be permitted to enforce their right of pre-emption, as they are bound to take over the whole bargain and not only a portion of it. The suit must, however, succeed so far as the claim of these plaintiffs is concerned who are co-sharers in one *mahal* only, for they are entitled to preempt only that portion of the property which is situate in the *mahal* in which they are co-sharers and have sued to enforce that right. [p. 145, col. 1.]

A vendee cannot by acquiring, during the pendency of a pre-emption suit, a defeasible title equal to that of the pre-emptor defeat the suit for pre-emption. [p. 145, col. 2.]

Nabiban Bibi v. *Kauleshar Rai*, 4 A. L. J. 351; A. W. N. (1907) 110; *Kauleshar Rai* v. *Nabiban Bibi*, 3 A. L. J. 426; A. W. N. (1906) 164; 28 A. 642, followed.

Second appeal against a decree of the First Additional District Judge, Aligarh, dated the 27th February 1922.

Dr. *M. L. Agarwala* and Mr. *Gulzari Lal*, for the Appellant.

Dr. *S. N. Sen*, for the Respondents.

JUDGMENT.—On the 7th January 1920 the second and third defendants sold to the first defendant, who is the appellant here, certain property situated in two *mahals*, Gobind Ram and Baqi Manda. The sale of these items of property was made by one deed.

Five plaintiffs brought a suit to preempt this sale. Of these, plaintiffs Nos. 1, 2 and 3 had no share in *mahal* Baqi Manda. Plaintiffs Nos. 4 and 5 had shares in both *mahals*. At the time of the purchase the vendee had no share in either *mahal* and this was the state of affairs at the time the suit was brought.

During the pendency of the suit the vendee got a transfer made in his favour of certain property situated in both the *mahals*. This transfer purported to be by way of gift. The Court of first instance, however, held that the transfer was not in reality a gift but was in fact a sale and this view has been affirmed in appeal by the lower Appellate Court.

The result of the suit in the Court of first instance was that the plaintiffs' claim was dismissed entirely with respect to the property situated in *mahal* Baqi Manda. The Munsif found that the plaintiffs Nos. 4 and 5 had, by associating with them in their claim, strangers to the property

in *mahal* Baqi Manda, disqualified themselves from obtaining any decree for pre-emption in respect of this property. We have already adverted to the fact that the first second and third plaintiffs had no share in *mahal* Baqi Manda.

The Munsif gave a decree to all five plaintiffs for pre-emption of the property situated in *mahal* Gobind Ram.

This decree of the Court of the first instance has been affirmed in appeal by the learned District Judge.

It is complained in second appeal that the learned Judge did not decide all the points which were raised before him. In fact the only question which the learned Judge has decided is that the transfer which was made in favour of the vendee during the pendency of this suit was a transfer by way of sale and not by way of gift.

The first plea of which we take notice is contained in paragraph No. 2 of the memorandum of appeal. The learned Counsel has contended that the suit ought to have been dismissed on the ground that no suit for partial pre-emption is maintainable.

We are of opinion that this plea ought to succeed so far as the fourth and fifth plaintiffs are concerned.

By joining in the suit persons who were strangers to the property situated in *mahal* Baqi Manda, these plaintiffs disqualified themselves from suing for pre-emption of the property in that *mahal*, and as under the law they must pre-empt the whole sale and as they have disqualified themselves from doing so, in our opinion, their suit must fail entirely.

This consideration however does not apply in the case of the plaintiffs Nos. 1, 2 and 3. They could only claim pre-emption of the property situated in *mahal* Gobind Ram and this they have done.

It is next pleaded in paragraph 3 of the memorandum of appeal that there is no sufficient proof of custom. That question has not really been argued before us and indeed it appears to us that no argument is possible in view of the provisions of the *wajib-ul-arz* upon which the First Court relied. We are satisfied that a custom of pre-emption does exist.

As regards the argument that the whole suit should be dismissed we have already expressed our opinion that the claim of the first second and third plaintiffs cannot be dismissed on the facts as they stand. Further it is to be observed that the appellant, the vendee, cannot succeed on the law as laid down by this Court. He has been found by both Courts to have taken a transfer by way of sale during the pendency of the suit. He has not acquired an indefeasible title to the property by this transfer and in fact a suit for pre-emption in respect of this transfer was filed before the Munsif gave his decision. At the time of the First Court's decree the appellant had no complete title and was, therefore, not in a position to claim the status of a co-sharer. He was in short only a stranger and under the custom as set out in the *wajib-ul-arz* the plaintiffs have a right of pre-emption as against him in respect of the property situated in *mahal* Gobind Ram.

This view of the law has been taken in the case reported as *Nabiban Bibi* v. *Kauleshar Rai* (1) affirming the decision of Richards. J., which is reported as *Kauleshar Rai* v. *Nabiban Bibi* (2).

This ruling has been followed in other decisions of this Court and we need only refer to a decision of the present Bench, dated 20th April 1923 in *Radhika Raman Bihariji Maharaj* v. *Bohra Shiam Sundar Lal* (3).

The result of all this is that we modify the decree of the Court below by directing that the claim of the plaintiffs Nos. 4 and 5 be dismissed in respect of *mahal* Gobind Ram as against the defendant-appellant with proportionate costs in all Courts. The decree in favour of the plaintiffs Nos. 1, 2 and 3 with respect to *mahal* Gobind Ram will remain and to this extent the appeal fails and is dismissed with costs to the plaintiffs-respondents Nos. 1, 2 and 3.

We may mention here that the order of the First Court dismissing the suit as

(1) 4 A. L. J. 351; A. W. N. (1907) 110.
(2) 3 A. L. J. 486; A. W. N. (1906) 164; 28 A. 642.
(3) 74 Ind. Cas. 382; 21 A. L. J. 518; (1923) A. I. R. (A.) 526; 45 A. 561.

regards *mahal* Baqi Manda has become final and no appeal was filed against that order in the Court below.

Decree modified.

Z. K.

BOMBAY HIGH COURT.

LETTERS PATENT APPEAL NO. 16 OF 1922.

February 23, 1923.

Present:—Mr. Justice Pratt and Mr. Justice Fawcett.

DHONDI SUBHANE POWAR—PLAINTIFF—APPELLANT

versus

SECRETARY OF STATE FOR INDIA—DEFENDANT—RESPONDENT.

***Bombay Hereditary Offices Act** (III of 1874), ss. 9, 11, 11A—Bombay Land Revenue Code (Act V of 1879), ss. 153, 166—Bombay Revenue Jurisdiction Act (X of 1876), s. 4 (c)—Vatan, alienation of—Order declaring alienation null and void—Liability to pay full rent, commencement of—Arrears of rent—Forfeiture—Notice, contents of—Suit for declaration of invalidity of forfeiture, maintainability of.*

On 5th October 1904 an order was made by a Collector under section 11 of the Bombay Hereditary Offices Act declaring the alienation of a *vatan* to be null and void and that the land was liable to assessment at the rate of full rent prescribed under clause (2) of section 9 of the Act, but the amount of the full rent was not assessed till July 6th 1908:

Held, that under section 11A of the Act the full rent assessed was payable from the date of the order declaring the liability of the land to pay the full rent and not from the date on which the amount of the full rent was actually assessed. [p. 147, col. 1.]

Section 166 of the Bombay Land Revenue Code does not make it obligatory on the Collector to specify in the notice issued under that section for what years the land revenue is in arrears. [p. 147, col. 2.]

Where an order of forfeiture made by the Collector under section 153 of the Bombay Land Revenue Code is *inura vires*, a suit for a declaration that the order is invalid is barred by section 4 (*c*) of the Bombay Revenue Jurisdiction Act. [p. 147, col. 2.]

Letters Patent Appeal from the decision of Macleod, C. J., in Second Appeal No. 722 of 1921, from the decision of the District Judge, Satara, confirming the decree passed by the Assistant Judge at Satara, in Suit No. 1 of 1917.

Mr. *K. N. Koyajee*, for the Appellant.

Mr. *S. S. Patkar*, Government Pleader, for Respondent.

JUDGMENT.

Pratt, J.—The plaintiff sued for a declaration that the order of forfeiture made by the Collector on March 10, 1915, was invalid. The order of forfeiture was made under the following circumstances:—

The predecessor-in-title of defendants Nos. 2 to 8 had in the year 1886 alienated their *vatan* land to the plaintiff. After the death of the alienor, the defendants applied to the Collector to take proceedings for the protection of the *vatan* and the Collector, on October 5, 1904, made a declaration under section 11 of Bombay Act III of 1874 that the alienation was null and void.

Thereafter there were two courses open to the Collector under section 11—either (1) to summarily resume possession of the land; or (2) to assess it at the rate prescribed under clause 2 of section 9, *i. e.*, at the full rent ordinarily paid by tenants of land of similar description in the same locality.

The Collector acted on the second alternative and decided not to summarily resume possession but to assess the land at the full rent. His order is quoted in the judgment of the District Judge and is as follows:—"Having no material to decide at once what a full rent would be, I close these proceedings, leaving it to the respondent to move further in the matter when he is ready." Later, on July 6, 1908, the Collector held further proceedings and assessed the land at a rental of Rs. 75 per annum.

The Collector, in 1915, forfeited the land because the plaintiff had not paid the full amount of arrears of rent then due. The plaintiff claims that the full amount had been paid and the question is whether the rent was due from July 6, 1908, when the assessment was fixed, or from October 5, 1904, when the Collector made his declaration that the alienation was null and void. If the rent ran from the former date there were arrears of rent due, and if from the latter no arrears were due.

Mr. Koyajee's contention is that the plaintiff is liable to pay rent only from

the date when the assessment was made. But I think the terms of section 11 A negative that construction. The assessment of land was an alternative to the summary resumption of possession. The order that the land was liable to assessment must, therefore, mean assessment from the date of the order. From that date the person in possession is either wrongfully in possession or a tenant liable to pay either mesne profits or rent from the date of the order.

Again the assessment was made under clause 2 of section 9 which refers to cases in which *vatan* property is resumed after an alienation prior to the date of the Act, and it is clear from clause (1) of section 9 that in such a case profits from the date of the order declaring alienation to be null and void are resumable. The inference must be that any assessment levied under section 11A would also be charged from the date of the same declaration.

Mr. Koyajee lays stress on words "thenceforward revert to *vatan*" in section 11A—perhaps these words would have been better placed at the end of section 11. They can only mean that the Act regards the restoration of the *vatan* complete after dispossession or assessment. But they do not indicate that the assessment should not be levied from the date of the order requiring such assessment to be made.

I, therefore conclude that there were arrears of land revenue for the recovery of which the Collector had jurisdiction to declare the land in holding forfeited under section 153 of the Bombay Land Revenue Code.

It is next contended that the Collector has not complied with one of the conditions precedent to the exercise of his jurisdiction in that no proper notice of forfeiture was given under sections 153 and 166 of the Bombay Land Revenue Code. Notice was given but there was a mistake of detail as to the years for which the land revenue was in arrears. It was a misdescription which in no way misled the plaintiff because he has admitted in his statement (Exhibit 7) that he himself was aware that the rent was due from the date of the Collector's order in 1904. Nor can it be said that this misdescription in any way involves a violation of the terms of section 166 of the Bombay Land Revenue Code, for the terms of that section do not make it obligatory upon the Collector to specify for what years the land revenue was in arrears.

As the Collector's order was *intra vires* the suit is barred not only by Art. 14, Schedule I, of the Indian Limitation Act, but also by section 4 (*c*) of the Bombay Revenue Jurisdiction Act.

I would, therefore, dismiss this appeal with costs.

Fawcett, J.—I agree. I would only add on the first point that has been argued that section 9, clause 1, of the Bombay Hereditary Offices Act, III of 1874, expressly says that an order giving the *vatandars* profits of the *vatan* should have effect from the date of the Collector's order, and there is nothing in section 11A that can, in my opinion, be held to apply a different principle. When that section says "he may assess it at the rate prescribed in clause 2," it seems to me to refer to his directing that the person in possession should pay the full rent specified in clause 2 of section 9. It is not, in my opinion, essential for the efficacy of such an order that he should in the same order state the amount this full rent comes to. As in the present case, it may obviously be necessary to make further inquiry on that point, and though of course the amount of full rent should be determined within a reasonable time, yet the case falls within the principle "*id certum est quod certum reddi potest.*" Accordingly I think there is no reason to differ from the view taken by both the lower Courts, and that the appellant became liable to pay the full rent, whatever it was, from the date of the Collector's order.

Z. K. *Appeal dismissed.*

THOPPAI VEDAVIASA AIYAR v. THE MADURA HINDU SABHA NIDHI CO. LTD.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 6 OF 1922

AND

CIVIL REVISION PETITION No. 74 OF 1922.

April 17, 1923.

Present:—Justice Sir Francis Oldfield, Kt., and Mr. Justice Devadoss.

THOPPAI VEDAVIASA AIYAR—RESPONDENT No. 13—APPELLANT

versus

THE MADURA HINDU SABHA NIDHI CO., LTD., BY ITS SOLE DIRECTORS AND PROPRIETORS VALLIAPA CHETTIAR AND OTHERS—PETITIONERS AND RESPONDENTS NOS. 1 TO 5, 7 TO 9, 13 AND 14—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, scope and object of—Dispute between different parties—Mortgage decree—Order settling in what order different properties are to be sold—Appeal, whether lies.

Section 47 of the Civil Procedure Code should be read as relating to all questions arising between any of the parties to the suit and not merely between parties who are opposed to each other in the suit. The object of the section is the cheap and speedy settlement of all disputes at the stage of execution. [p. 150, col. 1.]

Rayner v. *Mussoorie Bank, Limited*, 7 A. 631 at p. 636; A. W. N. (1885) 204; 4 Ind. Dec. (N. S.) 830; *Yagnasami Ayyar* v. *Chidambaranatha Mudaliar*, 61 Ind. Cas. 961; 13 L. W. 15 and *Bhagwati* v. *Banwari Lal*, 1 Ind. Cas. 416; 31 A. 82 at p. 93; 5 M. L. T. 185; 6 A. L. J. 71, distinguished.

Prosunno Kumar Sanyal v. *Kali Das Sanyal* 19 C. 683; 19 I. A. 165; 6 Sar. P. C. J. 209; 9 Ind. Dec. (N. S.) 898, followed.

An order passed in the course of execution proceedings for the settlement of the terms of a sale proclamation under a mortgage decree by which the mortgaged items in the possession of different parties are directed to be sold in a particular order is not merely administrative but is one relating to execution or satisfaction of the decree and is, therefore, appealable. [p. 150, cols. 1 & 2.]

Sivagami Achi v. *Subrahmania Ayyar*, 27 M. 259; 14 M. L. J. 57 and *Jogodishury Debea* v. *Kailash Chundra Lahiry*, 24 C. 725; 1 C. W. N. 374; 12 Ind. Dec. (N. S.) 1152 (F. B.), followed.

Appeal against the decree and judgment of the District Court, Madura, in A. S. No. 92 of 1921, preferred against the decree of the Court of the Subordinate Judge, Madura, in E. P. No. 151 of 1920 (E. A. No. 68 of 1921 in O. S. No. 14 of 1916 on the file of the Court of the Temporary Subordinate Judge, Madura).

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge, Madura, dated 21st March 1921, in E. P. No. 151 of 1920 (E. A. No. 68 of 1921, in O. S. No. 14 of 1916, on the file of the Court of the Temporary Subordinate Judge, Madura).

Mr. *T. L. Venkatarama Iyer*, for the Appellant.—The lower Appellate Court has refused to entertain the appeal on the ground that one does not lie.

The expression "between partition to the suit" in section 47 does not necessarily mean "between parties who are plaintiff and defendant respectively." The nature of the suit and the contention have to be considered and if there is a conflict between the parties, the question comes under section 47.

See *Samalapalli Mangayya* v. *Samalapalli Sriramulu* (1) which is a case directly on the point. I may also refer to *Krishnaswamier* v. *Swaminadhier* (2).

In the present case the question is between two mortgagors, as to whose property must be sold first, *i. e.*, from which property the decree should be satisfied in the first instance. It relates clearly to the mode of execution and comes under section 47 of Civil Procedure Code and an appeal, therefore, lay to the lower Appellate Court.

Mr. *P. V. Krishnaswami Aiyar*, for 8th Respondent.—With all respect the decision in *Samalapalli Mangayya* v. *Samalapalli Sriramulu* (1) is not correct and is supported neither by principle nor by authority. The judgment gives no reasons whatever and follows no previous ruling. The first point is that every judicial order made in the course of execution proceedings is not an order under section 47, Civil Procedure Code. See *Deoki Nandan Singh* v. *Bansi Singh* (3). To bring a case

(1) 19 Ind Cas. 448; 24 M. L. J. 477; 13 M. L. T. 347; (1913) M. W. N. 382

(2) 18 M. L. J. 568; 4 M. L. T. 392.

(3) 10 Ind. Cas. 371; 16 C. W. N. 124; 14 C. L. J. 35.

under section 47 the question at issue must be one between decree-holder or judgment-debtor or at any rate between parties who were opposed to each other in the suit itself. This contention receives support from the language of the section. My submission is that it would have no application to question between judgment-debtors *inter se* on the authority of *Raynor* v. *Mussoorie Bank, Limited* (4), *Kastura Kunwar* v. *Gaya Prasad* (5) and *Bhagwati* v. *Banwari Lal* (6). There is further the authority of a decision of this Court in *Yagnasami Ayyar* v. *Chidambaranatha Mudaliar* (7).

(OLDFIELD, J.—What about a suit for partition and the disputes arising between defendants therein in execution proceedings?)

Suits for partition stand on a different footing since every defendant in such suit is potentially a plaintiff.

The object of the Legislature in enacting section 47 being the speedy disposal of all proceedings in execution, it could not have contemplated that judgment-debtors should be enabled to ask the Court to adjudicate as between themselves.

My next point is, the order in question is only an administrative one and not judicial one and so attracts the ruling in *Sivagami Achi* v. *Subrahmania Ayyar* (8).

(OLDFIELD, J.—What do you mean by 'administrative orders'?)

The Privy Council have employed the same language in *Ko Tha Hnyin* v. *Ma Hnyin* (9) and must be taken to refer to executive orders of Courts during execution proceedings such as the one before us.

(OLDFIELD, J.—What is the test to be adopted to determine if an order is purely administrative or not?)

The test is supplied by Banerjee, J., in *Jogodishury Debea* v. *Kailash Chundra Lahiry* (10).

In much the same way in which an interlocutory order between a preliminary and final decree has been held to be not appealable: *Prayag Narain Singh* v. *Sukdeo Narain Singh* (11) and a question between co-decree-holders *inter se* also has been held to be not appealable as in *Gyamonee* v. *Radha Romon* (12) and *Ram Saran Pande* v. *Janki Pande* (13), no appeal would lie in this matter also.

JUDGMENT.—The question in this appeal is whether the lower Appellate Court was right in holding that no appeal lay to it and passing an order of dismissal. The decision of the Court of first instance was as to the order in which certain items or property were to be sold in execution of a decree on a mortgage and the question is whether that decision was appealable as having been passed under section 47. It is urged here that it was not passed under section 47, first because although it was passed between the parties to the suit that order should be read as relating only to questions arising between the parties who are opposed to each other in the suit; that is, it is contended, between the plaintiff and one or other of the defendants and not between the defendants themselves. In support of this we have been referred to *Raynor* v. *Mussoorie Bank Limited* (4), *Yagnasami Ayyar* v. *Chidambaranatha Mudaliar* (7) and *Bhagwati* v. *Banwari Lal* (6). But although these cases do contain language susceptible of an interpretation, which may support the appellant's argument, that argument was not what was being considered by the learned Judges. For in each of these cases the matter under consideration was in dispute between a judgment-debtor and his representative or a person on whom his interest had in some way devolved and not (as here) between two judgment-debtors, whose interests were absolutely indepen-

(4) 7 A. 681 at p. 686; A. W. N. (1885) 204; 4 Ind. Dec. (N. S.) 880.
(5) 29 A. 207 at p. 209; 4 A. L. J. 47; A. W. N. (1907) 89.
(6) 1 Ind. Cas. 416; 31 A. 82 at p. 98; 5 M. L. T. 185; 6 A. L. J. 71.
(7) 61 Ind. Cas. 961; 13 L. W. 15.
(8) 27 M. 259; 14 M. L. J. 57.
(9) 11 Ind. Cas. 545; 15 C. W. N. 862; (1911) 2 M. W. N. 449; 13 Bom. L. R. 694; 14 C. L. J. 241; 38 C. 717; 8 A. L. J. 1117; 6 L. B. R. 26; 4 Bur. L. T. 257; 38 I. A. 126 (P. C.).
(10) 24 C. 725; 1 C. W. N. 37 (12 Ind. Dec. (N. S.) 1152 (F. B.).
(11) 13 Ind. Cas. 170; 17 C. L. J. 605.
(12) 5 C. 592; 2 Ind. Dec. (N. S.) 984.
(13) 18 A. 106; A. W. N. (1895) 240; 8 Ind. Dec. (N. S.) 776.

dent. It is in our opinion clear on principle that no such rule as the 8th respondent's learned Vakil contends for can be laid down. In the case for instance of a partition suit the judgment-debtors may very well find their interests opposed when delivery is attempted, although up to the final decree they had no cause for complaint against each other and similarly in administrative or partnership suits. We can see no reason for acceding to the suggestion that we should limit the scope of section 47 in the way suggested, when to do so would exclude from its purview the decision of many of the questions, which must inevitably arise only after the decree and when the result would be to frustrate the object of the section recognised by the Privy Council in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (14) *viz.*, the cheap and speedy settlement of all disputes at the stage of execution.

The other argument attempted is that the question now raised is intrinsically not one relating to the execution or satisfaction of the decree, because it has arisen in proceedings for and relates to the settlement of the terms of the sale proclamation. It is true that the question in terms is only whether one item of the mortgaged property shall be sold before the others and, of course, whether that order of sale shall be entered in the proclamation. But in fact we may say without expressing any opinion on the merits that the question raised is whether the decree shall be satisfied to a substantial exent primarily from the 12th defendant's Item No. 2 in accordance with the terms of his transfer from the mortgagor and the 13th defendant, the Official Receiver, representing the mortgagor's estate. It is clear that the interests of the owners of the items of the mortgaged property other than Item No. 2 will be seriously affected according as the 12th defendant's claim for postponement of the sale of the last mentioned item is allowed or rejected. In those circumstances, the matter is not in our opinion one of those referred to as administrative in *Sivagami Achi* v. *Subrahmania Ayyar* (8) in respect of which no appeal is allowed. The question raised is of a substantive right covered by section 47, the disposal of which, as the last paragraph of the judgment in *Sivagami Achi* v. *Subrahmania Ayyar* (8) shows results in an appealable order. To illustrate this, we may refer to the judgment of Banerjee, J., in *Jogodishury Debea* v. *Kailash Chundra Lahiry* (10). An order in execution proceedings can come under section 244 (now section 47) only when it determines some question relating to the rights and liabilities of parties with reference to the relief granted by the decree, not when it determines merely an incidental question as to whether the proceedings are to be conducted in a certain way." The result is that an appeal lies to this Court and lay to the lower Appellate Court. The lower Appellate Court has not dealt with the appeal before it on the merits. There must, therefore, be a remand, its decision being set aside in order that it might do so. Costs in the lower Appellate Court and in this Court to date will be costs in the case and will be provided for in the order to be passed on remand.

Civil Revision Petition No. 74 of 1922 is dismissed. No order as to costs.

V. N. V.
Z. K.

Order set aside;
Case remanded.

(14) 19 C. 683; 19 I. A. 166; 6 Sar. P. C. J. 209; 9 Ind. Dec. (N. S.) 898.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 5573 OF 1922.

February 26, 1923.

Present:—Mr. Justice Pratt.

HURBUT JOHN AMIES—PLAINTIFF

versus

JAL P. VIRJI—DEFENDANT.

Contract Act (IX of 1872), ss. 78, 114—Contract for sale of motor car—Instalments—Property, when passes—Intention of parties—Warranty, implied, breach of—Damages—Evidence Act (I of 1872), s. 92, proviso (2)—Warranty, express—Oral evidence, whether admissible.

HURBUT JOHN AMIES v. JAL P. VIRJI.

A seller of a motor car impliedly contracts to sell a car that is reasonably fit for use as a motor car. [p. 152, col. 2.]

Jones v. *Just*, (1868) 3 Q. B. D. 197; 9 B. & S. 141; 37 L. J. Q. B. 89; 18 L. T. 208; 16 W. R. 643, distinguished.

Priest v. *Last*, (1903) 2 K. B. 148; 72 L. J. K. B. 657; 89 L. T. 33; 51 W. R. 678; 19 T. L. R. 527, relied on.

A contract for the sale of a motor car on instalments contained the conditions that the buyer would pay instalments punctually; that after delivery of the car the seller had a right to enter upon the premises where the car was and inspect the car; that the purchaser was not to dispose of the car before the full price was paid; that the purchaser was to insure the car and assign the policy to the seller; that in default of observance by the buyer of any of the conditions aforesaid the seller had the right to determine the contract and to seize and take possession of the car:

Held, (1) that the intention of the parties as expressed in the conditions was that property in the car should not pass until full price had been paid, and that that intention must prevail in spite of section 78 of the Contract Act; [p. 152, col. 1.]

Brij Coomaree v. *Salamandar Fire Insurance Company*, 32 C. 816, dissented from.

The Irrawaddy Flotilla Company v. *Bhugwandas*, 18 C. 620; 18 I. A. 121; 15 Ind. Jur. 403 & 542; 6 Sar. P. C. J. 40; 9 Ind. Dec. (N. S.) 413 (P. C.), referred to.

(2) that there was an implied warranty that the car was fit for use as a motor car; [p. 152, col. 2.]

(3) that the buyer was entitled to recover damages on proof of breach of the implied warranty. [p. 153, col. 2.]

Oral evidence of an express collateral warranty is admissible under proviso (2) to section 92 of the Evidence Act. [p. 152, col. 2.]

Mr. *Rangneker*, for the Defendant.

JUDGMENT.—The plaintiff sues the defendant for damages in respect of a contract for the sale of a motor car.

The contract is for sale by the defendant to the plaintiff for Rs. 4,000 of which Rs. 1,000 had already been paid and the balance was payable in monthly instalments of Rs. 250 on the 5th of May and of each succeeding month.

But the contract of sale contained certain very special conditions. These were:—that the buyer will pay instalments punctually; that after delivery of the car the seller had a right to enter upon the premises where the car was and inspect the car; that the purchaser was not to dispose of the car before the full price was paid; that the purchaser was to insure the car and assign the policy to the seller; that in default of observance by the buyer of any of the conditions aforesaid the seller had the right to determine the contract and to seize and take possession of the car.

The word 'hire' is not used in the contract and it is not a hire purchase agreement. At the hearing I expressed the opinion that the contract was not executory and that under section 78 of the Indian Contract Act property in the car passed when the car was delivered. The plaintiff was unfortunately not represented, and Mr. Rangnekar for the defendant being ready to accept this view the following issues were raised:—

(1) Whether the car was sold under an express warranty that the car was a new car and in perfect working order?

(2) Whether there was an implied warranty that the car was serviceable as a motor car?

(3) Whether there was a breach of warranty and what damages is the plaintiff entitled to for such breach?

(4) What is the amount of brokerage due to the plaintiff in respect of the sale of a car to Mr. Robbins?

(5) Whether the defendant was entitled to refuse to return the car after it had been given to him for repairs on September 2, 1922?

(6) Whether the defendant is entitled to his counter-claim for repairs and balance of price?

On further consideration, however, I have come to the conclusion that the view expressed by Maclean, C. J. in *Brij Coomaree* v. *Salamandar Fire Insurance Company* (1) is unsound. If section 78 were construed as laying down an inflexible rule as to the passing of property, not only would there be a serious limitation on the freedom of contract but there would also be an inconsistency with other sections of the Indian Contract Act, *e, g.*, section 7. No doubt it is curious that section 78 should not be expressed as subject to a contrary intention. But the Act is a notoriously badly drafted Act and it does not purport to be exhaustive: *Irrawaddy Flotilla Company* v. *Bhugwandas* (2). The intention of the

(1) 32 C. 816.
(2) 18 C. 620; 18 I.A. 121; 15 Ind. Jur. 403 & 542; 6 Sar; P. C. J. 40; 9 Ind. Dec. (N. S.) 413 (P. C.);

parties as expressed in the conditions cited was that the property in the car should not pass until full price had been paid. That is the construction put upon the contract in the pleadings and that intention prevails in spite of section 78 of the Indian Contrat Act.

In this view the only amendment necessary to the issues is to add the words *or damages* to Issue No. 6. Mr. Rangnekar does not claim to call further evidence on this amended issue.

The plaint is so badly drafted that it was difficult to frame appropriate issues. The plaint claims damages for loss of earnings consequent on the defendant's refusal to return the car after it had been given for repairs on September 2. This is absurd as the defendant had a lien at least for his bill for repairs and all the instalments then due had not been paid. Plaintiff's main grievance as set forth in paragraph 1 of the plaint seemed to be the inferiority of the car and so I raised issues for damages for breach of warranty express and implied. An amendment of the plaint was not insisted upon to save expense.

The undisputed facts are that the plaintiff entered into negotiations for the purchase of the car on April 5, and deposited Rs. 1,000 that day, signed the agreement to take delivery of the car on April 27, and paid the insurance money and Rs. 250 for the first instalment on May 11. There was no other payment of instalments except Rs. 150 on July 24. The plaintiff, however, was entitled to credit for brokerage for selling another car of the plaintiff on July 15. The car was frequently sent to defendant for repairs. It was last so sent on September 2 and as plaintiff had not paid all the instalments the defendant determined the contract by notice in November. The defendant claims in the counter-claim damages for breach of the contract and for the amount of his bill for repairs and on the other hand the plaintiff in this suit claims damages on the ground of inferiority.

To take the plaintiff's case first. His plaint avers that there was an express warranty that the car was a new car and in perfect working order. There is no such warranty in the written agreement. But evidence of such an express collateral warranty would be admissible under section 92, proviso (2), Indian Evidence Act. The plaintiff has given no evidence of it. All he says is that defendant called it a new car but he was not deceived by this for he at once contradicted him and said it was not a new car.

I think, however, the contract of sale was subject to an implied warranty that the car was serviceable, *i. e.*, reasonably fit for the purpose for which it was bought. Mr. Rangnekar contends there is no such presumption where the buyer had an opportunity of inspecting the goods. The Common Law rule depended upon whether the buyer relied on his own judgment or the seller's: *Jones* v. *Just* (3); but that distinction is not made in the Indian Contract Act. Pollock and Mulla suggest that the words "have been ordered" in section 114 imply that the buyer is relying on the seller's judgment. But this is a strained construction of the section and there is no reason why the seller should be excused from performance of his contract because of what may or may not be passing in the buyer's mind. The plaintiff had an opportunity to inspect the car, though I do not believe he had a trial drive, for if he had he would have driven himself. The distinction between the English cases where the buyer had an opportunity of inspection is not made in the Indian Contract Act, and even in England it only applied to patent defects. The circumstances of the case may raise an implication that the goods were ordered for a particular purpose. See *Priest* v. *Last* (4). A seller of a motor car impliedly contracts to sell a car that is reasonably fit for use as a motor car.

As to the condition of the car I accept the plaintiff's evidence. The plaintiff says that before he had the car a fortnight the engine choked and he had to take it to the workshop where the engine was opened and decarbonised. There was then

(3) (1868) 3 Q. B. D. 197; 9 B. & S. 141; 37 L. J. Q. B 89; 18 L. T. 208; 16 W. R. 643.
(4) (1903) 2 K. B. 148; 72 L. J. K. B. 657; 89 L. T. 33; 51 W. R. 678; 19 T. L. R. 527.

carburetter trouble and the car was consuming a gallon of petrol for ten miles. Then there was accident and the damage was repaired by the defendent. The plaintiff says that that was in the middle of May but it was more probably at the end of May or beginning of June. In June two front springs broke and were replaced by plaintiff but the carburetter troubles continued and in August defendant substituted another carburetter of the same make. This leaked, so the plaintiff took it back to the workshop on September 2 and defendant has now put in another type of carburetter.

The defendant admits the carburetter trouble but denies replacing the carburetter in August. He also denies that the engine had to be opened and decarbonised a fortnight after delivery to the plaintiff.

But the decarbonising of the engine was mentioned in plaintiff's letter of May 23. Defendant does not impute forgery but denies receipt of the letter. I do not believe his denial and I think that letter important corroboration of the plaintiff's evidence. Moreover, the defendant has not called his workshop foreman to deny plaintiff's evidence as to the decarbonising of the engine and the re-placing of the carburetter.

It is true there was an accident some time in May or more probably in June and the repairs consequent thereon were the subject of defendant's bill for Rs. 294-4-0 This did not affect the engine and was subsequent to the decarbonising of the engine at the end of April or beginning of May.

Much is made of the admission in plaintiff's letter of October 9, "The car has not been roughly handled as no complaints have been made in reference to mechanical parts." But plaintiff is only semi-literate and I do not think he understood what he was writing—for he had complained of a choked engine and defective carburetter and the front spring collapsed in two months.

It is also rather surprising that in spite of his own experience plaintiff should have helped defendant to sell another car. But as plaintiff earned money for himself by so doing it does not follow that he was satisfied with his own bargain.

The defendant has produced an invoice showing the price of the car was Rs. 4,650 but the car was exported from America in 1920 and the decarbonising of the engine is clear proof that the car had been used and was a second hand car when sold to the plaintiff.

Defendant explains the rapid collapse of the tubes and tyres as due to the car having been a long time in his showroom. But the hood was tattered at the time of the contract and the upholstry had deteriorated so much that the springs of the seat protruded a few days after the purchase. I think that defendant was conscious that he had sold a second-hand car and that is why he has made no charge for decarbonising the engine in April and May or re-placing the carburetter in August.

Plaintiff says the car when sold was worth only Rs. 1,500 but this is probably an exaggeration. Considering that the car was second-hand and not serviceable in the condition it was in when given to plaintiff, its value could scarcely have been more than half the invoice price, *i. e.*, Rs. 2,325. The present value of Rs. 4,000 on the instalment system would be about Rs. 3,925. Damages for breach of warranty would therefore be Rs. 1,600

I do not think that plaintiff is debarred from claiming this by the rule in *Braithwaite* v. *Foreign Hardwood Company* (5) for he never repudiated the contract. If property had passed and defendant had sued him for balance of price he would have been entitled to plead breach of warranty in reduction of the price.

On the other hand, defendant was entitled to determine the contract in November for plaintiff was in default of instalments. At that time seven instalments, *i.e.* Rs. 1,700 were due and only Rs. 250 plus Rs. 150 plus a sum for brokerage had been paid. There is a dispute as to the amount of brokerage. Plaintiff says it was Rs. 500. Defendant says it was Rs. 250 at once and Rs. 250 later, on full price of the car being paid by the purchaser. I take the brokerage of ten per cent. which would

(5) (1905) 2 K. B. 543; 74 L. J. K. B. 688; 92 L. T. 637; 10 Com. Cas. 189; 10 Asp. M. C. 52; 21 T. L. R 413

make it at Rs. 450 so the total amount paid was Rs. 850. Thus more than two instalments were in arrears in November and the plaintiff had committed breach of his contract.

As to damages the car if sold now would fetch little less than its market value when sold. It has had some extra wear and tear but on the other hand the upholstry has been repaired and a new carburetter fitted. Its present value I would assess at Rs. 2,000. The defendant's damages are, therefore, Rs. 3,925 minus Rs. 2,000 which equals Rs. 1,925. Of this he has already received Rs. 850 leaving a balance due to him of Rs. 1,125. There are special stipulations in the contract as to damages which I neglect as unreasonable.

As to defendant's bill for repairs I disallow Rs. 250 which plaintiff has paid for insurance; also Rs. 294-4-0 covered by insurance, also Rs. 110 plus Rs. 45 for a hood and upholstry. Defendant admits Rs. 110 is not chargeable as there was a separate oral agreement to supply a new hood. Plaintiff says this agreement extended to the upholstry also and I believe him. There is, therefore, due to the defendant a bill for repairs of Rs. 282. I, therefore, allow Rs. 282 plus Rs. 1125, *i. e.*, Rs. 1,407.

I, therefore, find the issues (1) in the negative; (2) in the affirmative; (3) in the affirmative Rs. 1,600; (4) Rs. 450; (5) in the affirmative; (6) in the affirmative as to repairs to the extent of Rs. 282, and as to damages to the extent of Rs. 1,125.

There will, therefore, be a decree for the plaintiff for Rs. 1,600, and for the defendant for Rs. 1,467 on the counter-claim.

Under the circumstances, I make no order as to costs.

Z. K.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1930 OF 1918.

August 24, 1920.

Present:—Justice Sir N. R. Chatterjea, KT., and Mr. Justice Panton.

Raja NARENDRA LAL KHAN—PLAINTIFF—APPELLANT

versus

BHOLA NATH BHUYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 92—Registered agreement—Conduct, evidence of, whether admissible to modify agreement—Patni Kabulyat—*Stipulation to deliver certain documents—Failure to enforce stipulation for long period—Estoppel.*

A *putni kabulyat* contained the following stipulation:—"I shall deliver one set of the *chita, khatian jamabandi,* and *sheha, thoka* and *jama wasil baki* and other *lawazima* papers of the *patni mehals*, signed by the persons preparing the same and bearing my signature into your *sherishta* after the expiry of two consecutive years at the end of every third year, and obtain receipt for the same, on failure to do so you will take from me Rs. 215 the cost of preparing the papers at the end of every three years, and if I do not pay the same amicably, you will realize the same by having recourse to law and get the said papers prepared by making *mofussil* survey and *tumar* by appointing *amin* at the end of every third year." Under the law some of these documents could not be prepared every third year. For thirty-five years no documents were demanded by the landlord or submitted by the *patnidar*. The present suit was brought by the landlord to recover the sum of Rs. 1,290 for the *patnidar's* default to deliver the documents, the sum having been calculated at the rate of Rs. 215 per annum for six years:

Held, that the landlord having failed to enforce the clause in the *kabulyat* for thirty-five years was not entitled to maintain the present suit for damages.

Case-law discussed.

Evidence of the subsequent acts and conduct of the parties to a written contract is admissible in evidence to show that certain terms of the contract were never intended to be acted upon from the very beginning. [p. 156, col. 2.]

Appeal against a decree of the Second Additional District Judge, Midnapore; dated the 22nd of July 1918, affirming that of the Subordinate Judge, First Court of that District, dated the 19th of September 1916.

Babus *Mohendra Nath Roy* and *Khirod Narain Bhuya*, for the Appellant.

Babus *Bepin B. Ghose* and *Santosh K. Pal*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for recovery of Rs. 1,290 from the defendants as damages on account of the defendants' failure to deliver certain papers under the terms of a *patni kabulyat*.

The *patni kabulyat* is dated the 23rd February 1880 and was executed by the grand-father of the defendants. There is a stipulation in the *kabulyat* which runs as follows:—"I shall deliver one set (or one copy) of the *chita, khatian jamabandi* and *Sheha, Thoka* and *jama wasil baki* and other *lawazima* papers of the *patni mehals*, signed by the persons preparing the same and bearing my signature into your *sherishta* after the expiry of two consecutive years at the end of every third year, and obtain receipt for the same, on failure to do so you will take from me Rs. 215 the cost of preparing the papers at the end of every three years, and if I do not pay the same amicably, you will realize the same by having recourse to law and get the said papers prepared by making *mofussil* survey and *tumar* by appointing *amin* at the end of every third year. To this neither I nor my heirs will be able to make any objection."

The suit was instituted on the 21st September 1915. It is found that during the course of 35 years since the execution of the *kabulyat* the *patnidar* never submitted any papers as aforesaid, nor did the *zemindar* ever demand the same. The Court of first instance held that the stipulation was stringent and unreasonable and was never meant to be acted upon, and that in any case the plaintiff was entitled only to compensation not exceeding Rs. 215, but there was no evidence to show the amount of loss actually sustained by the plaintiff. In the result the suit was dismissed. On appeal the learned District Judge was of opinion that the terms of the *kabulyat* cannot reasonably bear the interpretation sought to be put upon it by the plaintiff, that ever since the execution of the *kabulyat* the papers had never been demanded or submitted, and that the stipulation was never meant to be enforced. The appeal was accordingly dismissed. The plaintiff has appealed to this Court.

It is contended that the evidence of conduct relied upon by the Courts below is not admissible in evidence having regard to the provisions of section 92 of the Evidence Act. The authorities upon the point are not uniform. A Full Bench of this Court in the case of *Preonath Shaha* v. *Madhu Sudan Bhuiya* (1) held that oral evidence of the acts and conduct of parties such as oral evidence that possession remained with the vendor notwithstanding the execution of a deed of out and out sale is admissible to prove that the deed was intended to operate only as a mortgage. A question was, however, raised in some later cases whether the Full Bench decision had not been affected by the decision of the Judicial Committee in the case of *Balkishen Das* v. *W. F. Legge* (2). But the evidence which was held to be inadmissible by the Judicial Committee in that case was certain oral evidence of intention which had been admitted in the Court below and the ground upon which their decision is based is that such evidence is excluded by the provisions of section 92 of the Evidence Act. The evidence there consisted only of oral statements of the parties, and there was no other evidence of the acts and conduct of the parties adduced in that case which was considered by the Privy Council. It is upon these grounds that the decision in *Balkishen's case* (2) was distinguished by Banerjee and Brett, JJ. *Khankar Abdur Rahman* v. *Ali Hafez* (3) and the learned Judges held that *Balkishen's case* (2) did not in any way affect the rule laid down by the Full Bench in *Preonath Shaha* v. *Madhu Sudan Bhuiya* (1). The same view was taken by Maclean, C. J., Banerji and Brett, JJ. in *Mahomed Al Hossein* v. *Nazar Ali* (4).

In the case of *Radha Raman Chowdry* v. *Bhowani Prasad* (5), Rampini and Gupta, JJ.;

(1) 25 C. 603; 2 C. W. R. 562; 13 Ind. Dec. (N. S.) 397 (F. B.)

(2) 27 I. A. 58; 22 A. 149; 4 C. W. N. 153; 2 Bom. L. R. 523; 7 Sar. P. C. J. 601; 9 Ind. Dec. (N. S.) 1121 (P. C.).

(3) 28 C. 256; 5 C. W. N. 351.

(4) 28 C. 289; 5 C. W. N. 326.

(5) 6 C. W. N. 60.

were of opinion that oral evidence of the subsequent acts and conduct of the parties is not admissible to show that the rent is less than what was stated in a registered *kabulyat*. A similar view was taken by Rampini J. in the case of *Beni Madhub Gorani* v. *Lalmoti Dassi* (6), but his decision was set aside on appeal by Maclean, C. J. and Macpherson, J. and the learned Judges held that certain rent receipts showing payment of a smaller rent than that provided in a registered lease were admissible to show either that the parties never intended the terms of the *kabulyat* to be strictly carried out or that as between the parties there had been a waiver of the strict terms of the lease. The case was followed in the case of *Kalis Chandra Saha* v. *Darbaria Sheik* (7), and *Manindra Chandra Nandi* v. *Srimati Durga Sundari Dasya* (8), one of the members of the present Bench being a party to both the decisions. It may be open to doubt, however, whether there can be a waiver of the essential terms of a registered lease except by a registered instrument having regard to the decision of the Full Bench in the case of *Lalit Mohan Ghose* v. *Gopali Chauk Coal Company, Limited* (9), where, however, the variation was sought to be effected by documents. But in the cases mentioned above, the Court held upon the evidence of the subsequent acts and conduct of the parties that certain terms of the contract were never intended to be acted upon. On the other hand in the case of *Lakhatullah Sheikh* v. *Bishambar Roy* (10) Jenkins, C. J., and Doss, J., held that an agreement is nore-the-less oral because it is to be inferred from the conduct of the parties.

The question was raised before the Judicial Committee in the case of *Maung Kyin* v. *Ma Shwe La* (11), but was not decided. Their Lordships observed:—"The evidence which the appellants thus proposed to tender was described in general terms, and their Lordships have not the advantage of dealing with it in the form of questions specifically put and argued. So far, however, as it is still pressed, it, no doubt, consisted only of evidence relating to the acts and conduct of the parties as distinguished from evidence of oral statements and conversations constituting in themselves some agreement between them. Its object was to show that, whatever the terms of the documents may have been, none of the parties had acted on them as effecting an absolute sale, but that through a long course of mutual dealings materially affecting their respective positions, they had always treated the business between them as one of loan secured by mortgage.

"This may give rise to important and difficult questions under section 92 of the Indian Evidence Act, which provides that when the terms of any contract required by law to be reduced to the form of a document (and sales or mortgages of land are by sections 54 and 58 of the Transfer of Property Act, 1882, included among such contracts) 'no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms.'"

We have not referred to the decisions of the other High Courts some of which have taken a view contrary to that taken by the Full Bench of this Court in *Preonath's case* (1) and of the effect of the decision in *Balkishen's case* (2). The question, therefore, is not free from difficulty nor settled. But the weight of authority so far as this Court is concerned is in favour of the admissibility of evidence of the acts and conduct of parties and as stated above in some cases, this Court has held upon the subsequent acts and conduct of the parties that certain terms of a contract were never

(6) 6 C. W. N. 242.
(7) 32 Ind. Cas. 251; 20 C. W. N. 347.
(8) 32 Ind. Cas. 185; 20 C. W. N. 680.
(9) 12 Ind. Cas. 723; 39 C. 284; 14 C. L. J. 411; 16 C. W. N. 55.
(10) 6 Ind. Cas. 577; 12 C. L. J. 646.
(11) 12 Ind. Cas. 39; 38 C. 892; 15 C. W. N. 958; 10 M. L. T. 103; (1911) 2 M W. N. 30; 14 C. L. J; 276; 13 Bom. L. R. 797; 8 A. L. J. 1184; 21 M.L. J. 1105; 4 Bur. L. T. 273; 38 I. A. 146 (P. C.).

intended to be acted upon *i. e.*, from the very beginning. It is unnecessary, however, to discuss the matter further having regard to the view we take of the construction of the *kabulyat*. The covenant relied upon provides that one set (or one copy) of "*chita, khatian, jamabandi, seha, thoka jama wasil baki* and other *lawazima* papers" are to be submitted at the end of every third year bearing the signature of the persons preparing the same. The tenure created by the *kabulyat* was a *putni* tenure. Ordinarily no such papers are delivered by the *putnidar* to the *zemindar*. There is, however, nothing in the law to prevent the parties from entering into such a contract. But *chita, khatian* and *jamabandi* can be prepared only after measurement of lands. Such papers are not prepared every third year and under section 90 of the Bengal Tenancy Act, the landlord can (subject to any contract) cause a measurement of the lands of tenants only once in 10 years except in certain cases which do not apply to the present. The *patnidar*, therefore, cannot have such measurement made and, therefore, cannot have *chittas khatian* and *jamabandi* prepared every third year. It was not possible, therefore, for the *patn dar* to comply with such a stipulation. The *zeminda* could not also for the same reason get a measurement of the lands by appointing an *amin*, every third year, even if he could realise Rs. 215 every third year from the *patnidar*. It is probably for those reasons that such papers were never demanded nor submitted. It is true *seha thoka* and *jama wasil baki* papers are prepared every year, but the sum of Rs. 215 agreed upon to be paid in the event of the breach of the contract includes the cost of preparation of the *Chita khatian* and *jamabandi*, as well as for preparation of *seha, thoka* and *jama wasil baki* papers. As stated above, the papers were never demanded nor submitted at any time during the 35 years that the *putni* was in existence and the plaintiff after having acted in a particular way for 35 years has instituted a suit for recovery of Rs. 1,290 as damages for failure to submit such papers for six years, claiming Rs. 21 for each year. We are of opinion that the Courts below are right in dismissing the suit. In this view it is unnecessary to consider the other contentions raised before us.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

Z. K.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 110 OF 1921.

August 2, 1923.

Present:—Justice Sir Jwala Prasad, KT., and Mr. Justice Ross.

Musammat DULHIN SONA KUER—PLAINTIFF—APPELLANT

versus

Musammat BIBI ALE FATIMA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 10, scope of—Dismissal of suit—Suit, when premature—Contract Act (IX of 1872), s. 69—"Interested," meaning of—Person benefiting by payment, duty of—Rate of interest, how determined.

Section 10 of the Civil Procedure Code does not bar a suit, nor has a Court any jurisdiction thereunder to dismiss a suit; the section merely enacts that the trial of one of two or more suits in which the same issue is directly and substantially involved, is not to be proceeded with until the cognate case pending in another Court is disposed of. [p. 163, col. 2.]

Provided there is valid cause for it, a suit cannot be said to be premature under section 10 of the Civil Procedure Code. [p. 163, col. 2.]

Nemagauda v. *Paresha*, 22 B. 640; 11 Ind. Dec. (N. S.) 1009, referred to.

Where a proprietor in good faith pending litigation makes necessary payments for the preservation of the estate in dispute, and the estate is afterwards adjudged to his opponent, he is entitled to be recouped what he has so paid by the person who benefits ultimately by the payment, if he has failed through no fault of his own to reimburse himself out of the rents. [p. 165, col. 2.]

Dakhina Mohan Roy v. *Saroda Mohan Roy*, 21 C. 142; 20 I. A. 160; 17 Ind. Jur. 576; 6 Sar. P. C. J. 366; 10 Ind. Dec. (N. S.) 727 (P. C.), relied on.

The word "interested" in section 69 of the Contract Act ought not to be construed narrowly

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as meaning a person with a real interest. If *bona fide* one believes that he has an interest in property and not only as a pretext for having a claim against those who are bound to make the payment, there is no reason why the law should not compel the person ultimately benefiting by the payment to return the money to the payer. [p. 166, col. 1.]

The rate of interest recoverable from a judgment-debtor is determined not by the purpose for which the money is applied but by the market-rate prevailing at the time. [p. 166, col. 2.]

Appeal from a decision of the Subordinate Judge, First Court, Patna, dated the 21st January 1921.

Messrs. *P. K. Sen*, *Rai Guru Saran Prasad* and *Raghunandan Prasad*, for the Apellant.

Messrs. *Sultan Ahmad*, *Nurul Hussain* and *Hassan Jan*, for the Respondents.

JUDGMENT.

Jwala Prasad, J.—This is an appeal by the plaintiff against the decision of the Subordinate Judge of Patna, dated the 21st January 1921. The facts are undisputed.

Bibi Fasihan was a Muhammadan lady of rank, belonging to the Suni sect of Mussalmans. She possessed considerable property. On the 21st of November 1891 she executed a mortgage-bond in favour of Girdhar Das and others, mortgaging the following properties:—

1. *Mahal* Kurmi Chak.
2. *Mahal* Kasba Barowna.
3. Bankipur Machhiarawan.
4. Karnauti Khurd and Buzrug, and
5. Abdulla Chak.

The mortgagees obtained a mortgage-decree on the 2nd September 1903 on foot of their mortgage which was made absolute on the 4th September 1905, in accordance with a compromise entered into by the parties whereby five years' time was given for payment of the entire decretal amount. The decretal amount not having been paid within the time allowed, the decree-holders put their decree in execution against Bibi Fasihan, and on her death against her heirs.

Bibi Fasihan died on the 2nd July 1909, leaving behind her four daughters, named Fatima, Saera, Salema and Habiba, a son named Mohammad Umar by her first husband, and another son named Kalimuzaffar by her second husband. Before her death, between the 7th of May and the 8th of June, she executed several deeds of gift, two of them being in favour of Kalimuzffar *alias* Cheddi, one in favour of her daughter, Habiba, and one in favour of her son Muhammad Umar. By these deeds of gift she gave her properties to her aforesaid children, the bulk of them to Kalimuzaffar. No deed of gift was executed in favour of her three daughters, Bibi Fatima, Saera and Salema. The donees, under the aforesaid deeds of gift, got their names registered as proprietors in the Collectorate in respect of the share conveyed to them by the lady and took possession of their respective properties and began to deal with them and to give leases, mortgages, etc., in favour of other persons. The three daughters, Fatima, Saera and Salema, in whose favour no gift was made by the lady, brought suits on the 26th of March 1912 in the Court of the Subordinate Judge of Patna to have the aforesaid deeds of gift declared invalid and to recover their full shares of the properties left by their mother. These suits were subsequently transferred to the file of the District Judge of Patna where Fatima and Saera's suit was No. 6 of 1913, and Salema's suits were numbered 9, 10, 11 and 12 of 1913. All these suits were disposed of by the District Judge on the 8th April 1914. The result of his decision was that all the deeds executed by the lady except the deed of gift of the 7th May 1909 in favour of Kalimuzaffar were set aside. The parties affected by the decision of the District Judge appealed to this Court and by the decision of this Court dated the 18th July 1917 the appeals were disposed of, with the result that all the deeds, including the deed in favour of Kalimuzaffar, were set aside. The operative portion of the decision of this Court is as follows :—

"The deeds of gift, therefore, do not stand in the way of the heirs of Bibi Fasihan taking their shares under the Muhammadan Law. Her husband, Abdus Subhan, inherited a share of $\frac{1}{4}$ of the lady's properties, her two sons Umar and Kalimuzaffar each took 6/32 and each of her four daughters Fatima, Saera, Salema and Habiba took 3/32 of the properties left

by her. The heirs of such of the aforesaid persons as have died since the death of the lady have succeeded to the shares inherited by their predecessor. The properties left by *Musammat* are, therefore, liable to be distributed among her heirs and the heirs of her heirs unaffected by dealings or transfers of interests in excess of their legal shares. As the donees and the heirs have been dealing with the properties since 1909 and the matter is complicated by claims of creditors and others it is useless to give each of the heirs a decree for his or her share in the ordinary way. The result of passing such decree would be endless litigation. The proper course appears to be to direct a general administration of the property of *Musammat* Fasihan under the orders of the Court. I would dismiss with costs Appeals Nos. 73 and 219 arising out of Suit No. 6, Appeal No. 42 arising out of Suit No. 9, and Appeal No. 339 arising out of Suit No. 11. I would allow with costs Appeal No. 112 arising out of Suit No. 6 and Appeal No. 581 arising out of Suit No. 6 and setting aside the deed of May 7th, 1909, I would declare that the heirs of the deceased are entitled to the shares specified above in the property of *Musammat* Fasihan. I would remand Suits Nos.6 and 9 of 1913 to the Court below in order that in the presence of the parties a preliminary decree may be passed with reference to O. XX, r. 13, ordering such accounts and enquiries to be taken and made and giving such directions as may appear to be necessary. It will probably be necessary to appoint a Receiver or Commissoners to carry out the administration. Arrangement must be made to pay off the debts of the deceased as soon as possible. Those heirs or representatives of heirs who have been in possession of parts of the property should be debited with what they or persons claiming under them have received."

In Suit No. 6 of 1913 which was instituted by Bibi Fatima and Saera, in addition to the relief sought by the plaintiff to have the deeds of gift executed by Bibi Fasihan declared null and void, there was a further claim for administration of the estate and for partition of it among the heirs and for other reliefs. Suit No. 9 of 1913 was instituted by Salema to have the two deeds of gift executed in favour of Kalimuzaffar *alias* Cheddi of the 9th May and 5th June 1909 set aside and to have her declared in possession of her legal share in the properties of Bibi Fasihan. These two suits were, by the decision of this Court, referred to above, remanded to the Court below for the purposes of the joint administration of the properties of Bibi Fasihan and for the drawing up of a preliminary decree under O. XX, r. 13. We are, therefore, concerned with these two suits only, the other suits having been now fully and finally disposed of.

In accordance with the aforesaid directions of this Court the preliminary decree was drawn up by the District Judge on the 27th September 1917.

While the litigation about the estate of Bibi Fasihan was going on, Muhammad Umar, one of her sons, who had a *hiba* deed executed in his favour by his mother dated the 6th June 1909, executed a mortgage-bond in favour of Dulhin Sona Kuer. That mortgage was executed on the 4th February 1913 and was in respect of a sum of Rs. 85,000. The properties mortgaged in this bond by Muhammad Umar were thirteen *Mouzahs* out of a total of twenty which were conveyed to him by his mother under the deed of gift referred to above. Two of the mortgaged properties, namely, *Mouza* Kasba Barowna and Karnauti Khurd, and Bazrug had alreay been mortgaged by Bibi Fasihan along with certain other properties mentioned above on the 21st November 1891 to Girdhar Das and others. Therefore, Girdhar and others were prior mortgagees in respect of these two properties covered by the mortgage of Dulhin Sona Koer.

Dulhin Sona Koer obtained a mortgage-decree on the basis of the aforesaid bond on the 25th February 1915 and after it was made absolute she put the same into execution and purchased the aforesaid 16-annas of *Mahals* Kasba Barowna and Karnauti Khurd and Buzrug on the 20th June 1916. In the meantime, Girdhar Das had put his decree into execution. That execution case was numbered 362 of 1914. *Mahal* Bankipur Machhiarawan, one of the properties mortgaged in the deed of Girdhar Das, was covered by the deed of gift in

favour of Kalimuzaffar. On the 28th July 1915 he paid Rs. 65,000 as the rateable share of the debt over the said properties to the decree-holder who agreed not to sell *Mahal* Bankipur Machhiawaran until after the other properties were sold and the sale-proceeds found insufficient to pay off the entire decretal amount; and he put in a petition to that effect in Court. His prayer was granted and *Mahal* Bankipur Machhiarawan, which was lot No. 1, was directed to be sold after all the other properties were sold, by the order of the Court dated the 28th July 1915 (Exhibit 2). Girdhar Das, therefore, proceeded to sell the other properties and *Mahal* Kasba Barowna was sold for Rs. 36,500, Kurmi Chak for Rs. 41,000 and Abdulla Chak for Rs. 18,000 The sale took place on the 26th February 1916.

Muhammad Umar, Bibi Habiba and Sona Koer then instituted proceedings under O XXI, r. 90, to have the sale of *Mahal* Kurmi Chak and Kasba Barowna set aside. The sale was set aside on the 15th December 1916. On the 15th January 1917 one Janki Das and others purchasers of these properties appealed to this Court against the order of the Subordinate Judge setting aside the sale of the aforesaid properties. This appeal was disposed of on the 5th June 1918 in terms of a compromise arrived at between the parties. In the meantime, in the administration proceedings which were pending before the District Judge, Mr Jamil Ahmad was appointed Receiver on the 25th January 1918 and he was, therefore, made a party respondent in the aforesaid appeal pending in the High Court as representing the estate of Bibi Fasihan. The decree of this Court dated the 5th June 1918 runs as follows:—

"By consent it is ordered that upon the judgment-debtors respondents paying to the appellants the consolidated sum of Rs. 15,000 on account of all and every claim the appellants may have against the judgment-debtors respondents the Appeals Nos. 7 and 8 of 1917 will be dismissed. The appellants will then be entitled to withdraw from the Court all and every amount deposited on account of the purchas-money in respect of the properties but the appellants will not be entitled to claim credit for any sum of money paid by them into the Government Treasury on account of Government revenue. If the above sum of Rs. 15,000 is not deposited here in Court to the credit of the appellants on or before the 26th June 1918, the Appeals Nos. 7 and 8 will stand decreed with costs."

After the sales were set aside by the Subordinate Judge on the 15th December 1916, the decree-holder was directed on that very day to deposit the necessary expenses and furnish materials in order that the execution and the sale of the properties might be proceeded with. On the 2nd January 1917 the proceedings, therefore, continued and the plaintiff paid Rs. 36,500 to Girdhar Das, being the amount for which *Mahal* Barowna had been sold, and upon her doing so she obtained an order similar to that which was obtaind by Kalimuzaffar referred to above, with respect to this property Barowna. The order of the Court was that Barowna should be sold after lots Nos. 3 and 4, *i.e.*, Kurmi Chak and Karnouti. As regards the money that was paid by her the Court's order was in the following words:—

"Let Rs. 36,500 be credited against the decree and let sale proclamation issue as prayed for in the petition."

Upon this the plaintiff paid Rs. 15,000 to the Receiver (defendant No. 20 in this case) to enable him to pay the amount directed by the compromise decree of the High Court to be paid to the purchaser of the aforesaid two *Mouzahs* before the sale could be set aside. The Receiver having got the money from the plaintiff, the Receiver paid the said sum to the purchaser and the aforesaid Miscellaneous Appeals Nos. 7 and 8 of 1917 in the High Court were dismissed on the 15th June 1918, the result of which was that the sales of Barowna and Kurnauti were set aside.

Now in September 1916, the plaintiff as purchaser of the aforesaid properties in execution of her mortgage-decree against Muhammad Umar obtained delivery of possession through the Court. There was then still due to the plaintiff about Rs. 37,000 under her decree. She also got possession of other properties purchased by her except those that had already been sold for arears of Government revenue, namely, Ibrahim Lodi, Syedpur Behrna and Supasang.

After his appointment the Receiver

wanted to take possession of these properties but the plaintiff refused to deliver up possession to him, and, on a reference being made to the District Judge, the matter was decided against the plaintiff on the 22nd March 1918. The plaintiff then moved this Court in revision (No. 75 of 1918) against the decision of the District Judge. Her application was, however, dismissed by this Court on the 7th November 1918, *vide* judgment, Exhibit B 1. It was held that the plaintiff having taken a mortgage and purchased the property during the pendency of the litigation, started at the instance of the heirs of Bibi Fasihan, impugning the validity of the gifts in favour of the plaintiffs'-mortgagor Muhammad Umar and others, she could not resist the taking of possession of the property by the Receiver who was appointed by the Court in the administration suit No. 6 of 1913. This Court further held that inasmuch as the plaintiff did not satisfy the whole mortgage-debt of Girdhar Das-Kesho Das she could not be subrogated to the position of the prior mortgagee. Her application for leave to appeal to His Majesty in Council was dismissed by this Court on the 27th May 1919 *vide* judgment, Exhibit B. The result of this decision was that the Receiver took back possession of the aforesaid properties from the plaintiff on the 21st August 1919.

Musammat Sona Koer applied on the 21st June 1919 to the District Judge (*a*) to grant permission to execute her decree against the Receiver or (*b*) to direct the Receiver to pay Rs. 36,500 to her. On the 26th June 1919 the District Judge granted prayer No. 1 on the same condition as was imposed upon Bibi Aley Fatima by order of the Court, dated the 19th May 1919. No order appears to have been passed with regard to her prayer to direct the Receiver to pay the sum of Rs. 36,500.

On the 10th December 1919 she appears to have repeated her application for directing the Receiver to pay the said sum. In that petition she further asked that in case the money was not paid she may be given permission to sue the Receiver. This application was referred to the Receiver for report who submitted his report on the 19th December 1919. In his report he stated that the *Musammat* was in possession of some of the properties yielding an income of Rs. 10,000 for which she was liable to account and also for mesne profits and that she had withdrawn the surplus sale proceeds amounting to about Rs. 40,000 odd in respect of village Supasang appertaining to the estate and that she being a party to the administration suit her claim to the aforesaid sum of Rs. 36,500 could be considered in the administration proceedings, and the Receiver further added that her application was premature and not entertainable. The Court recorded the following order :—

"Read Receiver's report dated the 19th December 1919 on the petition of *Musammat* Sona Koer filed on 10th December 1919 for payment of Rs. 36,500 with interest and for grant of permission to sue the Receiver : Ordered, permission is granted".

Accordingly the present suit was instituted and she filed her plaint on the 2nd January 1920. She claims in this suit the aforesaid sum of Rs. 36,500 with interest at the rate of one per cent. per mensem from the date of payment, *viz.*, 2nd January 1917 up to the date of the filing the plaint, amounting to Rs. 49,640.

Defendants Nos. 1 to 6 are the heir of Muhammad Umar, defendant No. 7, is Kalimuzaffar, defendants Nos. 8 to 11 heirs of Bibi Solena, defendants Nos. 12 to 15 heirs of Bibi Fatima, defendants Nos. 16 to 18 heirs of Bibi Saera, defendant No. 19 is Bibi Habiba and defendant No. 20 is the Receiver. Defendants Nos. 1 to 6, 8 to 11 and 16 to 20 filed different sets of defence on substantially the same grounds. In short their objections were that the suit is not maintainable in its present form, that the estate of Bibi Fasihan was not benefited by the plaintiff's payment ; nor can she recover the same from the defendants, that the plaintiff withdrew the sum of Rs. 40,000 odd from the Collectorate out of the sale proceeds of *Mahal* Supasang and other villages and the said sum should be set off against the plaintiff's claim and that her suit is barred under section 10 of the Civil Procedure Code.

The aforesaid pleas gave rise to the following issues :—

"1. Is the suit as framed maintainable ?

"2. Has the plaintiff a valid cause of action against the defendant No. 20 ?

"3. Whether the defendants are entitled to any set off. If so, can they claim it without payment of Court-fee and for what amount?

"4. Is the plaintiff entitled to contribution? If so against which defendant?

"5. Can the plaintiff maintain the present suit in the face of proceedings of the administration suit pending before the District Judge and in face of section 10, Civil Procedure Code?

"6. Is the plaintiff entitled to get interest, and if so, at what rate?

"7. To what relief, if any, is the plaintiff entitled?".

The learned Subordinate Judge decided all these issues in favour of the defendants with the result that the plaintiff's suit has been dismissed. She has, therefore, come to this Court in appeal.

I will first dispose of Issue No. 5. The learned Subordinate Judge records the following finding upon this issue:—

"It requires no decision in face of the above finding, but I have already remarked above, that it would have been better had the plaintiff put forth her claim in the Administration Court"

In the previous paragraph, the Court in dealing with Issues Nos. 1, 3, and 4, remarked as follows:—

"Admittedly plaintiff withdrew a large sum of money out of the surplus sale-proceeds from the Collectorate and admittedly she has been in possession of the property, the income of which was also considerably large. The plaintiff is admittedly to account for these items. But it is urged for the plaintiff that all these accounts will be taken in the administration suit which is pending before the District Judge, and it she is found liable she would be called upon to pay. In other words plaintiff wants to take away her own money and ask the defendants to wait till the administration suit is decided. I think all these questions can be fully tried by the Administration Court and no preference should be given to plaintiff's claim over that of the defendants, at least the equity requires so. Hence there seems to be no reason to grant any relief to the plaintiff in this suit."

Continuing the Subordinate Judge says:

"For these reasons I am of opinion that the suit is not maintainable, that if plaintiff wants any relief she may come under the provisions of the mortgage law with a suit properly so framed in the light of the observations made above. I, therefore, decide these issues against the plaintiff and in defendants' favour."

The Subordinate Judge also quoted a passage from the judgment of Mullick, J., (Exhibit B1) to the effect that the mortgage of the plaintiff was affected by the litigation which was pending at the time when the plaintiff took her mortgage and until the administration suit was over, it could not be known how much of the property would come into the hands of the plaintiffs as a representative of Muhammad Umar, and it might be that no residue might be left which might come into the plaintiff's hands.

These are the grounds upon which the learned Subordinate Judge considered the case of the plaintiff to be premature. But the suit has been dismissed upon the principal ground that the plaintiff paid the money in question to Girdhar Das and Kesho Das voluntarily in order to secure benefit to herself and not with a view to confer any benefit to the estate of Bibi Fasihan, and that, as a matter of fact, the estate of Bibi Fasihan was not at all benefited, in other words according to the learned Subordinate Judge the plaintiff cannot recover the amount paid by her either by way of contribution from the other co-heirs of Muhammad Umar, she representing Umar's interest, nor can she recover the property from them under the provisions of sections 69 and 70 of the Indian Contract Act. In other words, the learned Subordinate Judge is of opinion that she can under no circumstances recover the money from the defendants in the present case. Therefore, whether the claim is premature or not does not affect the decision of the learned Subordinate Judge, for the plaintiff in no circumstances is entitled to press her claim against the heirs and legal representative of Bibi Fasihan or her estate now in the hands of the Receiver. This view of the matter makes it certain that unless the plaintiff establishes her claim to recover the amount

paid by her from the estate of Bibi Fasihan, the Receiver or the Court in the administration suit cannot possibly grant any relief to her.

The Receiver in his report referred to above did not definitely state that the claim was untenable, but from the attitude assumed by the Receiver in the subsequent stage of the case, and particularly in the written statement, it is impossible to conceive that the plaintiff had the remotest chance of getting her relief in the administration suit. The Court did not venture to enquire into her claim when she put it forward just after her discomfiture in this Court *vide* judgment date the 7th November 1918 (Exhibit B1). Her first application, as stated above, was made in June 1919 and the consequent dispossession of the property in August 1919. Her second application was made on the 10th December 1919 while the claims of other creditors either of Bibi Fasihan or of her heirs were being dealt with by the Receiver and the Court administring the estate of Bibi Fasihan; but no definite decision was arrived at with respect to the claim of the plaintiff because of complications having arisen on account of the purchase of the properties by Girdhar Das, the prior mortgagee; but the sale of these properties was set aside, and when the matter came before this Court in revision it was held that the plaintiff's mortgage was affected by the doctrine of *lis pendens* and that she could not be subrogated to the position of a prior mortgagee. The lower Court's order of the 19th December 1919 referred to above contained in three words, "permission is granted" does not give any reason for the said order far less does it promise any investigation into the claim of the plaintiff. Probably as the estate was being administered by the Court and as the claim of the plaintiff had to be enforced against the estate, the permission of the Court would be necessary. If that was so, the bar, if any, to institute the present suit was removed by the order of the Administration Court. In face of that order and in view of the fact that there was never any intention on the part of the Receiver or of the Court to investigate the claim of the plaintiff; to my mind it seems that there was no option left to her but to have her claim established in Court by a separate suit.

In order to apply section 10 of the Code of Civil Procedure as a bar to any further proceeding with the trial of the present case, it is necessary to show that the matter in issue involved in the present case was also directly and substantially the same as in the administration suit. The claim of the plaintiff to recover the aforesaid sum upon the facts alleged in the plaint was not at all pending in the administration case as the aforesaid order of the Court clearly indicates.

Again the section does not bar the suit but it only says that the trial of it shall not be proceeded with, and thirdly that the Court under that section has no jurisdiction to dismiss a suit but can only postpone the determination of the same until the cognate case pending in another Court is disposed of. In other words the Code provides for the trial of only one of two or many suits if the same issue is directly and substantially involved, in order to save time and possibly a conflict in the views taken by different Courts of concurrent jurisdiction with respect to the same matter. Nor does the section dispense with the necessity of instituting such suits. Under this section a suit cannot be said to be premature provided that there is valid cause for it. No authority is needed to support the aforesaid proposition for the section itself is clear, *vide* however the case of *Nimagauda* v. *Paresha* (1). The learned Subordinate Judge is, therefore, wrong in holding that the present suit is either barred or that it is premature; he is also wrong in dismissing the suit upon that ground.

The next question is, and that is the material question in the case, is the plaintiff entitled to recoup herself from the estate of Bibi Fasihan? It is not denied that Rs. 36,500 paid by her to Girdhar Das was a debt over the estate of Bibi Fasihan under the mortgage executed by Bibi Fasihan on the 21st of November 1891 and that after her death in 1909 her heirs and representatives took her estate burdened

(1) 22 B. 640; 11 Ind. Dec. (N. S.) 1009.

with that debt; and, before they can distribute among themselves the assets of the estate and the properties of the deceased, it is incumbent upon them to discharge the said debt. Rupees 36,500 is part of the mortgage-decree for the payment of which each and every property included in the mortgage is severally and jointly liable.

Subsequent to the mortgage Bibi Fasihan chose to execute certain deeds of gift referred to above in favour of some of her children preferring them to others, Muhammad Umar was one of her children on whom her favour seem to have been bestowed and he was given 16-annas of the properties, whereas his share therein was only three annas. In 1912 some of Bibi Fasihan's heirs objected to the deeds of gift made in favour of some of her children on the ground that their shares in the properties of Bibi Fasihan were reduced on account of the deeds in question and this naturally led to litigation.

The plaintiff in this case took a mortgage of 16 annas of some of the properties conveyed to Muhmmad Umar by his mother after the suits that were instituted by the daughters of Bibi Fasihan, namely, Fatima, Saera and Salema. The plaintiff, no doubt, took the mortgage subject to the final decision in the case which was then pending and which has now resolved itself into the administration of the estate of Bibi Fasihan. Her claim under the mortgage is, as held by this Court, affected by the doctrine of *lis pendens* and possibly after the final administration her claim might be either reduced or wholly extinguished by reason of there being nothing left in Muhammad Umar which she could take as his mortgagee. But that is the question which has to be decided because the plaintiff in her capacity as mortgagee is claiming under the mortgage executed by Muhammad Umar. We, in this case, are not concerned with that. Her position as mortgagee is relevent only in order to find out whether she had any interest or supposed interest in the properties of Bibi Fasihan so as to impel her heirs to pay the debt over the estate.

Now at the time when the plaintiff paid the money, the sale of the mortgaged properties was set aside but the properties had really not gone out of danger. The execution was proceeding and there was no order of the High Court in the appeals that were filed by the purchasers against the order of the Subordinate Judge setting aside the sales, to stay further proceedings in the execution, and from the record of the execution case we find that the Court as well as the decree-holder was strenuously pursuing the properties in question and orders for the issue of sale proclamation had already been passed. Kalimuzaffar, defendant No. 7, had already paved the way as to what should be done by one interested in the properties which were the subject of the mortgage of Girdhar Das-Kesho Das. To him, as to Umar, 16 annas of another property *Mahal* Machhiarawan was given by their mother under the deeds of gift. He settled with the decree-holder to pay a proportionate sum of the decree and to have this property sold last of all. Thus this property would be exempt from sale in the event of the entire sum due under the decree being realised by the sale of other properties or the liability would be in any case considerably diminished.

The plaintiff also resorted to the same remedy. She paid Rs. 36,500 as the proportionate share of *Mahal* Barowna and got an order from the Court with the consent of the decree-holder to sell it after Kurmi Chak and Karhouti. This arrangement will not in any way affect the liability of the properties which were mortgaged to Girdhar Das and Kesho Das. That payment, whatever be the arrangement between the parties, was to go towards the satisfaction of the decree and as a matter of fact the Court directed that the said money be credited towards the satisfaction of the decree.

No doubt the record of the case has grown into an enormous magnitude and the case has been complicated on account of the number of villages and the diversity of the interests held by the heirs. But the very statement of the case, so far as the present point is concerned, makes it simple. The order of the Court, as observed above, was that the amount paid by the plaintiff be credited towards the decree and this was done. Now this decree the heirs of Bibi Fasihan are bound to discharge. If the

plaintiff had not paid the proportionate amount of the decree *viz.*, Rs. 36,500, it would have been realised by the sale of the mortgaged properties which had not then been sold, and it is immaterial whether the liability in the final adjustment of the decree in question would have fallen upon *Mahal* Barowna.

Now whose property was saved by this payment of Rs. 36,500? It was the property of Bibi Fasihan. Then, the question that might be asked by the heirs of Bibi Fasihan is "why do you lay claim to the property Barowna and others". If the money was not paid by the estate, then the heirs of Bibi Fasihan would be bound to pay it; if not, the estate of Bibi Fasihan would be sold, and in that event probably the interest of the plaintiff would also have been extinguished. But that is no consideration for holding that the estate of Bibi Fasihan was not benefitted by that payment. The Receiver, as a matter of fact went to the length of paying Rs. 15,000 as compensation under the compromise decree of the High Court in order to prevent the sale of the properties including Barowna for whose sake—not for the sake of the plaintiff but for the sake of the heirs of Bibi Fasihan—the money was paid. Therefore, I have no hesitation in holding that the money was paid for the benefit of the property which at that time the plaintiff thought belonged to her, or there was a possibility of her having an interest in it; but at the same time the Receiver, as representing the heirs of Bibi Fasihan, thought that the property was, as a matter of fact, Bibi Fasihan's. The question then is whther the lady was interested in making the payment. She is a mortgagee of the estate of Muhammad Umar. Muhammad Umar is admittedly an heir of Bibi Fasihan and has an interest in the estate left by her though not of 16 annas yet of 3 annas at least in all the mortgaged properties of the estate of Bibi Fasihan. If the property had been sold in execution of a prior mortgage-decree and not redeemed either by the mortgagor or the pusine mortgagee, the puisne mortgagee would be sure to suffer and that was the position in which the plaintiff was placed. Therefore, the plaintiff was interested in the payment of the money. It was through the Court that she obtained a title under her sale certificate in execution of her decree and delivery of possession; she lost possession of the property on account of the decision of this Court but she was always entitled to call upon the persons representing the estate of Bibi Fasihan to pay the debt that she had discharged in order to re-imburse her. This is to be gathered from the observation of Lord Macnaghten in the case of *Dakhina Mohan Roy* v. *Saroda Mohan Roy* (2). In that case the plaintiff obtained possession under the decree of the High Court of a revenue paying estate and he paid the rents and cesses in default of which payment the estate would have been sold. The High Court decree was afterwards reversed by the Privy Council. In 1885 the defendant obtained possession of the estate in execution of the High Court decree, and the plaintiff claimed the revenue and cesses paid by him while he was in possession of the property. Their Lordships observed:

"It seems to their Lordships to be common justice that when a proprietor in good faith pending litigation makes the necessary payments for the preservation of the estate in dispute, and the estate is afterwards adjudged to his opponent, he should be recouped what he has so paid by the person who ultimately benefits by the payment, if he has failed through no fault of his own to re-imburse himself out of the rents."

Now if Muhammad Umar had made the payment, would he not have been entitled as heir of the three annas share in the estate of his mother to ask the other co-heirs to contribute towards it? We find that this principle was accepted in the practical dealings with the estate in question in the administration proceedings, and Kalimuzaffar one of the heirs, having a seven annas share paid off Rs. 65,000 in order to save the property Machhirawan, the sixteen annas of which was given to him, from being sold. The Receiver without any objection makes that sum a charge upon the estate of Bibi Fasihan and the Court sanctions it. Dulhin Sona Koer then stepped into the shoes of Umar by reason of his

(2) 21 C. 142; 20 I. A. 160; 17 Ind. Jur. 576; 6 Sar. P. C. J. 366; 10 Ind. Dec. (N. s.) 727 (P. C.).

mortgage which was a transfer of the property held by him in the true sense of the word and as defined in the Transfer of Property Act. Therefore, what Umar could do Sona Koer could also do. If she paid the money, as she did, she has as much right as Umar had (and this was recognised in the case of Kalimuzaffar) to ask the other heirs to contribute towards the payment and to recoup her on account of the money that she had advanced. Upon this principle, therefore, not only sections 69 and 70 will apply but various other sections of the Indian Contract Act, *viz.*, sections 43, 68, 69, 70 and 72. In a case of this kind one is not to be pinned down to a particular section of the Act but all the sections read together laid down the principle upon which one paying money out of his own pocket is entitled to recoup himself from those who either derive benefit out of it or are bound to pay. It is also immaterial whether the person paying the money had a real interest or not. The word "interested" used in section 69 cannot have such a narrow meaning. If *bona fide* one believes that he has an interest in property and not only as a pretext for having a claim against those who are bound to make the payment, there is no reason why the law should not compel the person ultimately benefitting by the payment to return the money to the payer.

In this connection I would like to refer to the authorities quoted in the judgment in Second Appeal No. 1067 of 1921 delivered by me on the 28th June 1923 [*Rang Lal Sahu* v. *Kali Shankar Sahai* (3)] The principles of those cases would apply therein but did not apply to the second appeal which was disposed of by me.

I, therefore, hold that the plaintiff is entitled to get back the money paid by her from the estate of Bibi Fasihan and that this should be treated in the same way as the payment made by Kalimuzaffar.

We, therefore, set aside the decision of the Subordinate Judge and in its stead make a decree to the effect that the plaintiff is entitled to recover the sum of money claimed by her from the estate of Bibi Fasihan.

Then the question is whether she is entitled to recover the rate of interest of one per cent. per month as claimed by her and which was stipulated in her mortgage-bond. This was the rate of interest and perhaps compound interest agreed to by Bibi Fasihan when she execute the mortgage bond in favour of Girdhar Das-Kesho Das. The learned Vakil on behalf of the respondents contends that 6 per cent. per annum should be allowed to the decree-holder inasmuch as that is the rate directed by the decree of the Subordinate Judge to be paid to Girdhar Das. That is no doubt the rate of interest on the amount of Girdhar Das' decree but the payment made by the plaintiff was out of her own pocket and if the Receiver or the judgment-debtors had had to borrow money from outside in order to pay the decree they would have had to pay the market-rate of interest. That is the test which is applied to all such cases, and in our experience we know that when a decree has to be paid by a creditor he does not borrow money at the rate of interest mentioned in the decree but he borrows it at the market-rate, so the purpose for which the money was applied would not determine the rate of interest but the rate of interest which was prevailing at the time. No evidence has been given in this case as to what the market-rate of interest was at the time, nor has it been shown that the rate of interest mentioned in the bond is excessive or more than the market-rate prevailing at the time. Therefore, the bond rate must be deemed to be the market rate in the absence of any evidence to the contrary. But in the circumstances of the case compound interest is not allowable; nor has it been claimed. Therefore, simple interest only at the rate of one per cent per month will be allowed.

The result is that the decree of the Court below is set aside and in lieu thereof there will be a decree in favour of the plaintiff to recover from the defendants the sum of money claimed by her with future interest at the rate of 6 per cent per annum. The heirs of Bibi Fasihan are liable to the extent of the assets of the estate which have come into their hands. Bibi Fasihan's estate being in charge of the Receiver he shall administer it in the administration suit and the decretal amount in question together

(3) 77 Ind. Cas. 73; 2 Pat. 890; (1923) Pat. 353.

with interest will be paid by the Receiver out of the joint assets of the estate of Bibi Fasihan. In doing so, the Receiver will take into account the liabilities of Dulhin Sona Koer and her successors-in interest of the estate. These liabilities will be set forth in the judgment in Civil Revision Cases Nos. 177, 291, 300, 309, 310, and 312 of 1923 which have been heard along with this appeal.

The appeal is decreed with costs.

Ross, J.—I agree.

W. C. A. *Appeal accepted.*

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 97 OF 1916 WITH RULE NO. 338 OF 1916.

July 12, 1916.

Present:—Justice Sir N. R. Chatterjea, KT., and Mr. Justice Richardson.

Maharaj KUMAR SHOSHI KANTA ACHARJI CHOWDHURY BAHADUR—APPELLANT

versus

Raja SARAT CHANDRA ROY CHOWDHURY—RESPONDENT.

Execution of decree—Construction of decree, rules of—Execution Court, duty of—Variance between judgment and decree—Amendment—Procedure—Civil Procedure Code (Act V of 1908), s. 152, O. XX, rr. 6, 7.

A decree speaks for itself and must be executed as it stands, the executing Court being confined between the four corners of the decree. [p. 171, col. 1.]

Bhugobat Singh v. *Ram Adhin Singh*, 22 W. R. 330, *Radha Pershad Singh* v. *Torab Ali*, 18 C. 108; 5 Sar. P. C. J. 582; 9 Ind. Dec. (N. S.) 72 and *Udwant Singh* v. *Tokhan Singh*, 28 I. A. 57; 28 C. 353; 3 Bom. L. R. 318; 8 Sar. P. C. J. 14 (P. C.), followed.

But a decree, like any other document, is open to construction, and where a decree is ambiguous it ought to be so construed as to conform with the judgment. [p. 168, col. 2.]

Maharaja of Bhartpur v. *Rani Kanno Dei*, 28 I. A. 35 at p. 42; 23 A 181; 3 Bom. L. R. 51; 5 C. W. N. 137; 7 Sar. P. C. J. 792 (P. C.), relied on.

There is, however, a limit to what construction can do, and the remedy by construction is only appropriate if the language of the decree is ambiguous. If the language is plain and there is no ambiguity the proper remedy for a variance between the decree and the judgment is to apply for the amendment of the decree. [p. 169, col. 1.]

The operative words of a decree were as follows:—

"It is ordered that this suit be partially decreed, that the plaintiff's right be declared to so much of the disputed lands as falls within the boundary lines of the Revenue Survey Map of 1848 of Mauza Nij Shampur Paharpur comprised in Mahal 218 of the Touzi of the Mohalla Collectorate, laid down in the *Amin's* map:"

Held, that the meaning of the decree was not that the plaintiff's right was declared to so much of the disputed lands as fell within the boundary lines of the survey map of the village of which the *Amin* had made a map, but that the boundary lines of the Survey map were taken to be those laid down or shown in the *Amin's* map. [p. 168, cols. 1 & 2.]

Appeal against the order of the Subordinate Judge, Rajshahi, dated the 5th April 1916.

Babus *Jogesh Chandra Roy*, *Govinda Chandra De Roy* and *Bhupendra Chandra Guha*, for the Appellant.

Babu *Bhupendra Chandra Guha*, for the Judgment-debtor-Petitioner.

Messrs. *Jackson* and *H. N. Ghose*, Babus *Bisnu Coomar Bose*, *Dwarka Nath Chuckerbutty* and *Jotish Chandra Guha*, for the Respondent.

Babu *Jotish Chandra Guha*, for the Opposite Party.

JUDGMENT.—This appeal is from a determination of the Court below contained in a judgment, dated the 5th April 1916, upon a question raised under section 47 of the Code in regard to the construction of a decree.

The decree (dated the 27th March 1905) was obtained by the respondent Raja Sarat Chandra Roy against Raja Surja Kanta Acharjya, the predecessor of the appellant, Raja Sashi Kumar Acharjya. There was an appeal to this Court which was dismissed on the 22nd May 1908. A further appeal to the Privy Council was also dismissed on the 20th July 1914 *Surja Kanta Acharjya* v. *Sarat Chandra Roy Chowdhury* (1). The result was that the decree of the First Court stood confirmed without modification.

The suit related to a considerable area of land in the possession of the appellant which the respondent claimed as part

(1) 25 Ind. Cas. 309; 18 C. W. N. 1281; 20 C. L. J. 563; 16 M. L. T. 290; 27 M. L. J. 365; 1 L. W. 807; (1914) M. W. N. 757; 16 Bom. L. R. 925 (P. C.).

of an estate which he had purchased at a sale held for arrears of revenue. The respondents' success was not complete but partial. It was held that he was entitled to so much of the land as fell within the boundaries of his estate as shown in a Revenue Survey Map of 1848. This is plain from the judgment delivered and is not disputed. There is also no dispute as to the tri-junction point or the starting point which a surveyor, demarcating the boundaries in the locality, would commence his measurement. It is agreed that this point was conclusively fixed by the Trial Judge. The present dispute arises in this way. A map prepared by an *amin* who had made a local enquiry under the direction of the Trial Court purports to show the boundaries according to the Revenue Survey Map. The decree at first sight, at any rate, adopts the *amin's* map. Towards the close of his judgment, however, the learned Subordinate Judge referred to the variation between the magnetic north and the true north. The *amin* apparently had made no allowance, for such variation and the point at issue is whether the respondent is entitled to have the variation taken into account for the purpose of the delivery of possession or whether under the terms of the decree he is bound by the *amin's* map. The point is not touched upon in the judgments of this Court and the Privy Council.

The words of the decree are as follow:—

"It is ordered that this suit be partially decreed, that the plaintiff's right be declared to so much of the disputed lands as falls within the boundary lines of the Revenue Survey Map of 1848 of Mouza Nij Shampur Paharpur comprised in Mahal 218 of the Touzi of the Mohalla Collectorate, laid down in the *amin's* map."

The original decree is in Bengali but with every respect for the learned Subordinate Judge, there is at any rate no patent ambiguity either in the original or in the translation. The Bengali expression (*Aminer Naksha Ankita*), which represents the words "laid down in the *amin's* map," refers, as clearly as those words do, to the boundary lines of the Survey map. According to the grammatical sense the boundary lines of the Survey map are taken to be those laid down or shown in the *Amin's* map. The meaning is not "the boundary lines of the Survey map of the village of which the *amin* has made a map." Apart from the language such a reference to the *amin's* map would be entirely useless. What is called the ordinary portion of the judgment, which is in English, puts the meaning beyond doubt. The words there are:—"It is ordered that these five suits are partially decreed in this way that the plaintiffs' right to the portions of the disputed lands shown in the *amin's* maps as falling within the boundary lines given in the Revenue Survey Maps of 1848 of the *Mouzas* in questions.....be declared as appertaining to his *zemindari*." The decree, therefore, as already stated, on the face of it adopts the *amin's* map and if it were not for the passage in the judgment which creates the difficulty, there would be no room at all for discussion.

As the decree was in his view ambiguous, the learned Subordinate Judge goes on to refer to that passage as a clue to the meaning and as a justification for the order which he made, namely that "The Civil Court *amin* should determine the boundary line of the Revenue Survey Map with reference to the certified copy of the map supplied by the parties." In other words he throws the *Amin's* map overboard and directs that the Survey map should be relaid.

Appealing from that order the appellant naturally takes his stand upon the decree between the four corners of which a Court of Execution is no doubt confined: *Radha Pershad Singh* v. *Torab Ali* (2), *Udwant Singh* v. *Tokhan Singh* (3). On the other hand it is perfectly true that a decree like any other document is open to construction. The Code says that the decree shall agree with the judgment (O. XX, r. 6) and a decree, therefore, ought, if possible, to be construed so as to conform with the judgment. *Maharaja of Bhartpur* v. *Rani Kanno Dei* (4).

(2) 18 C. 108; 5 Sar. P. C. J. 582; 9 Ind. Dec. (N. S.) 72.

(3) 28 I. A. 57; 28 C. 353; 3 Bom. L. R. 318; 8 Sar. P. C. J. 14 (P. C.).

(4) 28 I. A. 35 at p. 42; 23 A. 181; 3 Bom. L. R. 51; 5 C. W. N. 137; 7 Sar. P. C. J. 792 (P. C.).

But there is a limit to what construction can do. The remedy by construction is only appropriate if the language is ambiguous. If the language is plain and there is no ambiguity, the proper remedy for a variance between the decree and the judgment is to apply for the amendment of the decree. The fact that such an application must be made to the Privy Council in England is no reason why we should strain the law in order to assist one party to the prejudice of the other. On the contrary we should not be justified in taking liberties with a decree which has become, by adoption, His Majesty's order in Council; *Raja Bhup Indar Bahadur Singh* v. *Bijai Bahadur Singh* (5).

The question, then, is whether this decree is capable of the construction which the respondent seeks to have put upon it. We have pointed out that there is no such ambiguity as that suggested by the learned Subordinate Judge and that the decree, as it stands, agrees with the ordering portion of the judgment. That being so, is there any reason for departing from the natural meaning of the words? In the paragraph of the judgment on which the argument for the respondent was rested the Subordinate Judge says:—"The Civil Court *amin* has failed to ascertain what at the time variation between the two meridians was. I, however, do not consider this omission to be of importance now, as I think there would be necessity again for ascertaining this variation at a subsequent stage in the execution department, when delivery of possession would have to be made for the plaintiff." Then he adopts the *amin's* tri-junction points (five suits were tried together with one of which we are concerned) and says that he considers "them to be the proper starting points for laying down the boundary lines of the Revenue Survey of 1848". Then he says in conclusion "The suits, therefore, should be decreed in parts as noted above and it is accordingly ordered." Then follows the ordering portion the relevant part of which has already been quoted.

(5) 27 I. A. 209 at p. 215; 23 A. 152; 5 C. W. N. 521; 2 Bom. L. R. 978 (P. C.).

Some importance was attributed to the words "as noted above" in the last sentence of the passage cited. But those words were probably intended to qualify the preceding words "in parts" The reference was probably to the beginning of the preceding paragraph where the Subordinate Judge had found that the plaintiff was "entitled to recover possession of the lands in suit in portions." The passage as a whole, however, does support the respondent to this extent that the Subordinate Judge evidently contemplated that in execution allowance would be made for the variation between two meridians, the magnetic meridian and the polar meridian. It is contended for the respondent that effect should be given to an intention which is not expressed in the decree. The contention in its most plausible form is that by the *amin's* map the Subordinate Judge means the *amin's* map adjusted with reference to the true north. But, however the contention be put, the result of acceding to it would be to introduce into the decree a direction which is not there, namely, that the *Amin's* error in not taking into account the deviation of the magnetic meridian should be corrected and his boundaries re-aligned accordingly. That the further result would be an entirely new map is shown by the Subordinate Judge's order which discards the *Amin's* map and directs the Survey map to be relaid.

Now the Courts which dealt with the case had nothing before them except the *amin's* map to indicate the practical effect of the decree which they were making or confirming. The case of *Lukhi Narain Jagadeb* v. *Jodu Nath Deo* (6) aptly illustrates what important and even startling consequence might follow from the correction of the *amin's* map in the manner suggested. If the decree said that the *amin's* map was to be corrected the correction would have to be made whatever the effect might be, though conceivably the suit having been decreed in part, a difficulty might arise, if the effect were to show a title in the respondent to all or more than all he

(6) 21 I. A. 39; 21 C. 504; 6 Sar. P. C. J. 408; 10 Ind. Dec. (N. S.) 966 (P. C.).

claimed. The decree, however, gives no such direction and cannot be made to give any such direction without importing into it words which are not there.

It was said that it was hard that the respondent should suffer because the Court made a mistake in drawing up the decree. The first answer to that is that if there is a mistake, it is open to the respondent to take steps to have it corrected. But so far as the Subordinate Judge was concerned the mistake seems rather to have been in the judgment than in the decree. The Subordinate Judge appears to have under-estimated the possible importance of the question and to have wrongly assumed that the *amin's* map would be corrected in execution as a matter of course. That accounts for the omission in the decree and in the ordering portion of the judgment. The decree said what the Subordinate Judge intended to say though the effect is not what he thought it would be. The mistake in the judgment produced a corresponding mistake in the decree.

As to the parties, it is true that the Code (O. XX, r. 7) directs the Judge to sign the decree when he "has satisfied himself that the decree has been drawn up in accordance with the judgment," but there is a general and convenient practice which was apparently followed in the present case, under which the signatures of the Pleaders are placed upon a decree before it is signed by the Judge, and it is undesirable to minimize the responsibility of the parties for the correctness of a decree as drawn up. We were told by the learned Pleader for the appellant (and the statement was not disputed), that neither party took objection to the *amin's* report and map on the specific ground that his north did not correspond with the true north. The question, it was said, was suggested in the course of cross-examination conducted on the appellant's behalf. That may illustrate the danger of random cross-examination but it does not prevent the appellant from insisting on the decree as it stands. It it probable that the question was not pushed to a plain conclusion at the time because neither side knew what the effect of allowing for the deviation would be. That may account also for the decree being accepted by both parties in the form in which it was drawn up. In that state of things the appellant can hardly complain of hardship. It is just possible that if the decree had been drawn up in the way in which he says it ought to be understood, the result on appeal might have been different. So far as there is any question whether one or the other party is to blame for the form which the decree has taken, there is little to choose between them and the decree binds one as much as the other.

We do not know, and it does not signify for the present purpose, what the result of correcting the map would be. The appellant says that he would be adversely affected and that a considerable addition would be made to the area to be awarded to the respondent. If the result would have been the other way we should doubtless have heard the same argument from the opposite quarters. The respondent would have been for the decree and nothing but the decree and the appellant would have relied on the judgment. The decision at which we should have arrived, it may be hoped, would have been the same, as the decision at which we are now about to arrive. The consideration which suggests itself is that the party who would be prejudiced by an alteration of the map had, as the decree stands, no inducement and possibly no right, to raise the question in appeal. The Courts, it is true, accepted the Survey map. The Revenue Survey of 1848 was presumably carried out on scientific lines and the north shown in the Survey map is the true north. But mistakes have been known to creep even into Survey maps. The *amin's* version of the Survey map may be wrong in theory but it was adopted in the decree and his map may in fact more closely represent the true boundaries. At any rate it was certainly not necessary for the party who would suffer from its rectification in the way proposed to take in appeal such a point as this, that if the rectification were made, the practical result would be to throw grave suspicion on the correctness of the Survey map.

Then it was said that the parties are as much bound by the judgment as the decree. That is no doubt so and it may be that the respondent has a title or right to have the decree amended. We need not consider that question which may turn to some extent on the terms of section 152 of the Code. All we need say is that the decree cannot be construed in the way in which it has been construed by the Court below and that the question raised is a question not of construction but of amendment.

The point is a short one but we have dealt with it at same length as it was energetically argued and is of considerable importance. In this country a decree is often executed, not by the Judge who made it and best knows what was intended, but by a successor, or by some other Judge to whom it is sent for execution. It would add to the many difficulties which arise in the execution department if any encouragement were given to the alteration of decree under the guise of interpretation. The principle has long been recognised that a decree must be executed as it stands. As Phear, J. said in *Bhugobat Singh* v. *Ram Adhin Singh* (7) "the decree speaks for itself."

The result is that this appeal must be allowed with costs and the order of the Subordinate Judge set aside. The order was passed in a proceeding in the nature of a review of two previous orders dated the 24th March 1916, and the 30th March 1916, the first passed on an application made by the decree-holders, and the second on a reference made by the *amin*. We refer the view of the decree taken in those orders and the decree will be executed accordingly. We assess the hearing fee at eight gold *mohurs*.

In view of our judgment, it is unnecessary for us to pass orders on the Rule.

Let the record be sent down at once.

Z. K.

Appeal allowed: no order in Rule.

(7) 22 W. R. 330.

BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT No. 1080 OF 1920.

July 2, 1923.

Present:—Mr. Justice Fawcett.

KISHEN PRASAD & CO. LTD. —PLAINTIFFS

versus

FULLUMAL HIRALAL.—DEFENDANT.

Civil Procedure Code (Act V of 1908), s. 153, O. VI. r. 17—Bombay High Court Rules, r. 266—Amendment of plaint, after decree—Preliminary decree—Receiver, costs of.

An amendment of pleadings can, as a general rule, be allowed only during the actual pendency of a suit, and not after the decree has been actually drawn up and sealed. [p. 172, col. 1.]

The Duke of Buccleuch, (1892) P. 201; 61 L. J. P. 57; 67 L. T. 739; 40 W. R. 455; 7 Asp. M. C. 294 and *Sukhdeo Prasad* v. *Lachman Singh*, 24 A. 456; A. W. N. (1902) 114, distinguished.

Where, however, a Receiver has been appointed by the Court in a suit, the Court may, even though the suit be no longer pending, permit parties to intervene on a question as to the Receiver's costs. [p. 172, col. 2.]

Administrator-General of Bengal v. *Prem Lall Mullick*, 22 C. 1011; 22 I. A. 203; 5 M. L. J. 157; 6 Sar. P. C. J. 660; 11 Ind. Dec (N. S.) 672 (P. C), followed.

Mr. *Lalji*, for the Plaintiffs.

JUDGMENT.—In this motion the Court's leave is asked to amend the plaint by adding certain words in the first prayer for relief which will have the effect of making payable to the plaintiffs the expenses, etc., payable to the *muccadams* for storing, etc., the 407 and 16 bales of cotton which the plaintiffs had received from the defendants. In its decree of April 8, 1922, the Court appointed the manager of the plaintiffs to be Receiver of these bales; and the question of plaintiffs' right to recover these expenses has arisen in the course of the Receiver passing his accounts before the Commissioner. The Chamber Judge has held that they are not covered by the decree, and hence this motion. It is also asked that the decree should be amended similarly on such terms as the Court may deem fit to impose on the plaintiffs.

The first question that arises is whether the amendment of the plaint, which is asked for, falls under section 153 and O. VI, r. 17 of the Civil Procedure Code. Section 153 allows the Court to give leave for amendment at any time in any

proceeding in a suit, and O. VI, r. 17, says that the Court may allow such amendments at any stage of the proceedings. *Prima facie* this limits the Court to allowing amendments in pleadings during the actual pendency of the suit and not after the decree has been actually drawn up and sealed. This is the general rule which applies in the case of the corresponding rule of the English Supreme Court, *viz.*, O. XXVIII, r. 12. At page 377 of the Yearly Practice of the Supreme Court of 1923 it is said: "Speaking generally, an amendment of an indorsement or pleading cannot be made after judgment has been entered, unless the case comes within the 'slip' Rule." That 'slip' Rule is the rule allowing amendments of a judgment or decree for clerical or arithmetical mistakes corresponding to section 152 of the Civil Procedure Code. It goes on to say: "But the words of r. 1, 'At any stage of the proceedings' occur also in O. XVI, r. 11, and upon those words the Court of Appeal held, in *The Duke of Buccleuch* (1) that the power given by the Rule may be exercised after final judgment, as long as anything remains to be done in the case." In that particular case it will be found that there was a limitation that consent should be given by the party that it was proposed to add and it was held that the decree was not final. I do not suppose that that case can be treated as an authority for allowing the amendment of a pleading in a case where the decree is final and has been sealed, or, as it is sometimes expressed, "perfected." So far as I am aware there is no Indian authority to the contrary. Mr. Lalji for the plaintiffs referred to *Sukhdeo Prasad* v. *Lachman Singh* (2), where it is said that the suit had proceeded up to judgment and decree. These words are ambiguous, and I think they must, as there used, mean that the suit was ready for judgment and the decree that follows on the judgment, not that a decree had actually been passed. The case is, of course, different from one where an amendment is allowed by an Appellate Court, for in such a case the suit is, so to speak, proceeding in that appellate Court. But when a decree has actually been passed, if it is final, the original Court is, generally speaking, *functus officio*, and the occasion for an amendment of pleadings cannot really arise. Mr. Lalji says that the decree in question is only a preliminary one. It is, no doubt, marked as a preliminary decree on mortgage. But as expressly declared by clause (2) of section 2 of the Civil Procedure Code, a decree can be partly preliminary and partly final; and there can, I think, be no doubt whatever that, in so far as the decree fixed the sum of Rs. 68,425-0-6 as the sum to be paid by the defendants to the plaintiffs for debt and interest, it is final, for it thereby fixes the amount due from the defendants up to the date of the decree. It is no doubt preliminary in so far as it subsequently declares that the plaintiffs have a first charge on certain immoveable property for the amount due and payable by the defendants to the plaintiffs under the decree and in so far as it appointed the plaintiffs' manager to be a Receiver of these 407 and 16 bales and directed that he should pass his accounts before the Commissioner. In regard to the latter point, it may be mentioned that O. XL, r. 1 (1) (*a*), does declare that the Court can appoint a Receiver of any property, whether before or after decree. And there is the authority of Privy Council in *Administrator General of Bengal* v. *Prem Lall Mullick* (3) for saying that where a Receiver has been appointed by the Court in a suit, the Court may, even though the suit be no longer pending, permit parties to intervene on a question as to the Receiver's costs. So that in that particular regard the plaintiffs have a stronger case than in regard to an amendment of the pleadings, and a consequent alteration of the decree as to the amount that was payable by the defendants to the plaintiffs at the date of the judgment. In regard to the latter point, the whole object of the proposed amendment of the plaint is that the Court should subsequently allow an

(1) (1892) P. 201; 61 L. J. P. 57; 67 L. T. 739; 40 W. R. 455; 7 Asp. M. C. 294.
(2) 24 A. 456; A. W. N. (1902) 114;
(3) 22 C. 1011; 22 I. A. 203; 5 M. L. J. 157; 6 Sar. P. C. J. 660; 11 Ind. Dec. (N. S.) 672 (P. C.).

amendment of the decree, so as to enable the plaintiffs to add to the amount decreed against the defendants a further sum of Rs. 5,000 odd in regard to the *muccadamage* charges for these bales; and the case really falls under rule 266 of this Court which restricts the powers of the Court, after the decree or order has been sealed, to amend the same. It allows this to be done only so as to bring it into conformity with the judgment or rectify an inaccuracy or clerical or arithmetical error. Its last clause is "Save as aforesaid, no alteration or variation shall be made without a review of judgment and re-hearing under the provisions of section 114 and O. XLVII of the Code of Civil Procedure".

Subject to a qualification, which I will deal with later the alteration which the plaintiffs seek seems to me to be clearly one which cannot now be allowed by this Court save in accordance with the provisions for review of judgment, which are referred to in the rule; and as a somewhat analogous case I may refer to the case of *Glasier* v. *Rolls*(4) where a judgment had been passed allowing certain costs but no provision had been made for the costs of the short-hand notes of the reporters, and the Court was asked to allow the judgment to be amended by inserting a provision for those costs, though they had not been asked for at the trial. The Court of Appeal unanimously refused this application, and in his judgment Bowen, L. J. says (p. 376):

"It is quite a different thing to come after a judgment and ask that it should be amended so as to express the real intention of the Court, entertained by the Court at the time the judgment was given..... But to seek to alter the judgment by asking that something may be embodied in it the demand for which was not even thought of at the time, and was never brought to the attention of the Court, is really to ask us to make a different judgment from that which has already been perfected."

I think those remarks apply equally to the present case.

(4) (1890) 62 L. T. 305; 59 L. J. Ch. 63; 38 W. R. 113.

It was alleged by Mr. Lalji that it was a mere inadvertence which led to the omission of the plaintiffs to ask for relief in regard to these particular expenses, and no doubt that may be so. But, on the other hand, the case of *Jehangir Cowasji* v. *The Hope Mills, Limited* (5) shows that the Court should not ordinarily draw any such presumption of inadvertence; and reference to my notes of the proceedings underlying the *ex parte* decree shows that the plaintiffs' witness Niranjanprasad Dwarkadas stated that Rs. 59,462-10-6 was the sum due to the plaintiffs up to March 19, 1920, and that after that date no item was debited to the defendants except interest. It seems difficult to understand why the plaintiffs should not have paid these charges when they became due and debited them to the defendants in their account, so that they would naturally have been brought to the attention of the Court.

The result is that, subject to the qualification, which I have already mentioned, I hold that the motion is misconceived and should not be allowed. The plaintiffs, in regard at any rate to such expenses incurred up to the date of the Receiver taking possession, in my opinion, can only proceed by an application for review of judgment under O. XLVII of the Civil Procedure Code. I must not, however, be taken to encourage such an application. There are various difficulties in the way of the plaintiffs, for instance, limitation, and the necessity of showing that the case falls properly under O. XLVII, r. 1, as construed in the recent Privy Council judgment in *Chajju Ram* v. *Neki* (6).

Now I come to the qualification I have mentioned. I think a distinction can rightly be made as to costs in respect of *muccadamage*, etc., which became leviable for the storage, etc., of these bales from the date of the Receiver taking possession of them as Receiver. I have

(5) 2 Ind. Cas. 294; 33 B. 216; 10 Bom. L. R. 488.

(6) 72 Ind. Cas. 566; 24 Bom. L. R. 1238; 30 M. L. T. 295; 26 C. W. N. 697; 41 P. L. R. 1922; 3 P. L. T. 435; (1922) A. I. R. (P. C.) 112; 16 L. W. 37; 17 P. W. R. 1922; 3 L. 127; 43 M. L. J. 332, 4 U. P. L. R. (P. C.) 99; 36 C. L. J. 459 (P. C.)

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already pointed out that there is the authority of the Privy Council for entering into questions as to the Receiver's accounts even although the suit may not be pending, and I have also pointed out that in my opinion the decree is preliminary with regard to the Receiver taking certain action and passing his accounts. That being so, rule 258 applies, namely, in every decree and order that is not final liberty to apply shall be implied. It is open in my opinion, to the party interested to apply in regard to any question that may arise as to the Receiver's accounts, so far as they are accounts in respect of any liability subsequent to his appointment as Receiver taking effect; and to that extent I do not think that rule 266 bars any alteration of or addition to the terms of the preliminary decree that may be justified. I, therefore, leave that position also open to the plaintiffs.

Subject to that, the motion is discharged with costs.

Z. K. *Motion dismissed.*

LAHORE HIGH COURT.

CIVIL APPEAL NO. 324 OF 1919.

August 2, 1922.

Present:—Mr. Justice Martineau and Mr. Justice Brasher.

GOKHA RAM—DEFENDANT—APPELLANT

versus

SHAM LAL—PLAINTIFF—AND ANOTHER—DEFENDANT—RESPONDENTS.

Hindu Law—Joint family—Alienation by father—Necessity—Small portion of consideration not for necessity—Sale, whether can be set aside—Suit by son to annul sale—Limitation—Limitation Act (IX of 1908), Sch. I, Arts. 120, 126.

A sale of family property by a Hindu father cannot be set aside merely because a small portion of the sale consideration is found not to have been advanced for necessity. [p. 175, col. 1.]

Lala Chatranarayan v. *Uda Kanwari*, 1 B. L. R. 201; *Felaram Roy* v. *Bagaianand Banerjee*, 6 Ind. Cas. 207; 14 C. W. N. 895; *Naman Mal* v. *Har Bhagwan*, 66 Ind. Cas. 362; 2 L. 357; (1922) A. I. R. (L.) 317 and *Kannu Chetty* v. *Amirthammal*, 26 Ind. Cas. 418; 1 L. W. 877, relied on.

A sale of family property by a Hindu father merely for the purpose of paying off a mortgage which exists on the property is not justified. [p. 175, col. 2.]

A suit by a Hindu son to get a sale of family property effected by the father annulled is governed by Art. 126 and not by Art. 120 of Schedule I to the Limitation Act. [p. 176, col. 1.]

Second appeal from the decree of the District Judge, Ludhiana, dated the 15th December 1918, varying that of the Subordinate Judge, 1st Class, Ludhiana, dated the 1st August 1918.

Mr. *Shamsir Chand*, for the Appellant.

Mr. *Fakir Chand*, for the Respondents.

JUDGMENT.—Seven suits have been brought by Sham Lal for the annulment of alienations effected by his father Labhu Ram. The Subordinate Judge found that Labhu Ram was a drunkard and a gambler who had wasted his property, that he had no business or occupation on which the money he borrowed might legitimately have been spent, and that the debts he had incurred, except those which could be connected with his son's marriage, were tainted with immorality and not binding on the plaintiff. He passed decrees annulling the alienations, subject to the condition that the plaintiff should pay to the alienees certain sums for which necessity had been proved.

On the appeals of the alienees the District Judge has found that the evidence is not of such a nature as to lead to the conclusion that Labhu Ram was licentious throughout his life or had no business or occupation, and he has accepted six of the appeals, and while maintaining the decrees for annulment of the alienations he has allowed further sums to the alienees on account of the antecedent debts which formed part of the consideration for the alienations. The seven alienees have preferred Second Appeals Nos. 324 to 326 and 328 to 331 of 1919, which may be disposed of by one judgment.

It will be convenient to take First Appeal No. 325 by Atma Ram, to whom Labhu Ram sold a house for Rs. 1,200. The lower Appellate Court has allowed Rs. 939 which were required for the payment of debts, disallowing only an item of Rs. 100 and one of Rs. 161. It is contended for the appellant that

the item of Rs. 100, which is said to have been paid to one Mangu Mal, should have been allowed, the lower Appellate Court having overlooked certain evidence in coming to the conclusion that the payment was not proved. It is unnecessary, however, to go into this matter, as we think the ap eal must succeed even if necessity for the sum of Rs. 261 has not been proved.

In *Lala Chatranarayan* v. *Uba Kanwari* (1), where a widow had sold property for Rs. 995, out of which only Rs. 670 were needed for the payment of a debt, it was held that the mere fact that she had sold the property for more than the amount of the debt did not render the sale invalid.

That ruling was followed in *Felaram Roy* v. *Bagalanand Banerjee* (2) in which it was held that a sale by a Hindu widow cannot be set aside upon payment of the amount which it was necessary for her to raise to pay off a legal debt simply because the property sold was not sold for a sum which exactly covered that debt.

The same view has been taken by this Court in *Naman Mal* v. *Har Bhagwan* (3).

It has also been held by the Madras High Court in *Kannu Chetty* v. *Amirthammal* (4) that if in the case of a sale by a widow a small portion of the purchase money was not required for urgent necessity it does not follow that the sale itself was not due to necessity, unless it could be reasonably presumed or unless it is proved that the sale of a lesser area for the exact amount required for necessity was feasible.

The principle enunciated in these rulings is applicable with all the more force to the case of an alienation by a male proprietor. In the present case it was necessary for Labhu Ram to sell the house in order to pay his debts which amounted to Rs. 939, and the fact that he obtained by the sale an additional sum of Rs. 261 for which he is not shown to have had any necessity is not a sufficient reason for annulling the sale.

The same principle applies to Appeal No. 330 which relates to a sale in favour of Fattu and Buta, effected for the purpose of paying debts due to different persons. The sale was for Rs. 1,400 of which all but Rs. 200 has been allowed.

Appeal No. 324 relates to a sale in favour of Gokha for Rs. 1,900, out of which the lower Appellate Court has allowed Rs. 1,500 on account of Labhu Ram's share in a mortgage-debt due to the vendee. No necessity was proved for the remaining items. This case is distinguishable from Appeals Nos. 325 and 330, as the mortgage which was to be paid off by the sale was a mortgage of the very property which was sold, and it was a mortgage with possession. There was no other debt to be discharged, and the sale of the property merely for the purpose of paying off the mortgage which existed on it was perfectly useless. The decree annulling this sale was, therefore, correct.

Similar remarks apply to Appeal No. 328, which is by Ram Rachpal, to whom Labhu Ram sold land for Rs. 900 for the purpose of paying off two mortgages held by Ganesha Mal on the same land. The lower Appellate Court disallowed two items amounting to Rs. 160, for which no necessity was shown. It is true that Ganesha Mal's mortgages carried interest, but the mortgage-deed contained no provision for his recovering principal or interest either from the mortgaged property or from other property of the mortgagor, and the mortgagee could only get possession of the mortgaged property if the mortgagor made default. There was, therefore, no necessity whatever for Labhu Ram to sell the mortgaged property, and the sale has been rightly annulled.

Appeal No. 329 relates to an alienation in favour of Nikka for Rs. 900, out of which Rs. 750 have been allowed. This alienation was not a sale, but a mortgage, so that the remarks made above in regard to Appeal No. 325 do not apply to this case. The findings that necessity has not been proved for the items disallowed are findings of fact, and Counsel for the appellant has not been

(1) 1 B. L. R. 201.
(2) 6 Ind. Cas. 207; 14 C. W. N. 895.
(3) 66 Ind. Cas. 362; 2 L. 357; (1922) A. I. R. (L.) 317.
(4) 26 Ind. Cas. 418; 1 L. W. 877.

able to say anything in support of the appeal. There was an additional mortgage to Nikka for Rs. 99, but no evidence was given of the payment of the money.

Appeal No. 331 relates to an oral sale to Muhammad Shah for Rs. 400. The District Judge has disallowed the whole of this sum, finding that no necessity for any item has been proved. The finding is one of fact, and nothing has been said in support of this appeal.

There remains Appeal No. 326, the subject of which is a sale of land to Rahmat and others for Rs. 2,500. The land was mortgaged with possession to one Rosha for Rs. 1,225, and the lower Appellate Court has allowed that item and Rs. 35 for registration expenses, disallowing the two remaining items of Rs. 740 and Rs. 500, for which the vendees failed to prove any necessity. Nothing has been urged with regard to the items disallowed, and there was clearly no necessity for the sale, as Labhu Ram could have allowed the land to remain in mortgage with Rosha. The main argument advanced is that the suit was barred by limitation under Art. 120 of the First Schedule to the Limitation Act, having been instituted more than six years after the sale, which took place on the 25th January 1911. Had the suit been merely for a declaration that the sale should not affect the plaintiff's rights the argument would have been correct, but the plaintiff sued for the annulment of the sale, and in fact obtained a decree for annulment, so that Art. 126 applies, and the period of limitation is 12 years. The fact that the plaintiff was not given a decree for possession as well as for annulment of the sale does not make Art. 126 inapplicable. We hold, therefore, that the suit was within time and that the decree is correct.

The result is that we accept Appeals Nos. 325 and 330, reverse the decrees passed in those cases, and dismiss the suits with costs throughout. We dismiss Appeals Nos. 324, 326, 328, 329 and 331 with costs.

Z. K.

Appeals Nos. 325 and 330 accepted, the remainder dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2530 OF 1917.

November 9, 1921.

Present :—Mr. Justice Chevis and Mr. Justice Harrison.

NANAK CHAND AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAM CHAND AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4, O XXXIV, r. 1—Mortgage—Redemption—Suit by second mortgagee—Appeal—Death of mortgagor—Abatement.

To a suit by a second mortgagee to redeem from the prior mortgagee the mortgagor is an absolutely necessary party and the suit cannot proceed in his absence.

Where, therefore, during the pendency of an appeal in such a suit the mortgagor dies and his legal representatives are not brought on the record within the period of limitation allowed by the law, the whole appeal abates.

Second appeal from a decree of the District Judge, Attock at Campbellpore, dated the 21st April 1917, affirming that of the Senior Subordinate Judge, Campbellpore, dated the 8th August 1916.

Dr. *Nand Lal*, for the Appellants.

Mr. *M. S. Bhagat*, for the Respondents.

JUDGMENT.—A preliminary objection to the hearing of this appeal has been raised by Mr. M. S. Bhagat who points out that Waryam, one of the respondents, died on the 31st December 1917 and that no application to bring his legal representatives on the record was made until 12nd April 1921. This is so and as the provisions of section 5 of the Limitation Act do not apply to an application of this nature, O. XXII, r. 4 (3) governs the case. The respondent who has died was the mortgagor, the suit being one brought by a second mortgagee to redeem from the prior mortgagee. It is therefore clear that the mortgagor is an absolutely necessary party and in his absence the suit cannot proceed against the remaining defendant. We accordingly declare that the appeal has abated. This order is made without prejudice to any application which the appellant may be advised to make under O. XXII, r. 9, Civil Procedure Code. The costs of the hearing (Rs. 32) will be paid by the appellant to Ram Chand respondent.

Z. K.

Appeal abated.

PATNA HIGH COURT.

CRIMINAL REVISION NO. 224 OF 1923.

May 3, 1923.

Present:—Justice Sir John Bucknill, KT.

LACHMI NARAIN MARWARI AND ANOTHER—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Bengal Public Gambling Act (II of 1867), ss. 5, 8—Money on person of gambler—Forfeiture.

What is liable to forfeiture under section 8 of the Bengal Public Gambling Act, are those things which may be reasonably suspected to have been used or intended to be used for the purpose of gaming. The private property of an individual, such as money or jewellery on his person, who is found gaming in a gaming house cannot be seized and forfeited under the section, unless it is quite clear that there was attached to such private property the taint that it was reasonably suspected to have been used or intended for the purpose of gaming. [p. 178, col. 2.]

Emperor v. *Tola*, 26 A. 270; A. W. N. (1904) 11; 1 Cr. L. J. 35; *Tula* v. *Emperor*, 54 Ind. Cas. 250; 41 A. 366; 17 A. L. J. 368; 1 U. P. L. R. (A.) 161; 21 Cr. L. J. 42 and *Emperor* v. *Kifayat* 49 Ind. Cas. 165; 41 A. 272; 17 A. L. J. 64; 20, Cr. L. J. 133, referred to.

Revision from an order of the Additional District Magistrate, Dhanbad, affirming a decision of the Senior Deputy Magistrate, Dhanbad, dated the 2nd December 1922.

Mr. *Janak Kishore*, for the Petitioners.

JUDGMENT.—This is an application in criminal revisional jurisdiction. It is made on behalf of two persons who were prosecuted and convicted of an offence against the provisions of section 4 of the Public Gambling Act (1867). They were convicted by the Senior Deputy Magistrate of Dhanbad on the 2nd December 1922; they pleaded guilty. The first applicant was fined Rs. 40 and the second applicant Rs. 25. When the Police raided the premises where the gambling was going on they searched the persons of the applicants and took from them a considerable sum of money which the learned Vakil who appears on behalf of the applicants informs the Court was of the value of about Rs 100. After the conviction the applicants made an application to the Deputy Magistrate asking for a return to them of the money which had been found in their possession by the Police. I take it that this money would certainly have been available for the purpose of paying the fine, but I understand from the learned Vakil who appears on behalf of the applicants that the fines were paid and that the application for refund of the money seized upon their persons was made after such payment. Now, on the 2nd December the Deputy Magistrate of Dhanbad passed the following order :—

"The money found on the persons who visited the gaming house for gambling has been forfeited to Government."

From this order the applicants applied to the Additional District Magistrate of Dhanbad who, however, although he thought that the matter presented considerable legal difficulty, did not think that it was within his province to refer the case to this Court merely to obtain a correct interpretation of the law; which he considered was somewhat doubtful. He accordingly refused to make any reference to this Court and a Rule was accordingly obtained in revisional jurisdiction from Mr. Justice Mullick and Mr. Justice Macpherson on the 18th April last. The matter has now come up before me.

I think that it is important to consider the words of the section of the Act under which it is said that the accused were convicted. Section 4 reads :—

"Whoever is found in any such house. (such house here means common gaming house) tent, room, space or walled enclosure, playing or gaming with cards, dice, counters, money or other instruments of gaming, or is found there present for the purpose of gaming, whether playing for any money, wager, stake or otherwise, shall be liable on conviction before any Magistrate, to a fine not exceeding one hundred rupees, or to imprisonment of either description as defined in the Indian Penal Code for any term not exceeding one month, and any person found in any common gaming house during any gaming or playing therein shall be presumed, until the contrary be proved, to have been there for the purpose of gaming." Section 5 reads :—

"If the Magistrate of a District or other officer invested with the full powers of a Magistrate or the District Superintendent of Police, upon credible information and after such inquiry as he may think

necessary has reason to believe that any house, tent, room, space or walled enclosure is used as a common gaming house, he may either himself enter or by his warrant authorise any officer of Police, not below such rank as the Lieutenant-Governor shall appoint in this behalf, to enter, with such assistance as may be found necessary by night or by day, and by force, if necessary, any such house, tent, room, space or walled enclosure, and may either himself take into custody or authorise such officer to take into custody all persons whom he or such officer finds therein, whether or not such persons may be then actually gaming, and may seize or authorise such officer to seize all instruments of gaming, and all moneys and securities for money, and articles of value, *reasonably suspected to have been used or intended to be used for the purpose of gaming which are found therein*; and may search or authorise such officer to search all parts of the house, tent, room, space or walled enclosure which he or such officer shall have so entered, when he or such officer has reason to believe that any instruments of gaming are concealed therein, *and also the persons of those whom* he or such officer so takes into custody and may seize or authorise such officer to seize and take possession of all instruments of gaming found upon such search."

Under section 8 it is laid down :—

"On conviction of any person for keeping or using any such common gaming house, or being present therein for the purpose of gaming, the convicting Magistrate may order all the instruments of gaming found therein to be destroyed and may also order all *or any of the securities for money, and other articles seized not being instruments of gaming to be sold and converted into money, and the proceeds thereof with all moneys seized therein to be forfeited*; or in his discretion may order any part thereof to be returned to the persons appearing to have been severally thereunto entitled."

Now, it is quite clear to my mind that what is liable to forfeiture are those things which may be reasonably suspected to have been used or intended to be used for the purpose of gaming. It is impossible, I think, to suggest that the private property of an individual who is found gaming in a gaming house could be seized and forfeited unless it was quite clear that there was attached to such private property the taint that it was reasonably suspected to have been used or intended for the purpose of gaming. It may be said that even with regard to such tainted things the Magistrate has a discretion to order their return in whole or in part to whom they belonged. But the law itself provides the penalties by way of fine and imprisonment for the offence, and over articles which cannot be clearly regarded as being tainted with the reasonable suspicion of having been used or intended to be used for the purpose of gaming, I think, that it must be clear that the Court had no jurisdiction whatever. It is said that if that was so, circumstances might arise which might on the one hand render the provisions of the Act somewhat nugatory; whilst on the other hand they might render the position of the person convicted one of the utmost hardship and injustice. In illustration of the first proposition it is pointed out that, if money found on a person discovered in a gaming house cannot be seized and forfeited, the probability would be that immediately upon the least alarm the gamblers would at once put in their pockets all the money on the premises. On the other hand to illustrate the latter position it is perfectly easy to imagine a case where a person in possession of a very large sum of money, which had not been used and which he had no intention whatever of using for gaming, paid a visit to a gaming establishment, he might find that he forfeited the whole of his property under the provision of this section, a result which I do not think the Legislature could ever have contemplated or which the construction of the Act itself will permit. It must be judicially clear that the money or articles seized are reasonably suspected to have been used or intended to be used for the purpose of gaming. It is obviously quite impossible for a Magistrate definitely to say, without proof, what amount of money found on an individual in a gaming house has been used for gaming

or is intended by its owner to be used in gaming. It is also equally impossible for a Magistrate without proof to say that articles of value such, for example, as a watch or rings found on the person of an individual discovered in a gaming house, may have been intended to have been used or may have been used as pledges or securities for money wagered. The learned Vakil who appears on behalf of the applicant was unable to find any authority dealing with this matter under the provisions of the Public Gambling Act (1867). But he drew my attention to several cases which have been decided in the High Court of Allahabad under the provisions of the Public Gambling Act, 1867. This Act is not quite identical with the Bengal Gambling Act (1867) but is in many respects very similar. Section 4 reads :—

"Whoever is found in any such house, walled enclosure, room or place playing or gaming with cards, dice, counters, money or other instruments of gaming, or is found there present for the purpose of gaming, whether playing for any money, wager, stake, or otherwise, shall be liable to a fine not exceeding one hundred rupees, or to imprisonment of either description, as defined in the Indian Penal Code for any term not exceeding one month, and any person found in any gaming house during any gaming or playing therein shall be presumed, until the contrary be proved, to have been there for the purpose of gaming."

Section 5 reads:—

"If the Magistrate of a District or other officer invested with the full powers of a Magistrate or the District Superintendent of Police upon credible information and after such enquiry as he may think necessary has reason to believe that any house, walled enclosure, room or place is used as a common gaming house, he may either himself enter or by his warrant authorise any officer of Police not below such rank as the Lieutenant Governor or Chief Commissioner shall appoint in this behalf to enter with such assistance as may be found necessary, by night or by day, and by force if necessary, any such house, walled enclosure, room or place, and may either himself take into custody, or authorise such officer to take into custody all persons whom he or such officer finds therein, whether or not then actually gaming, and may seize or authorise such *officer to seize all instruments of gaming* and all moneys and securities for money, and articles of value, reasonably suspected to have been used or intended to be used for the purpose of gaming, which are found therein; and may *search* or authorise such officer to search all parts of the house, walled enclosure, room or place, which he or such officer shall have so entered when he or such officer has reason to believe that any instruments of gaming are concealed therein, and *also the persons of those whom* he or such officer so takes into custody and may seize or authorise such officer to seize and take possession of *all instruments of gaming* found upon such search.

Whilst section 8 reads:—

"On conviction of any person for keeping or using an such common gaming house or being present therein for the purpose of gaming the convicting Magistrate may order all the instruments of gaming found therein to be destroyed and may also order *all or any of the securities for money and other articles seized not being instruments of gaming to be sold and converted into money and the proceeds thereof with all moneys seized therein to be forfeited* or in his discretion may order any part thereof to be returned to the persons appearing to have been severally thereunto entitled."

It will be observed at once that although slightly differing in detail, these sections correspond very closely to the sections of the Act which is applicable in this province. In the case of *Emperor* v. *Tota* (1) it was held that where persons were found gaming in a public place under circumstances to which section 13 of the Public Gambling Act (1867) was applicable although instruments of gaming, etc., could be seized by the Police, there is no authority for the confiscation of money found with the persons arrested. Section 13 of the Act applicable to the United Provinces corresponds to our section 11

(1) 26 A. 270; A. W. N. (1904) 11; 1 Cr. L. J. 35.

relating to pla ing for money in any public market, fair street, place or thoroughfare. The case is not altogether identical with that which is now before me and some distinction is drawn between the position which exists under the provisions of section 13 and that which exists under the provisions of section 8. The difference lies apparently between the wording of the section as in the one case it deals with gaming in a common gaming house and in the other case gaming in a public place. In the case of *Tulla* v. *Emperor* (2) it was held by Mr. Justice Lindsay that in the case of men convicted under section 3 or 4 of the Public Gambling Act, 1867, the law does not contemplate the confiscation of money found on the persons of the accused. His Lordship in his decision observes:—

"This case has been referred by the Sessions Judge of Saharanpur for the purposes of having an order passed by a Magistrate set aside. The Magistrate was dealing with a case under the Gambling Act and after convicting the persons who were accused before him he made an order confiscating some of the money which was found in possession of the persons concerned. The Judge, I think, is right in saying that the law does not contemplate the confiscation of the money found on the persons of the accused...I accept the recommendation of the learned Judge and direct that the order of confisacation be set aside."

The decision in this case (decided in 1919) seems to have been at variance with the decision of Mr. Justice Rafique in *Emperor* v. *Kifayat* (3) where his Lordship thought that an order ordering the confiscation of money found on the premises was a legal order. The report, however, is not very clear. It would seem, so far as I can gather, that the order of the Magistrate was directin confiscation of the money found *in the house*. I cannot see that it was an order ordering the confiscation of the money found on the persons of those who were in the common gaming house. The head-note* is probably incorrectly reported. For it reads :—

"A conviction under section 3 or section 4 of the Public Gambling Act, 1867, differs from a conviction under section 13, in that in the case of the latter the forfeiture of money found with the persons convicted is not lawful, but in the case of the former the forfeiture of money of securities for money *found in a common gaming house is lawful.*"

This head-note may perhaps be a little misleading and both the decisions of Mr. Justice Rafique and Mr. Justice Lindsay may be capable of reconciliation. I have myself no doubt that in the ordinary case of money found in the possession of a person who is discovered in a gaming house such money is not capable of being forfeited. The Act provides its penalties. Everything found on the premises or on the persons there which is surely tainted with the gaming mark, that is to say, if we use the words of the section, reasonably suspected to have been used or intended to be used for the purpose of gaming, is liable to forfeiture and may or may not be returned under the discretion of the Magistrate under the provisions of section 8 but not otherwise.

The order, therefore, of the Deputy Magistrate of Dhanbad dated the 2nd December 1922 will be set aside. The money seized by the Police from the two applicants must be refunded to them.

Z. K. *Rule made absolute.*

(2) 54 Ind. Cas. 250; 41 A. 366; 17 A. L. J. 368; 1 U. P. L. R. (A.) 161; 21 Cr. L. J. 42.

(3) 49 Ind. Cas. 165; 41 A. 272; 17 A. L. J. 64; 20 Cr. L. J. 133.

*Head-Note of 41 A. 272.—[*Ed.*]

CALCUTTA HIGH COURT.

REFERENCE NO. 7 OF 1922.

May 22, 1923.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Thomas Richardson, KT.,

EMPEROR

versus

Babu BHUBANESWAR NAG, PLEADER.

Legal Practitioners Act (XVIII of 1879), s. 13—Pleader paying client's money to his relation—Neglect of duty—Grossly improper conduct.

If a Pleader withdraws his client's money from Court at the instance of a relation of his client and pays the same to that relation without satisfying himself but assuming *bona fide* that he had authority from the client to instruct him to withdraw the money and to receive it, the Pleader is guilty of neglect of duty both towards the Court and his client but he is not guilty of grossly improper conduct in the discharge of his professional duty. [p. 183, col. 1.]

Reference under section 14 of the Legal Practitioners Act (XVIII of 1879) made by the District Judge, Dacca, in the matter of Babu Bhubaneswar Nag, a Pleader practising in the Judge's Court, Dacca.

Babus *Dwarka Nath Chakravarti* and *Surendra Nath Guha*, for the Government.

Babu *Prokash Chandra Pakrasi*, for the Pleader.

JUDGMENT.

Sanderson, C. J.—This is a report by the learned District Judge of Dacca with regard to a Pleader of that Court.

The learned District Judge arrived at the conclusion that the Pleader had been guilty of grossly improper conduct in the discharge of his professional duty and, accordingly, he made a recommendation that the Pleader should be suspended from practice. He made a further order that pending the orders of the High Court on his report the Pleader should be suspended from practice and he should deliver up his certificate

The material facts which it is necessary to mention are shortly as follows: One Niljan Bibi in August 1918 was appointed by the Court guardian of her minor sons and daughters and, in respect of the minors' property she was directed to submit accounts. After much delay she submitted accounts; and, upon examination it appeared that she had not accounted for a sum of Rs. 269 which it was alleged had been withdrawn from the Court on behalf of Niljan Bibi in her capacity as guardian of the minor children. She was called upon to explain why that sum had not appeared in the accounts. She alleged that one Ketabdi Khan had stood surety for her with respect to the guardianship and she suspected that it was he, who had withdrawn the sum from the Court. She further alleged that she was not aware that it had been withdrawn until she was called upon to account, and that if it had been withdrawn it had been withdrawn without her knowledge or consent. Thereupon at her instance Ketabdi Khan was called upon to show why he should not be proceeded against for cheating or criminal breach of trust. Ketabdi Khan stated that apparently the money had been withdrawn by the Pleader in question, that it had been withdrawn without the authority of Ketabdi Khan or of the guardian Niljan Bibi. Thereupon, the learned Judge made an enquiry; and, the Pleader asserted that he had received authority from Niljan Bibi through Ketabdi Khan and that after the withdrawal of the money which he admitted; he had paid the sum of Rs. 230 to Ketabdi Khan on the 28th of November 1919 and that he had obtained a receipt for the same from Ketabdi Khan on behalf of the guardian and that he had paid the balance of Rs. 39 at a subsequent date, some eight or ten days afterwards.

The learned Judge after this enquiry came to the conclusion that whatever might be the position with regard to the payment of the money, the Pleader had no authority to make the application for the withdrawal of the money or to pay the money to Ketabdi Khan and he instituted proceedings under the Legal Practitioners' Act and called upon the Pleader to show cause why he should not be dismissed or suspended.

The Pleader filed an answer to those proceedings and stated that he made the application for withdrawal of the money under instructions of Ketabdi Khan who was the brother of Nilian Bibi's late husband and surety for the guardian, Niljan Bibi, and that he made over the money to Ketabdi Khan on the verbal

authority of Niljan Bibi given on a previous occasion, and that Ketabdi Khan had admitted his signature on the receipt granted by him for Rs. 230 out of Rs. 269. He then referred to the fact that he had been given time for paying the money but owing to the hardness and difficulty of the times he was unable to collect money and comply with the order and he prayed for another opportunity to collect money and refund the same. The learned Judge thereupon fixed the 20th of July as the date for the hearing of the proceedings; and, on that occasion Niljan Bibi and Ketabdi Khan were examined, and we have their depositions before us. The Pleader did not appear, and he has not paid the money which he had practically admitted was due from him. The learned Vakil who appeared for the Pleader to-day stated that the reason why he had not appeared was that he made a mistake as to the date. When the learned Vakil was asked why the Pleader did not apply to the learned Judge for an opportunity of being further heard, the answer was that as the final order had been made he did not think that he should make an application to the learned Judge but that when the report came before the High Court he would put in an affidavit stating the facts on which he would rely. He has not put in such an affidavit and I am not prepared to accept the explanation which the Pleader has given for his failure to appear before the learned Judge on the 20th of July. It is an excuse which has no substance whatever.

The findings of the learned Judge are as follows:—

"In view of the contradiction between Ketabdi Khan's statement in these proceedings and the statement he made at the enquiry previously held by the Court, it must be admitted that the defendant's allegation that he paid to Ketabdi Khan and obtained from him a receipt for money and subsequently paid him the balance of Rs 39 has not been disproved." He then proceeded to discuss further the question of the receipt, and then arrived at the following finding: "This much is clear; namely, that the defendant had no authority to withdraw the money from the Court or to pay it to Ketabdi Khan and he not only deceived the Court by representing that he had authority to withdraw the money but if he paid the money to Ketabdi Khan he committed a gross breach of the duty imposed on him as a Pleader by paying the money to a person who was not entitled or authorised to receive it, and if he did not pay it to Ketabdi Khan he misappropriated the money. He has virtually admitted that he is liable to make good the money but though ample time has been given him to refund it, he has failed to do so." He then found that the Pleader was guilty of grossly improper conduct in the discharge of his professional duty.

Having regard to these findings of the learned Judge, in my opinion, we must approach this case upon the basis that the Pleader paid the Rs. 269 to Ketabdi Khan, and the question remains, whether assuming that to be a fact, there is anything in the conduct of the Pleader which would amount to grossly improper conduct in the discharge of his professional duty? There is no doubt in my mind that the Pleader ought to have satisfied himself before he made the application to the Court for the withdrawal of the money that Ketabdi Khan was acting with the authority of the guardian Niljan Bibi. He took no steps to satisfy himself that the application which he was about to make was really authorised by Niljan Bibi, and in that respect he was certainly wanting in the proper exercise of his duty not only towards the Court but also towards Niljan Bibi on whose behalf he was purporting to act.

Having obtained the money from the Court, in my judgement, the Pleader certainly ought to have satisfied himself that Ketabdi Khan had the authority of Niljan Bibi to receive the money. But he took no steps to satisfy himself upon that point, as it was clearly his duty to do. He must have known that he was dealing with a sum of money which having regard to the position of Niljan Bibi and her family, was a considerable sum of money, that it was money which she ought to have received on behalf of her minor children, and, certainly, it was his

duty to take steps to satisfy himself that that money reached the hands of Niljan Bibi.

In both these respects, in my judgment, the Pleader neglected the duty which he owed not only to the Court but also the guardian Niljan Bibi.

But that is not conclusive of the question which I have to decide. The question is whether I am satisfied that he was guilty of grossly improper conduct in the discharge of his professional duty. On a previous occasion he had paid a sum of Rs. 15 to Ketabdi Khan on behalf of Niljan Bibi and taken a receipt for it from him when Niljan Bibi was not present: and, on another occasion he had paid Rs. 25 to Ketabdi Khan on behalf of Niljan Bibi in the presence of Niljan Bibi and he obtained a receipt for that from him. If we assume, as I have said we must assume, for the purpose of this judgment that the Pleader paid this sum of Rs. 269 to Ketabdi Khan, it must have been, in my opinion, upon the understanding that he, Ketabdi Khan, was authorised to receive it on behalf of Niljan Bibi. Otherwise why should he pay the money to Ketabdi Khan? I am now proceeding upon the assumption that he paid the whole of the money to Ketabdi Khan. It seems to me that if we accept that fact, the Pleader must have acted upon the assumption that Ketabdi Khan was authorised to receive the money on behalf of Niljan Bibi, and, in those circumstances, though, as I have already said he ought to have taken proper steps to satisfy himself of Ketabdi Khan's authority to receive the money, I am not prepared to hold that he was guilty of grossly improper conduct in the discharge of his professional duty within the meaning of section 13 of the Legal Practitioners Act.

I have only to add that the circumstances of this case were so suspicious that they amply justified the learned Judge in taking proceedings against the Pleader, in reporting the matter to this Court and in suspending the Pleader from practice pending the orders of this Court.

We make no further order upon the report except that the order of suspension will cease from to-day.

Richardson, J.—I agree

S. D. *Suspension set aside.*

ALLAHABAD HIGH COURT.

CRIMINAL, REVISION NO. 337 OF 1923.

July 23, 1923.

Present:—Mr. Justice Walsh.

UMED SINGH—APPLICANT

versus

EMPEROR THROUGH UCHHAB SINGH—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 439—Revision—Finding of fact, whether can be interfered with—Penal Code (Act XLV of 1860), s. 500—Defamation—Proof—Prosecution, duty of—Public good.

Ordinarily findings of fact are accepted by a Revisional Court as binding upon it, but it has the power to look into the evidence for itself and see if these findings can be justified by what appears upon the record. [p. 184, col. 2.]

A Revisional Court does not decide the balance of credibility between two conflicting sets of witnesses or two conflicting issues of fact, but it may be compelled to dissent from a finding of fact which is either perverse or has been arrived at contrary to well-established principles of law [p. 184, col. 2.]

In a criminal case an accused person is not to be judged by how he pleads and fails to plead in the proceeding. Much injustice may be done by applying to criminal proceedings the precise and pedantic requirements of Civil Procedure. In dealing with defamation, the Penal Code has introduced a series of provisions, adopted partly from the old Common Law, in the nature of defences but it has not altered the fundamental principle of the Criminal Law, that the complainant or prosecution must prove the accused to be guilty, or, in other words, the absence of such facts as happen to bring the case within either of the defences or exceptions laid down in the section. [p. 185, col. 1.]

A complainant in a case of a defamation is bound to prove that the statement complained of is false and that if it is true it is not for the public good. [p. 185, col. 2.]

What is for the public good is a question of fact in each case. [p. 185, col. 1.]

Where a person has been outcasted a statement made to the brotherhood that he has been outcasted is made for the public good. [p. 185, col. 2.]

Criminal revision against an order of the Sessions Judge, Kumaon, dated the 31st May 1923.

UMED SINGH V. EMPEROR.

Mr. *M. L Agarwala*, for the Applicant.
Dr. *K. N. Katju*, for the Opposite Party.

JUDGMENT.—This is an exceptionally difficult matter to know what to do with but I have come to a sort of rough conclusion which I think will conform to the procedure laid down by this Court in other cases, and possibly in the end be more satisfactory to both parties than the present state of things. One Uchhab Singh complained before a Special Magistrate at Naini Tal that he had been slandered by the accused Umed Singh by reason of a statement made by Umed Singh to the effect that Uchhab Singh had suffered the penalty of being outcasted by reason of his social relations with one Lachhi who himself was an outcaste The matter had already assumed considerable proportions before it reached the Magistrate. Nothing else could account for the extremely elaborate judgment in which he has dealt with the matter, and although he describes it as a trifling matter (he is an Indian and ought to know better than I do, but I think that these caste questions in village communities are very far from being trifling matters) such an agitation was caused that 50 villages have been affected directly and hundred villages indirectly within a short time. It sounds more like the description of an incurable epidemic, and so serious has it become that marriage parties have been put under the ban. Yet says the Magistrate in his finding the allegation is false, and if that is so, it would seem to follow that the accused is a man of enormous influence, because it certainly is a startling thing that by the mere repetition of a false accusation which ought to be a le to be proved or disproved by the brotherhood without much difficulty, he has nonetheless been able to affect 100 villages. The mere fact that 100 villages are affected for good or for evil, confirms me in my view that it is really a public question. I can not help thinking that there is something out of the ordinary in this finding by the Magistrate. In the result, finding that the accused had uttered a false statement, which means of course false to his knowledge and if defamatory, one of the worst turns which one man can do to another in the same society, the Magistrate sentenced him to the somewhat mild punishment of one month's simple imprisonment. The matter came before the learned Sessions Judge of Kumaon in revision. Dr. Katju upholding in one sense the order of the learned Sessions Judge while at the same time he asks me to ignore it and to hold that it was made without jurisdiction because his only jurisdiction was to refer the question to this Court, has argued that the learned Judge had no right to go behind a finding of facts. I cannot agree with that statement framed in that bold way. In the ordinary course of things findings of fact are accepted by a Revisional Court as binding upon it, but revision would be an idle farce if the Revisional Court had not the power, which has been exercised hundred, possibly one thousand, times throughout the High Courts in India, to look into the evidence for itself and see if these findings can be justified by what appears upon the record. A Revisional Court does not decide the balance of credibility between two conflicting sets of witnesses or two conflicting issues of fact but it may be compelled to dissent from a finding of fact which is either perverse or has been arrived at contrary to well-established principles of law. In this case so far as the firding is concerned, it does not seem that the learned Judge was abundantly justified. He says that it seems that in January Uchhab Singh was outcasted, and Dr. M. L. Agarwala for the applicants, has drawn my attention to a written *panchayatnama* signed by several of the brotherhood, by which the brotherhood decided that he was outcaste, and did it in January, whereas the statement complained of made by the accused, was not until March. But though the finding of fact by the Sessions Judge on this documentary evidence seems *prima facie* justified, it does not seem to have been arrived at according to law. The learned Judge did not issue notice, never heard the complainant, and having his attention drawn to this document, assumed against the complainant that he had been outcaste, although in all human probability the only reason why the complainant brought the charge at all was to clear himself and stop these ugly statements being made about him So that the order of the learned Judge; although in one sense in

favour of the complainant becomes an injustice, because it overrules the Magistrate on fundamental issue of fact without giving the other side a chance of being heard. But further, the order of the learned Sessions Judge meets with my strong disapproval on a totally different ground. In vulgar parlance he seems to have given each party a slap in the face. Turning to the accused the learned Judge has said that he did not plead justification before the Magistrate, and that therefore, although the statement about the complainant having been outcasted might be true he has non-the-less got to go to jail. A touch of humour is added by the fact that the accused has already gone to jail, has served the full term of imprisonment and that what I am doing is really almost idle and superfluous. But I dissent totally from the proposition that in a criminal case an accused person is to be judged by how he pleads or fails to plead in the proceeding. Much injustice may be done by applying to criminal proceedings the precise and pedantic requirements of Civil Procedure. It is quite true that in dealing with defamation, the Penal Code has introduced a series of provisions adopted partly from the old Common Law in the nature o defences, but it has not altered the fundamental principle of the Criminal Law, that the complainant or prosecution must prove the accused to be guilty, or in other words the absence of such facts as happen to bring the case within either of the defences or exceptions laid down in the section. There is no such language as pleadings in a Criminal Court. The subsequent conduct or statement of an accused person may affect his credibility. It cannot destroy his right, assuming him to be an innocent person, until his guilt has been established without any reasonable doubt. The view of the learned Judge that the accused did not plead justification is in this case doubly fallacious, because in fact the Magistrate had framed an issue on that very question and had decided it adversely to the accused. But in my opinion the complainant was bound to prove that the statement was false, and further that if it was true, it was not for the public good. What is for the public good is a question of fact, but until I am corrected I should hold that if a person really was outcasted, a statement to the members of the brotherhood that he was outcasted, was the kind of statement contemplated by the expression for the public good. So long as caste prevails, and it must be remembered that it is sanctified by religious and by racial tradition going back for centuries and forming one of the fundamental characteristics of social life in India, any attempt to minimise, ignore or brush on one side existing regulations, existing sanctions or respect for existing decisions must be regarded from the Indian point of view as contrary to the public good. If it is not from the Indian point of view for the public good, caste ought to be abolished. It seems to me that there is no way out of that dilemma, and therefore to justify this conviction it was necessary to hold, not merely that the statement was untrue, but that if, as the Sessions Judge thought, it was true that it was a statement not honestly made for the benefit of the brotherhood. Unfortunately that does not conclude the difficulties raised by this order of the Sessions Judge. Dr. Katju himself, who appeared for the complainant to defend it, while at the same time somewhat illogically asking me to ignore it, pointed out to me that it was passed without jurisdiction. Strictly speaking he is right. On the matter coming before the Sessions Judge under section 435, his duty, if any question arose which he thought ought to be further dealt with, was to refer the matter to the High Court under section 433. It may be said in answer to this that the learned Judge did not think that there was anything to refer, because *ex parte* he was so satisfied with the Magistrate's order. But the difficulty in taking that view is that, as I have pointed out, even the learned Judge has fallen into two fundamental errors, and one of them is a finding of fact adverse to the complainant without a hearing. My attention has been drawn to the important decision in the case of *Sharif Ahmad* v. *Qabul Singh* (1), also a case of defamation and a case having an important bearing on the case now before me, in which the Chief Justice has approved the following *dicta* of Mr. Justice Piggott.

(1) 63 Ind. Cas. 875; 19 A. L. J. 425; 3 U. P. L. R. (A.) 77; 43 A. 497; 22 Cr. L. J. 715.

PARSHOTTAM JAGJIVAN v. EMPEROR.

"It is obviously advisable that this Court should make it a rule of practice that a person dissatisfied with any order or proceeding in a Court of inferior jurisdiction to that of the Sessions Judge or of the District Magistrate should, in the first instance, obtain the opinion of the Sessions Judge, or of the District Magistrate on the matter in question, before invoking the jurisdiction of this Court. Such a procedure tends to prevent the time of this Court from being wasted over frivolous or unsustainable applications. It also ensures the further advantage that, if the matter eventually comes before this Court, it comes upon a record containing an expression of opinion by a Court of superior jurisdiction, such as that of the Sessions Judge or of the District Magistrate." The value of that practice is of course entirely discounted if the opinion of the Sessions Judge therein mentioned as desirable to be laid before the High Court, is arrived at by an *exparte* finding. The result is that owing to a chapter of accidents I really am unable to come to a satisfactory conclusion in this case. One party wants me to quash the order, the other party wants me to ignore it. It struck me that I might deal with it by certain *dicta* and leave the accused in this case to repeat the slander and the complainant to fight it out with him in the Civil Court, where the matter can be finally and more satisfactorily determined, but that might be a hardship on the parties who possibly are not anxious to spend large sums on litigation, and as they have chosen this tribunal, I think it more satisfactory to ensure that they get a full adjudication in it. Holding myself therefore empowered to deal with it with a free hand, I allow the revision and I refer the whole matter back to the learned Judge to deal with the original revision application made to him by the accused according to law after hearing both parties and going into the evidence, and referring any question to the High Court which he thinks fit to do, if on a re-consideration of the matter he should come to the conclusion that the conviction of the accused was not according to law.

Z. K. *Application allowed.*
Case remanded to Sessions Judge.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 48 OF 1923.

April 26, 1923.

Present:—Sir Lallubhai Shah, KT., Chief Justice and Mr. Justice Kajiji.

PARSHOTTAM JAGJIVAN—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Bombay Primary Education (District Municipalities) Act (I of 1918), s. 1 (3)—Bombay District Municipal Act (III of 1901), s. 48 (f)—Bye-Laws of Surat Municipality—Bye-Law No. 4, whether ultra vires*—Information for purposes of census.*

Under section 48 (*f*) of the Bombay District Municipal Act, read with section 1 (3) of the Bombay Primary Education (District Municipalities) Act, a Municipality has power, with the previous sanction of the Governor-in-Council, to make bye-laws so far as they are not inconsistent with the Act, among other things, with reference to the taking of a census within the Municipal District. [p. 187, col. 1.]

Bye-law No. 4 of the Bye-laws of the Surat Municipality is not *ultra vires*, and a person who refuses to supply the information required under the bye-law is liable to the penalty provided in bye-law No. 5. [p. 187, col. 2.]

Criminal application against conviction and sentence passed by the Sub-Divisional Magistrate at Surat.

Mr. *Bahadurji*, (with him Mr. *M. B. Dave*), for the Applicant.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

Shah, C.J.—In this case the petitioner seeks to have the order of conviction against him revised. The accused has been convicted by the Sub-Divisional Magistrate of Surat of refusing to furnish information required by the Municipality under bye-law 4 framed under section 48 (*f*) of the Bombay District Municipal Act, 1901. The Municipality called upon the petitioner to furnish information which they required with regard to children of school-going age and they purported to do so under the said bye-law. The petitioner refused to furnish the information. Consequently he was prosecuted for a breach of this bye-law and he was sentenced under bye-law 5 to pay a fine of Rs. 2.

Then he made an application to the Sessions Court with a view to have this matter referred to this Court. But the

learned Sessions Judge declined to refer the case to this Court.

The present application is made to this Court to have the conviction and sentence set aside. The application is supported on two grounds.

First, it is urged that bye-law 4 is invalid in so far as it requires information with regard to the census of children of school-going age for the purpose of the Bombay Primary Education (District Municipalities) Act, 1918. It appears that in 1919 under section 3 of the Act it was declared that the provisions of that Act would be applicable to the Municipal District constituted under the Municipal Act. The Government have framed and published rules under section 18 of the Act which confers powers upon them to frame such rules for the purposes of the Bombay Primary Education Act of 1918. It is urged that as the Local Government have got powers to frame rules under this Act of 1918, the Municipality cannot have any power to frame bye-laws under the Municipal Act for the purpose of carrying out their obligations under the Primary Education Act. That, however, does not appear to me to be right because it is provided by section 1 (3) of the Act of 1918 that "it shall be construed as part of and supplementary to the Bombay District Municipal Act, 1901, hereinafter called "the Principal Act." Under section 48 (*f*) of the Principal Act the Municipality have the power, with the previous sanction of the Governor in Council, to make bye-laws so far as they are not inconsistent with the Act, among other things, with reference to the taking of a census within the Municipal District. Bye-law 4 provides:—

"Whenever a census is undertaken by the Municipality or the Schools Committee every occupier of a building in Municipal limits shall on demand supply to the best of his knowledge and ability to any officer authorised in this behalf by the Municipality all information that such officer may require of him either orally or in writing in a printed form supplied by the Municipality with regard to himself and all occupants of the same building who are either members of or servants in the family &c."

It is clear that this bye-law is framed so as to meet the requirements of Bombay Act I of 1918. Under that Act read with the rules framed by the Local Government under that Act it is obligatory upon the Municipality to keep a register of the children of school-going age and with a view to fulfil that obligation it was open to the Municipality to frame a bye-law which would enable them to take a census of such children within the Municipal area. In order to keep such a register certain information would be necessary and the Municipality were entitled under this clause of the principal Act to take the power to demand such information from persons living within the Municipal area. The bye-law does not appear to me to be in any way inconsistent with the principal Act or with the rules made by the Local Government under Act I of 1918. The powers of the Municipality to frame bye-laws under section 48 of the principal Act are not in any way curtailed by the powers conferred under section 18 of Act I of 1918 upon the Local Government to frame rules for the purposes of the Act. I am unable to accept the contention urged on behalf of the petitioner that the bye-law is invalid.

The second point urged in support of the application is that by a resolution of the Municipality dated January 12, 1922, the Act of 1918 ceased to have operation within this Municipal area. It does not appear, however, that the resolution of the Municipality rescinding the prior Notification of 1919 was published in the Local Government Gazette, nor does it appear to have received the previous sanction of the Local Government. Under section 21 of the Bombay General Clauses Act (I of 1904) the Municipality would have the power of rescinding the Notification published in 1919 subject to the sanction and conditions, to which the first Notification was subject. That means that it would be open to the Municipality to cancel their previous Notification with the previous sanction of the Local Government and by publication in the Local Government Gazette as

provided by section 3 of the Act of 1918. It is not suggested in the course of the argument that the resolution of the Municipality dated January 12, 1922, ever received the sanction of the Local Government: and it is conceded that it was never published in the Bombay Government Gazette. Therefore, the Act of 1918 was in operation in this area, at the date the information in question was demanded from the petitioner. This contention also must be disallowed. Section 16 of the Bombay Primary Education (District Municipalities) Act of 1918, to which reference has been made in the course of the argument, and under which the Local Government have the power to cancel a Notification under section 3 of the Act, has no application to the facts of this case.

We discharge the Rule.

Kajiji, J.—I agree.

Rule discharged.

Z. K.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE NO. 379 OF 1923.

July 19, 1923.

Present:—Mr. Justice Walsh.

LALLU RAM—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Public nuisance—Annoyance, proof of.

In order to establish a charge of committing a nuisance in a public place to the annoyance of residents or passengers in the locality, it is necessary to prove that somebody was annoyed. But annoyance to one person is sufficient and all that is required is to show that the act complained of was done in such a way as to annoy the person who complained of it. [p. 188, col. 2.]

When a public servant, like a Municipal employee, whose duty it is to look after the cleanliness of the streets, sees anybody easing himself in a public place or street he is sure to be annoyed. [p. 188, col. 2.]

Criminal reference made by the Sessions Judge, Ghazipur, dated the 9th of July 1913.

Mr. *K. Varma*, for the Applicant.

JUDGMENT.—This case has been referred to the High Court really for the decision of the question whether it is necessary, in order to establish a charge of committing a nuisance in a public place to the annoyance of residents or passengers in the locality, to prove that somebody was annoyed. The Act certainly says so, and I do not see how anybody can seriously doubt it. But annoyance to one person is sufficient, and even annoyance itself is a question of degree, and if a public servant, like a Municipal employee whose duty it is to look after the cleanliness of the streets sees anybody easing himself in a public place or street he is not unlikely to be annoyed. When you come to think of it, it is his business to be annoyed. He ought to be annoyed. A person trying to keep the streets clean who sees anybody easing himself, would be very wrong if he was not annoyed. In fact his employers would have every right to be annoyed with him, if he was not and, therefore, if he reports it in his official capacity and gives evidence of the act, it is a reasonable inference to draw that he was annoyed. Whether the *jamadar* in this particular instance attempted to define and put into precise language the degree of annoyance which he felt, does not appear, because the case was summarily tried. But it is reasonable to suppose that he was very much annoyed, and that if he was pressed on the question he would have said so. It turns out that between the offender and the *jamadar* there has been a terrible feud about the refusal to sell cloth on credit, and the *jamadar* according to the defence, harboured feelings of anger and indignation towards the offender. When one comes to picture the scene, if it is correct that in the course of his patrolling the streets in the interests of health and cleanliness this *jamadar*, armed with the authority of the law, saw this individual, against whom he had this grudge, committing an act of nature in one of the very places which was calculated to injure the public interest which the *jamadar* had to look after, one can imagine that his annoyance was very great indeed. It has not been found to be fictitious annoyance or *mala fide*, but the

In re RAMBHARTHI HIRABHARTHI

Magistrate has found that the case has been proved. I must assume that he meant what he said and that he was satisfied that the *jamidar* was sufficiently annoyed. I agree with the Sessions Judge that the matter is of importance, but it seems to me to have been hardly worth while referring it to the High Court, because, although every one must agree with the Sessions Judge that an ordinary person would consider the act objectionable, it is impossible to say, when the section requires the act to be one done to the annoyance of the public, that annoyance must not be proved. But it is sufficient if one person is annoyed, and as the act complained of can hardly be proved except by some person who comes forward to complain, the annoyance is almost necessarily involved in the complaint. It, therefore, comes to this, that all that is required is that the act was done in such a way as to annoy a person who complained of it. The proceeding in the Court below before the Sessions Judge was revision, and I am not at liberty to consider any point really except that referred to me. Mr. Kamlakant Verma has also contended that a drain by the side of the road does not come within the description contained in the Act of an open place. That is a question of fact. It was not raised in the Court below, and presumably a drain by the side of the road is not only in an open place but in a thoroughfare, which is sufficient. It would appear that there must have been an open place to enable the *jamadar* to see the offence. I merely, therefore, hold that the conviction was one according to law, and I direct the record to be returned to the Sessions Judge.

Z. K. *Record returned.*

BOMBAY HIGH COURT.

CRIMINAL APPLICATIONS FOR REVISION NOS. 55, 58 AND 59 OF 1923.

May 30, 1923.

Present :—Sir Lallubhai Shah, KT., Chief Justice, and Mr. Justice Kajiji.

In re RAMBHARTHI HIRABHARTHI —APPLICANT.

Penal Code (Act XLV of 1860), ss. 4, 182, 193, 211—Oaths Act (X of 1873), ss. 4, 14—Extra-territorial jurisdiction—Offences committed by Indian subject in relation to proceedings in Foreign Court—False information—Perjury—False charge—Trial in British India—Court in Native State whether "Court"—Jurisdiction.

Section 4 of the Penal Code confers certain extra-territorial jurisdiction in respect of acts committed outside British India by certain classes of persons including the Indian subjects of His Majesty : but it does not affect the nature of the act for which they are liable. The act alleged must amount to an offence punishable under the Code. [p. 191, col. 1.]

There is no provision in the Penal Code which constitutes it an offence to lodge a false complaint in a Foreign Court or to give false evidence before such Court where the oath is not administered under the provisions of law in force in British India, but under the law of that State in relation to proceedings before that Court. [p. 191, col. 1.]

Though the Oaths Act extends to the territories of Native Princes and States in alliance with His Majesty so far as regards the subjects of His Majesty, a Court in a Native State cannot be treated as a Court within the meaning of sections 4 and 14 of the Act, in relation to proceedings which were held before that Court entirely under the law of that State, and which had nothing to do with any proceeding in British India or under the law in force in British India. [p. 191, col. 2.]

While perjury before the Court of a Native State by an Indian subject of His Majesty would be as objectionable as perjury before a Court in British India, it is not punishable under section 193 of the Penal Code, where it is committed in a Foreign Court in relation to entirely foreign proceedings. [p. 191, col. 2.]

The criminal proceeding and false charge within the meaning of section 211 of the Penal Code mean proceedings and charge in British India, where the Penal Code is in force; criminal proceedings taken and a false charge made before a Court in a Native State are not within the scope of the section. [p. 192, col. 1.]

Criminal applications against an order passed by the City Magistrate, Surat.

Mr *M. B. Dave*, for the Applicant.

Mr. *Ratanlal Ranchhoddas*, for Mr. *H. V. Divatia*, for the three Opponents.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

In re RAMBHARTHI HIRABHARTHI.

JUDGMENT.—The applicant, who is the original complainant, filed information in the Court of the City Magistrate of Surat against the opponent in each of these three applications charging him with offences punishable under sections 182, 193 and 211, Indian Penal Code, or some of them. The acts complained of, *viz.*, the giving of false information to a public servant, the giving of false evidence and falsely charging the complainant with an offence, were all committed at Vyara, in the Baroda territory and before a public servant or the Court of the Baroda State at Vyara. The complainant and the accused in these cases are Native Indian subjects of His Majesty. They had gone from Surat to a place of pilgrimage called Unani in the Baroda territory in connection with the annual fair held there in April 1921. The accused Nagindas is said to have entrusted his clothes with certain articles including cash to the complainant there. The said accused prosecuted the complainant in the Vyara Court of the Baroda State on a charge of criminal breach of trust punishable under the Penal Code of the Baroda State in connection with the said entrustment, and the accused in the two companion cases gave evidence against the complainant; but the complainant was acquitted. It is in connection with these proceedings that these accused persons are said to have given false information and false evidence and to have made a false charge in the Court of that State.

The complainant is stated to have obtained the sanction of that Court as required by the rules of procedure in that State for prosecuting these accused persons in respect of the offences as constituted by the said acts punishable under the Baroda law. The parties are Indian subjects of His Majesty and ordinarily live in British India. The complainant seeks to prosecute the accused in British India in respect of the acts committed outside British India. Though at the date of the complaints the necessary certificate, of the Political Agent under section 188, Criminal Procedure Code, was not obtained, the complainant has subsequently obtained it. The learned Magistrate made the following order on December 22, 1922:—

"Return to the complainant for presenting the complaint before the proper Magistrate, as the offence has been committed completely within Baroda State limits: section 201, Criminal Procedure Code."

It does not appear as to whether the learned Magistrate made this order simply because no certificate under section 188, Criminal Procedure Code, was produced or he made it as no offences punishable under the Indian Penal Code were disclosed We are now informed by the Government Pleader that the order was made as no certificate under section 188, Criminal Procedure Code, was produced at the time. The complainant applied to the Sessions Court for a revision of this order. By this time he had obtained the necessary certificate under section 188. The Sessions Judge was of opinion that in view of the certificate under section 188, the complaints could be proceeded with but he declined to interfere as he thought that he had no jurisdiction to revise an order under section 201, Criminal Procedure Code. Accordingly he dismissed the applications. The complainant has now applied to this Court to have the order of the Magistrate returning the complaint set aside and for a direction that the complaint as originally filed be proceeded with. If the only difficulty in the way of the applicant was the absence of the certificate under section 188, Criminal Procedure Code, at the date of the complaints, we should allow these applications as the certificate has been obtained subsequently. But there is a fundamental difficulty in his way.

On the facts as alleged in the complaints the question is whether any offence punishable under the Indian Penal Code is disclosed. If no such offence is disclosed, it is obvious that we cannot properly direct the complaints to be proceeded with. This question was not raised in the lower Courts and does not appear to have been considered by them. As it arises, however, on the allegations in the complaint we cannot ignore it. We considered it desirable to ask the Goverment Pleader to appear and we have now heard full arguments on behalf of the

Crown, the complainant and the accused on the interesting question whether the acts alleged to have been committed by the accused at Vyara are punishable under the Indian Penal Code. I am of opinion that these acts do not constitute any offence punishable under the Indian Penal Code.

Section 4 of the Indian Penal Code is relied upon as showing that the provisions of the Code apply to any offence committed by any Native Indian subject of His Majesty without and beyond British India and that the word 'offence' includes every act committed outside British India which, if committed in British India would, be punishable under the Code. This section provides that any Indian subject of His Majesty is liable to be punished for an offence punishable under the Code committed outside British India and that the 'offence' includes any act committed outside British India which would be punishable under the Code if committed in British India. It gives certain extra-territorial jurisdiction in respect of acts committed outside British India by certain classes of persons including the Indian subjects of His Majesty: but it does not affect the natuie of the act. The act alleged must amount to an offence punishable under the Code. There is no provision in the Code which constitutes it an offence to lodge a false complaint in a Foreign Court or to give false evidence before such Court where the oath is not administered under the provisions of law in force in British India, but under the law of that State in relation to proceedings before that Court. All the acts attributed to the accused are said to have been done either before the Police Officer or the Court at Vyara with reference to proceedings which were held according to the law of the Baroda State. For instance, in this case, no offence under section 182, Indian Penal Code, can be made out as it is not suggested that false information was given to a 'public servant' as defined by the Indian Penal Code, quite apart from the consideration that it was given without and beyond British India. As regards the offence under section 193, Indian Penal Code, it is not suggested that the accused were legally bound by oath, *i. e.*, oath administered under the provisions of law in force in British India or by any express provision of law, *i. e.*, law in force in British India, to state the truth before the Vyara Court. The provisions of the Indian Oaths Act cannot apply to the statements in question. We have considered the provisions of sections 1, 4, 5 and 14 of the Indian Oaths Act as bearing on this question. Though the Act extends to the territories of Native Princes and States in alliance with His Majesty so far as regards the subjects of His Majesty, the Vyara Court cannot be treated as a Court within the meaning of sections 4 and 14 of the Act, in relation to proceedings which were held before that Court entirely under the law of that State, and which had nothing to do with any proceedings in British India or under the law in force in British India. The oaths were administered to the accused persons as witnesses by the Vyara Court under the law obtaining in the Baroda territory. While perjury before that Court by an Indian subject of His Majesty would be as objectionable as perjury before a Court in British India, it is not punishable under section 193 of the Indian Penal Code, when it is committed in a Foreign Court in relation to entirely foreign proceedings.

As to the charge under section 211, Indian Penal Code, the accused Nagindas is said to have instituted criminal proceedings at Vyara against the complainant and to have falsely charged him before the Vyara Court. The criminal proceedings and false charges contemplated by section 211 must mean proceedings instituted and charges made according to the provisions of criminal law in force in British India. The section occurs in a Chapter relating to offences against public justice which under the Indian Penal Code must mean public justice in British India unless it is expressly otherwise provided.

In the course of the argument it was conceded that it would be difficult to make out any offence punishable under sections 182 and 193; but it is contended that the expressions "institutes any criminal proceedings" and "falsely charges" in section 211 are general, and should be interpreted as including criminal proceedings and false charges before a Foreign Court like the Vyara Court. No authority is cited in support of this proposition: and on general rules of

construction it seems to us that the criminal proceedings and false charges within the meaning of section 211 must mean proceedings and charges in British India, where the Indian Penal Code is in force, though it is conceivable that a person may be able to institute such proceedings or make such a charge while he is actually in foreign territory. The criminal proceedings taken and the false charge made before the Vyara Court are not within the scope of the section.

We have not overlooked the fact that the complainant also is an Indian subject of His Majesty, and that the offence of criminal breach of trust charged against him before the Vyara Court would be an offence punishable under the Indian Penal Code in virtue of the provisions of section 4 of the Code. But that fact does not alter the nature of the proceedings before the Vyara Court nor does it affect in any way the nature of the acts alleged against the accused in the present proceedings.

No other provision of law has been referred to as justifying these proceedings before a Magistrate in British India on the allegations in the complaint.

We cannot, therefore, order these complaints to be further proceeded with.

We discharge the Rules.

Z. K. *Rules discharged.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE NO. 9 OF 1923.

March 13, 1923.

Present:—Mr. Dalal, A. J. C.

EMPEROR—COMPLAINANT

versus

SARJU PRASAD—ACCUSED.

Criminal trial —Conviction under repealed Act —Offence punishable under repealing Act as well —Conviction, legality of.

The fact that a conviction is recorded under an Act which has been repealed is not vital and does not vitiate the conviction, if the offence is punishable under the repealing Act as well.

Case reported by the Sessions Judge, Gonda. under section 438, Criminal Procedure Code.

The Government Pleader, for the Crown.

Mr. *H. K. Ghosh*, for the Accused.

JUDGMENT.—There is no reason to interfere with the order of the Deputy Magistrate. The learned Sessions Judge appears to have made this reference under a misapprehension. It is certain that the applicant Sarju Prasad's license for the vending of poisons was cancelled in 1922. The first order was passed by the District Magistrate on 13th January in the belief that the license for 1922 had not been issued to Sarju Prasad. He ordered that the license shall not be renewed for 1922. The Police then pointed out that the license for 1922 had already been issued to him whereupon, on 19th January 1922, the District Magistrate ordered the cancellation of the license. Clearly, therefore, the possession of poisons by Sarju Prasad on 22nd November 1922 was without a license and punishable under section 6 (1) (*a*) of Act XII of 1919. The Deputy Magistrate overlooked the fact that Act I of 1904 had been replaced by the Poisons Act of 1919 and recorded a conviction under the Act of 1904. This error, however, is not vital and does not vitiate the conviction recorded by the Deputy Magistrate. As I have pointed out the applicant was liable to punishment under the Act which is operative at present. The record shall be returned.

N. H. *Record returned.*

IMPERIAL TOBACCO CO., LTD. *v.* ALBERT BONNAN.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL NO. 100 OF 1922 IN SUIT NO. 1610 OF 1922.

April 10, 1923.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Thomas Richardson, KT.

IMPERIAL TOBACCO COMPANY, LTD. —PLAINTIFFS—APPELLANTS

versus

ALBERT BONNAN AND ANOTHER— DEFENDANTS—RESPONDENTS.

Trade mark — Law applicable — Assignment of trade mark—Manufacturer reserving right of manufacture— Right of sale, assignment of— Exclusive right of sale—Reputation in goods— Passing-off action—Common Law right—Injunction.

In India there is no system of registration nor is there any provision for a statutory title to a trade mark, so that the rights in respect of trade marks must be determined in accordance with the principle of the English Common Law. [p. 198, col. 2; p. 199, col. 1.]

British American Tobacco Company Limited v. *Mahboob Bux*, 7 Ind. Cas. 279; 38 C. 110 at p. 117; 15 C. W. N. 280, referred to.

A trade mark is a mode of warranting the origin of the goods, to which it is attached, or their trade association, and it is of the essence of a trade mark that its representation should be true. In this is to be found the true test of the assignability of a trade mark. [p. 199, col. 1.]

The title to a trade mark cannot be assigned or devolve in gross, but unless the mark connotes a personal connection between its original owner and the goods in connection with which it is used, it may be assigned and transmitted with the good-will of the business in such goods. It cannot be assigned when it is divorced from its place of origin, or when in the hands of a transferee it would indicate something different to what it indicated in the hands of a transferor. [p. 199, col. 1; p. 200, col. 1.]

Singer Manufacturing Company v. *Wilson*, (1875) 8 Ch. D. 434 at p. 455; 45 L. J. Ch. 490; 34 L. T. 858; 24 W. R. 1023 and *Pinto* v. *Badman*, (1891) 8 Pat. Cas. 181 at p. 194, referred to.

A passing-off action is one in which the plaintiff alleges that the defendant is injuring him in his property by wrongfully intercepting trade which, but for the defendant's wrongful acts, would come to the plaintiff in his business. It is an action in which the plaintiff alleges that the defendant so gets up his goods as that the public, intending to buy the plaintiff's goods, are induced to buy the defendant's goods, in the belief that they are buying the plaintiffs goods. The plaintiff's goods need not be goods manufactured by the plaintiff. They may be goods which he purchases, or which he imports, or otherwise acquires and which he sells under some 'get-up' which conveys that they are goods which, whether made, imported, or sold by him, carry with them the advantage of the reputation that the plaintiff is responsible for their quality or their character [p. 197, col. 1.]

The doctrine of passing-off cannot be so extended as to say that where the sole representation is that the goods are the goods of a particular manufacturer, it should be held that that carries with it a representation that they have come through any particular channel; or, putting it conversely, that any one who is injured by the passing-off of goods as the goods of the third party can bring an action. [p. 198, col 2.]

Dental Manufacturing Company Limited v. *C. DeTrey & Co.*, (1912) 3 K. B. 76 at pp. 87, 88; 81 L. J. K. B. 1162; 107 L. T. 111; 29 R. P C. 617; 28 T. L. R. 408; relied on.

A manufacturer, while reserving the right to manufacture and sell his goods with their well-established trade mark, cannot assign the sole right to sell those goods in any particular place so as to enable the purchaser to restrain members of the public from selling in that place goods which the manufacturer himself has manufactured and sold to them without any restriction upon their sale in that place. [p 200, col. 2; p. 201, col. 1.]

The mere fact that a seller has popularised certain goods does not prevent others having the same goods from following him into the same market and competing with him there, where the reputation of the goods is the reputation of the manufacturer and not of the seller. [p. 204, col. 1.]

Appeal from the judgment of Mr. Justice Pearson.

Mr. *L. P. E. Pugh* (with him Mr. *W. W. K. Page*), for the Appellants.

Mr. *Langford James* (with him Mr. *F. R. Surtta*), for the Respondents.

JUDGMENT.

Sanderson, C. J.—This is an appeal from the judgment of my learned brother Mr. Justice Pearson which was delivered on the 18th of July 1922, whereby he dismissed the plaintiff's suit.

The suit was brought for a declaration that the plaintiff Company was the sole owner in India, Burma and Aden of a certain brand, trade mark, trade name; covering, wrapper or label and the name W. D. and H. O. Wills; and that the plaintiff Company was solely entitled within the said limits to the exclusive right of user thereof and that it was solely entitled to import into and sell in India; Burma and Aden tobacco and cigarettes bearing, or contained in tins, boxes, packets, coverings, wrappers or labels or other receptacles bearing, the said brand, trade mark; trade name; covering; wrapper or

IMPERIAL TOBACCO CO., LTD. *v.* ALBERT BONMAN.

label or the said name. The plaintiff Company also asked for an injunction and damages against the defendants.

The trade mark brand and names are described in paragraph 6 of the plaint, and a specimen of the wrapper or covering used by the plaintiff Company is Exhibit A which is to be found at page 243-A of the paper book. A specimen of the wrapper or covering on the cigarettes imported by the defendant is to be found at page 245-A of the paper-book and is marked Exhibit C.

There is no dispute as to the main facts of the case, and they may be taken from my learned brother's judgment at pages 251 and 252, as follows—

"The cigarettes manufactured by W. D. and H. O. Wills of Bristol and London were very well known in the English market and were known in India long before 1902 by which time they had acquired a very high reputation in the Indian market also. One of their brands was the 'Gold Flake' brand used on cigarettes manufactured by them from Virginian tobacco.

"In 1902 there was a fight between the large American and English tobacco concerns or combines, the upshot of which was that they came to an arrangement among themselves :—The Imperial Tobacco Company of Great Britian and Ireland was thenceforward to confine its trade to the British Isles, and the American Tobacco Company to America while the British American Tobacco Company, Limited, was formed to carry on the trade throughout the rest of the world, using the same marks and manufacturing in England or America. The importation and sale in India was in the first instance let in the hands of a Company called the British American Tobacco Company (India), Limited.

"In 1910 the Imperial Tobacco Company of India Limited, the present plaintiff, was formed to take over the Indian business from the last named Company; and has since been importing and selling 'Gold Flake' cigarettes, as well as others of W. D. and H. O. Wills brands. Ninety per cent. of its shares are held by the British American Tobacco Company.

"These 'Gold Flake' cigarettes were at first, about 1907, imported to India in tins of 50, since 1911 they have been imported also in paper-packets of 10, the cigarettes being invariably manufactured in England. The plaintiff Company has also factories of its own in India, at one of which, at Bangalore in Southern India, it manufactures from Virginia tobacco, imported for the purpose, a cigarette which is placed on the market in tins of 50 and packets of 10 as 'Gold Flake' Magnums, the 'Gold Flake' label and get-up being used with the addition that they are made 'in India.'

"Between 1910 and 1922 the imports of 'Gold Flake' cigarettes into India by the plaintiff Company amounted to 128,000,000, in the tins of 50 and to 8,770,000, in the packets of 10. Of these last, however, some 7,043,000 were imported in a single year 1919, and were largely exported again to Mesopotamia and other places for Army use.

'So that, with allowance made for that, the proportion of imports and sales of the packets is extremely small as compared with the tins."

On the 1st September 1910 an agreement was made between the British American Tobacco Company, Limited, therein called the British American Company, the British American Tobacco Company, (India), Limited, therein called the "Indian Company," and the plaintiff Company called the "Imperial Company." The recitals were as follows —

"Whereas the British American Tobacco Company have for some time past carried on the business of manufacturers of tobacco and its products for India Burma and Aden and elsewhere and are the owners of the good-will and trade marks in various parts of the world including India, Burma and Aden And Whereas the British American Company have agreed to sell and the Imperial Company have agreed to purchase the business good-will and trade marks now owned by British American Company in India, Burma and Aden for the sum of one million five hundred thousand (Rs. 1,500,000) rupees And Whereas the Indian Company have for some time past carried on business in India Burma and Aden as sellers and distributors of the products of British American Company and others And Whereas the Indian Com-

pany have agreed to sell and the Imperial Company have agreed to purchase the business and good-will and trademarks now owned or used by the Indian Company together with the furniture in the various offices or depots."

And the material clauses were :—

"1. British American Company hereby sells and the Imperial Company hereby purchases for the sum of one million five hundred thousand rupees (Rs. 1,500,000):—

"(*a*) All those the good-will business rights and other assets in connection with or appertaining to the business of British American Company in India, Burma and Aden and the brand or brands trade marks or trade names in connection therewith formulæ the recipes of preparation treatment and manufacture and in particular the sole right and title to use in India Burma and Aden the name of British American Company and the names of firms and companies acquired by British American Company heretofore and used by them in connection with their business in and for India Burma and Aden. The Imperial Company shall further be entitled to the redemption fund set up by British American Company against the liability to redeem coupons and the Imperial Company shall assume and take over the liability to redeem such coupons as and when they become due or redeemable.

"2. The India Company hereby sells and the Imperial Company hereby purchases :—

"(*a*) The good-will business rights or other assets in connection with or appertaining to the business of the India Company in India Burma and Aden and the brand or brands trade marks or trade names in connection therewith formulæ and recipes of preparation treatment and manufacture and in particular the sole right and title to use in India Burma and Aden the name of the India Company and the leases and tenancies of the buildings acquired by the India Company and all rights and interests therein.

"3. The Imperial Company undertakes and agrees with the British American Company as follows :—

"That they will while they or any company or firm in which they may have a controlling interest are carrying on the business of manufacturing goods of the class required they or either of them will supply British American Company (on terms to be agreed upon) with such of the manufactured goods as British American Company shall require for consumption outside India, Burma and Aden.

"That they will not at any time either solely or jointly or as a manager or agent of any other person or persons company or firm or as a shareholder in any other company or otherwise be engaged or concerned in the business of a manufacturer of or in any dealing or trading in tobacco or its products or tobacconists' goods beyond the limits of India, Burma and Aden unless at the request or with the consent of British American Company.

"The Imperial Company will not, nor will any firm or firms over which they shall have controlling interest, without the consent in writing of the British American Company use any of the trade marks brands or other rights or licenses dealt with under this agreement upon or in connection with any goods except such goods be as nearly as circumstances permit of similar nature whereon or in connection wherewith the same are now or may from time to time be used by British American Company outside India Burma and Aden.

"4. The British American Company undertakes and agrees with the Imperial Company as follows :—

"That they will from time to time supply the orders of the Imperial Company and any company or firm in which Imperial Company shall have a controlling interest all goods for the time being manufactured by British American Tobacco Company outside India, Burma and Aden reasonably required by Imperial Company for consumption in India, Burma and Aden and to charge therefor such a price as shall be agreed upon between them from time to time.

"That they will not save as herein excepted and save as shareholders in Imperial Company or their successors or any company or firm in which they shall have a controlling interest carry on business in India or Burma or Aden either solely

or jointly with or as manager or agent for any other company or person or persons or directly or indirectly carry on or be engaged or concerned or interested in the business of manufacture or in any dealing or trading in tobacco or its products or tobacconist's goods within India, Burma and Aden (except as shareholders in Peninsular Tobacco Company Limited or their successors or assigns or except as may be permitted by the Imperial Company) and except that nothing herein shall prevent British American Company from being shareholders in any company exporting goods to India, Burma or Aden provided that (subject to any existing obligation) British American Company shall use their best endeavours to procure the Imperial Company as agents in India Burma and Aden for the sale of any such goods there.

"6. The India Company hereby undertakes and agrees with the Imperial Company that they will not save as herein excepted carry on business in India or Burma or Aden either solely or jointly with or as managers or agents for any other company or person or persons or directly or indirectly carry on or be engaged or concerned or interested in the business of manufacture or in any dealing or trading in tobacco or its products or tobacconists' goods within India or Burma or Aden.

"13 Each of the parties hereto shall enter into execute and do any further assurances or anything necessary for the carrying out of this agreement."

On the 27th of April 1922 there was an Indenture executed. The parties to that Indenture were the British American Tobacco Company Limited (called "the vendors") of the one part and the Imperial Tobacco Company of India Limited (called the purchasers) of the other part: and, it was recited that "Whereas the vendors sometime since agreed to sell and the purchasers agreed to purchase the said business carried on by the vendors in India Burma together with the trade marks used therein, but no specific assignment of the good-will or the said business and the said trade marks has been executed and whereas the consideration for the said sale was the sum of one million five hundred thousand rupees the receipt of which the vendors hereby acknowledge and whereas the purchasers have requested the vendors to execute this assignment for the purpose of effectually vesting in the purchasers the said good-will and trade marks: Now this Indenture witnesseth that in pursuance of the said agreement and for the consideration aforesaid the vendors hereby assign unto the purchasers all that the good-will of the business of the vendors so as aforesaid carried on by them in India and Burma together with all trade marks used in the said business and more particularly those registered by the vendors at Calcutta and Rangoon and referred to in the schedule hereto to hold the same unto the purchasers and their assigns absolutely." This deed was put in evidence though it was not pleaded: and, it may be noted that the "Indian Company" was not a party to it.

In 1919 the British American Tobacco Company, Limited, made cigarettes in packets in large numbers for the British Army Canteen authorities. They were called "Gold Flake" cigarettes and bore a label with Wills mark similar to the label used by the plaintiffs except for a notice at the end of the packet. The difference between the two labels was as follows: In the case of the goods imported and sold by the plaintiff Company there was at the end of the packet in small print. "This label is issued by the Imperial Tobacco Company of India Limited" (Here is the Star trade mark) "successor in India to W. D. and H. O. Wills. Cigarettes made in England." On the cigarettes which were manufactured by the British American Tobacco Company and which were afterwards imported into India by the defendant were these words in small print., "Established by W. D. and H. O. Wills, Bristol and London, British American Tobacco Company Limited" (Here is the Star trade mark), "Bristol, London, Liverpool and Virginia sucessor made temporarily in U. S. A."

Sometime in 1921 some of these cigarettes were sold in England by the Army Canteen authorities and the defendant purchased a large quantity in packets. The only restrictions placed upon [the defendant

at the time of his purchase from the Army Canteen authorities was that he was not to sell them in Great Britain. He alleged that he was to be at liberty to export them wherever he liked.

The cigarettes were genuine "Gold Flake" cigarettes made by the British American Tobacco Company, *i. e.*, the Company which made cigarettes for the plaintiffs; they bore the Gold Flake label, the Gold Flake get-up, and were manufactured of the same quality of tobacco as those made by the British American Tobacco Company for the plaintiffs.

The defendant offered to sell the cigarettes, which he had purchased, to the British American Tobacco Company. They, however, declined to buy them and the defendant in February 1922 imported a large quantity of the cigarettes into India.

The defendant had purchased the cigarettes at a bargain price and this enabled him to place them on the market in India at a price which was considerably lower than the price at which the plaintiff Company sold similar Gold Flake cigarettes.

The plaintiffs discovered that Gold Flake cigarettes were being placed on the market in India, and that the defendant had imported them; and, in May 1922, the plaintiffs filed this suit claiming the reliefs to which I have already referred.

The plaintiffs alleged two titles: the first a proprietary title to the exclusive use in India, Burma and Aden of the trade mark and name of W. D. and H. O. Wills, derived from British American Tobacco Company and the British American Tobacco Company (India), and the second an independent title in the plaintiffs themselves, alleging that the trade mark and name referred to the origin of the cigarettes and the importation thereof by the plaintiffs.

Both of these titles were disputed by the defendant.

The learned Judge in his judgment dealt in the first place with the second contention of plaintiffs, *viz.*, "the allegation that the get-up of the Gold Flake label used in connection with the sale of cigarettes in India indicates to the purchasers and consumers that the goods sold under the label are goods imported by the plaintiff Company; that the defendant's goods if placed on the market are calculated to deceive purchasers and consumers into the belief that in buying the goods of the defendant, they are buying goods imported by the plaintiff Company." No criticism upon this statement of the plaintiffs' case has been made, and it is in accordance with the description of such a claim given by Buckley, L. J., in *Dental Manufacturing Company, Limited* v. *C. De Trey & Co.* (1). "A passing-off action is one in which the plaintiff alleges that the defendant is injuring him in his property by wrongfully intercepting trade which, but for the defendant's wrongful acts, would come to the plaintiff in his business. It is an action in which the plaintiff alleges that the defendant so gets up his goods as that the public, intending to buy the plaintiff's goods, are induced to buy the defendant's goods, in the belief that they are buying the plaintiffs' goods. The plaintiffs' goods need not be goods manufactured by the plaintiff. They may be goods which he purchases, or which he imports, or otherwise acquires, and which he sells under some 'get-up' which conveys that they are goods which, whether made, imported, or sold by him, carry with them the advantage of the reputation that the plaintiff's well-known firm are responsible for their quality or their character."

The learned Judge's finding on this part of the case was as follows:—"I find, therefore, upon this part of the case that the reputation of the brand of Gold Flake cigarettes in India is the reputation of the maker and not of the plaintiff Company as importers. The reputation originated in the days of Messrs. W. D. & H. O. Wills, the original manufacturers, and the efforts of the plaintiff company have been directed not to creating or acquiring (if such a thing is possible) an importer's reputation of themselves in the brand but in maintaining and devolping the reputation of the brand as a manufacturer's brand. The issues, therefore, dependent upon this finding are answered in favour of the defendant."

The learned Judge, therefore, decided the two issues which related to this part

(1) (1912) 3 K. B. 76 at pp. 87; 88; 81 L. J. K. B. 1162; 107 L. T. 111; 29 R. P. C. 617; 28 T. L. R., 498.

of the case in the negative. The first issue was "Does the get-up of the cigarettes described in paragraph 7 of the plaint denote to purchasers in India that such cigarettes are imported by the plaintiff Company?" The second issue was, "Will the sale by the defendant Company of cigarettes in such get-up deceive the purchasers in the belief that the cigarettes have been imported by the plaintiff Company?" As I have said the answer to both these issues was in the negative.

The learned Counsel for the plaintiffs drew our attention to the whole of the evidence on this part of the case, though his argument was mainly directed to an attack upon the learned Judge's finding on the other part of the case.

There is no necessity for me to refer to the evidence in detail, for I agree with the learned Judge's finding of fact. In my judgment the sole representation made by the plaintiffs' user of the covering of the cigarettes was a representation that the cigarettes were the Gold Flake cigarettes manufactured by the successors of the well-known firm of W. D. & H. O. Wills There is no evidence to justify the alleged representation (on which the plaintiffs relied) that cigarettes, bearing the said wrapper or covering, had come through a particular channel, or had been imported by the plaintiffs. In the same way, the defendant by using the wrapper or covering was merely representing the cigarettes as Gold Flake cigarettes manufactured by the successors of the well-known firm of W. D. & H. O. Wills, *viz.*, the British American Tobacco Company. This was a perfectly true representation and the defendant was in no way passing off or attempting to pass off the cigarettes sold by him, as the plaintiffs' goods

False representation is the foundation of a suit such as this: and there was, in my judgment, no false representation by the defendant. Though the importation by the defendant may have been calculated to injure the plaintiffs' business, they had no cause of action on the ground now under consideration.

The concise statement of Fletcher Moulton, L. J., in *Dental Manufacturing Company Limited* v. *C. De Trey & Co.* (1) may usefully be referred to on this part of the case. It is as follows:—

"To my mind it would be an injurious and ridiculous extension of the doctrine of passing-off to say that, where the sole representation is that the goods are the goods of a particular manufacturer, it should be held that that carries with it a representation that they have come through any particular channel; or, putting it conversely, that any one who is injured by the passing-off of goods as the goods of a third party can bring an action."

In this case the defendant was passing off the cigarettes as the goods of the third party, *viz.*, as cigarettes manufactured by the British American Tobacco Company, the successor of W. D. & H. O. Wills and there was no representation that they were goods of the plaintiffs or that the goods were imported by the plaintiffs.

In my judgment, therefore, the learned Judge was right in deciding the first two issues in favour of the defendant and in holding that this part of the plaintiffs' case failed

The plaintiffs raised an issue as to the condition of the cigarettes imported by the defendant. The learned Judge came to the conclusion that these cigarettes were not bad or unsaleable, and I see no reason to differ from the learned Judge's conclusion on this point.

The other part of the plaintiffs' case is dependent upon their alleged derivative title, and is based upon the agreement dated the 1st September 1910 and the Indenture of the 11th April 1922.

This part of the plaintiffs' case is really inconsistent with the other part, which has already been considered, and if the plaintiffs have a good cause of action under this heading, the evidence, which was produced at the trial in the attempt to support the plaintiffs' alleged right as importers of the cigarettes, would have been unnecessary.

As pointed out by Sir Lawrence Jenkins in *British American Tobacco Company, Limited*, v. *Mahboob Bux* (2), in India there is no system of registration nor is there any provision for a statutory title

(2) 7 Ind. Cas. 279; 38 C. 110 at p. 117; 15 C. W. N. 280.

to a trade mark, so that the rights of the parties must be determined in accordance with the principle of the English Common Law; and, further a trade mark is a mode of warranting the origin of the goods, to which it is attached, or their trade association; and it is of the essence of a trade mark that its representation should be true. In this is to be found the true test of the assignability of a trade mark. In that judgment the learned Chief Justice drew attention to passages from the judgment of Lord Kingsdown, Lord Cranworth, Lord Westbury and Mellish, L. J. which I do not think it necessary to repeat, but which I regard as being material to the present case.

There is no doubt that the title to a trade mark cannot be assigned or devolve in gross, but unless the mark connotes a personal connection between its original owner and the goods, in connection with which it is used, it may be assigned and transmitted with the good-will of the business in such goods.

In this csase the plaintiffs' learned Counsel argued that the good-will of the business in India carried on by the British American Tobacco Company and by the British American Tobacco Company (India) was assigned to the plaintiffs along with the sole right to use the trade mark in question and the names of the two companies in India.

It was argued that the business of the British American Tobacco Company was carried on in several countries, that the British American Tobacco Company had a business in India and a good-will attached to it and that inasmuch as the good-will of the business in India was assigned, or agreed to be assigned to the plaintiffs, the property in the trade mark used in such business passed to the plaintiffs.

The difficulty on this part of the plaintiffs' case is that the trade mark is one which denotes the origin of the cigarettes and it has been and is still used in connection with cigarettes manufactured by the British American Tobacco Company for sale in other parts of the world besides India.

Before the assignment, relied on by the plaintiffs, the trade mark was not confined to cigarettes used by the British American Tobacco Company in connection with their business in India, and after the assignment it is still used by the British American Tobacco Company in connection with their business in parts of the world other than India. In other words, the trade mark in question was a mode of warranting the orign of the goods to which it was attached, *viz.*, the manufacture of W. D. & H. O. Wills or their successors and the goods imported by the defendant were genuine goods made by the British American Tobacco Company, properly bearing the trade mark in question as denoting the origin of the goods to which it was attached.

The difficulty on this part of the plaintiffs' case was illustrated by the argumefft of the learned Counsel for the plaintiffs. He was constrained to admit that if the trade mark means goods made by "Messrs. W. D. & H. O. Wills or their successors" the plaintiff have no case.

He contended, however, that the marke really means "goods of W. D. & H. O. Wills or their successors *in India*." In other words, he argued that outside India the mark denoted that the cigarettes were made by the successors of W. D. & H. O. Wills, but that in India the mark denoted that the cigarettes were made by or for the successors of W. D. & H. O. Wills *in India*, But in each case put by the learned Counsel, the trade mark was attached to cigarettes of the same quality, *viz.*, W. D. &. H. O. Wills Gold Flake Cigarettes, and in each case the cigarettes were made by the same company, *viz.*, the British American Tobacco Company.

In my opinion, it is not possible, on the facts of this case, to hold that the mark bore the dual meaning alleged by the plaintiffs and their contention in this respect cannot be accepted. Further, it should be noted that it is contrary to the evidence in the case and the findings of fact of the learned Judge.

In the case to which I have already referred, Sir Lawrence Jenkins drew attention to the fact that Mellish, L. J., in *Singer Manufacturing Company* v. *Wilson* (3), limited the passing of a trade mark

(3) (1875) 2 Ch. D. 434 at p. 455; 45 L. J. Ch. 490; 34 L. T. 858; 24 W. R. 1023.

to the case where the entire business, of which it is a part, is sold: And in *Pinto* v. *Badman* (4) Fry, L. J., in dealing with the transfer of a trade mark said:—"It follows, therefore, that it has been laid down by the clearest authority that a trade mark can be transferred with, to use Lord Cranworth's language, the manufactory of the goods in which the mark has been used to be affixed. Beyond that, as far as my knowledge goes, and so far as any case that has been cited to us at the Bar is concerned, no authority can be produced.

"Therefore, I conceive that is the limit of the assignability of the trade mark. It can be assigned if it is indicative of origin, when the origin is assigned with it.

"It cannot be assigned when it is divorced from its place of origin, or when in the hands of a transferee it would indicate something different to what it indicated in the hands of a transferor."

In my judgment, the trade mark in this case is indicative of origin, and the origin has not been assigned with the trade mark.

It was conceded that if there had been no agreement to assign or assignment by the British American Tobacco Company to the plaintiffs, and if this suit had been brought by the British American Tobacco Company, the Company could not have succeeded, in the absence of a covenant by the defendant with the British American Tobacco Company not to import the cigarettes, purchased by him, into India.

It seems to me that the plaintiff Company (in which the British American Tobacco Company held 90 per cent. of the shares) as assignees from the British American Tobacco Company cannot be in a better position than the British American Tobacco Company, unless it can be proved that the plaintiff Company have established some right of their own, independent of the British American Tobacco Company, such as might be established if they could have proved that the wrapper and covering upon and the get-up of the cigarettes denoted that they were imported by the plaintiff Company. This the plaintiff Company attempted to prove, but, as already stated, they failed.

In this case we have nothing to do with any statutory provision, such as is to be found in section 22 of the English Trade Marks Act of 1905; and the case is to be decided on the principles of the English Common Law. According to such principles, the property, if any, of the owner is in its nature, transitory and only exists so long as the mark is distinctive in the eyes of the public or a class of the public [see per Lord Parker in *Spalding* v. *Gamage* (5)]. In this case the mark is distinctive, as already stated, in the eyes of the public as the mark of the manufacturer, W. D. & H. O. Wills or their successors, the British American Tobacco Company. It was not distinctive of the business of the British American Tobacco Company or the British American Tobacco Company (India) *in India* and it has not become distinctive of the plaintiff Company's cigarettes.

It is clear, therefore, that the manufactory of the cigarettes in which the mark has been used to be affixed, has not been assigned to the plaintiffs, nor has the property in the business or the good-will of the business, in connection with which the trade mark has been used for a long period, been assigned to the plaintiffs.

In my judgment, the plaintiffs did not purchase the origin of the cigarettes or the exclusive right to manufacture. They must have known at the time of the agreement of 1st September 1910 that W. D. & H. O. Wills' Gold Flake cigarettes could and would be manufactured by the British American Tobacco Company and sold in different parts of the world and that there was a risk of persons buying such cigarettes outside India and importing them into India.

The British American Tobacco Company, while reserving the right to manufacture and sell W. D. & H. O. Wills' Gold Flake cigarettes with the well-established mark upon them, could not assign the sole right to sell such Gold Flake cigarettes

(4) (1891) 8 Pat. Cas. 181 at p. 194.

(5) (1915) 32 Pat. Cas. 273 at p. 284; 84 L. J. Ch. 449; 113 L. T. 198; 31 T. L. R. 328.

in India to the plaintiffs so as to enable the plaintiffs to restrain members of the public from selling in India genuine Gold Flake cigarettes of W. D. & H. O. Wills which the British American Tobacco Company had themselves manufactured and sold in the market without any restriction upon importation into India.

For the above mentioned reasons, I am of opinion that the plaintiffs have failed in both respects to establish their alleged right to the declaration, injunction and other reliefs claimed, and in my judgment the learned Judge was right in dismissing the suit.

The appeal must be dismissed with costs.

Richardson, J.—It will be convenient, in what I have to say, to use the name of Wills & Co., as a comprehensive term including the original firm of W. D. & H. O. Wills and their successors in England. The plaintiff Company will be referred to as 'the Company.' I will assume then that the good-will of the Indian business of Wills & Co., and the trade marks and trade labels, used in that business, were validly transferred and assigned to the Company by the agreement of 1st September 1910, and the Indenture of the 11th April 1922, and the Company have thus acquired all the rights which Wills & Co. had in India in respect of their cigarettes and the trade marks and labels associated with them. This litigation is particularly concerned with the brand of cigarettes called Gold Flake and the label on the tins or boxes in which they are packed for sale is well known. The trade mark on this label is a double Star.

I will assume further that the rights which the Company possess include the right to manufacture these Gold Flake cigarettes in India and to sell them in tins or boxes to which Wills & Co's. label is affixed.

This right of manufacture, however, has not been exercised and for the present purpose the Company are not manufacturers. They are only importers of Gold Flake cigarettes manufactured in England. In paragraph 9 of the plaint it is stated that since the 1st October 1910 Gold Flake cigarettes for sale in India, Burma and Aden have been manufactured by Wills & Co. solely for the Company and have been imported into and sold in these countries solely by the Company, the number sold amounting to about one hundred and twenty-five million.

Moreover, the learned Judge, Pearson, J., before whom the case came in the first instance, has found, and in my opinion, on the evidence, rightly and conclusively found, that up to the date of the suit, the Company had acquired no independent reputation as importers. Nor do they use any distinctive importer's mark. Apart from the legend in small letters round the double Star, the label which they use as importers is identical with Wills and Co.'s label The legend is:—"This label is issued by the Imperial Tobacco Company of India, Limited, successor in India to W. D. & H. O. Wills—Cigarettes made in England." The mention of the Company's name is formal and insignificant while the name of the original firm "W. D. & H. O. Wills" appears conspicuously in three places.

As to the position of the defendants, it appears that the first defendant Albert Bonnan, who describes himself as a Frenchman, purchased in 1921 a large quantity of Wills & Co.'s Gold Flake cigarettes about twenty-one and a half million—from the Board of the Army and Canteen Stores in England, the cigarettes being packed in tins or boxes bearing Wills & Co.'s label. The small letter legend round the double Star on that label is "established by W. D. & H. O. Wills Bristol and London; British American Tobacco Company, Limited, Bristol, London, Liverpool and Virginia—successor, made temporarily in U. S. A." Doubtless, the Board had obtained their supplies direct from Wills & Co. and were getting rid of their surplus stock. At any rate, it is not disputed that Bonnan's cigarettes are genuine Gold Flake cigarettes. In the argument nothing turned on the fact that they happen to have been made in America and not in England. It would seem that during the War, Wills & Co. made temporary arrangements for the manufacture of their cigarettes in America.

Bonnan's purchase was subject to the contractual restriction that the cigarettes were not to be disposed of in Great Britain. Otherwise, so far as the vendors were

concerned, he was free to do with the cigarettes what he liked. He brought them into India and formed a Company, the second defendant, Bonnan & Co., to sell the cigarettes there. As the interests of Bonnan and Bonnan & Co. appear to be the same, I will follow Pearson, J., in treating Bonnan as the sole defendant. Having bought his cigarettes cheap, Bonnan was able to undersell the plaintiff Company in the Indian market and thus came into conflict with them. I repeat that for all material purposes Bonnan's cigarettes must be regarded as of the same quality and manufacture with those sold by the Company.

It was in these circumstances that the Company instituted their suit on the 11th May 1922 and obtained a temporary injunction prohibiting the further sale of Bonnan's cigarettes pending the issue. They ask for a declaration that within the limits of India, Burma and Aden they have the exclusive right as owners to the user of the trade mark and label denoting Wills & Co.'s Gold Flake cigarettes, and that they are solely entitled to import into and sell in those countries cigarettes bearing or contained in tins or other receptacles bearing such mark or label. They further ask for a perpetual injunction in aid of the rights which they assert and, by amendments of the plaint made in June 1922, for damages.

The suit was dismissed by Pearson, J., and the appeal is from the learned Judge's judgment dated 18th July 1922.

In brief, the Company claim to be the only persons at liberty to import Wills & Co.'s Gold Flake cigarettes into India for purposes of sale. In paragraph 15 of the plaint the claim is put on the grounds (1) that the importation and sale by Bonnan of his cigarettes is " an infringement of the rights and property of the plaintiff Company to and in Wills & Co's trade mark" and (2) that the use of the Wills & Co.'s trade mark and label by Bonnan "will deceive purchasers of the said cigarettes into the belief that the said cigarettes have been imported by the plaintiff Company." In paragraph 16A of the plaint, added in June, it is further stated that the importation by Bonnan of his cigarettes will diminish the sale of the plaintiff Company's cigarettes and "has impaired and will further impair the reputation of the plaintiff Company" and their cigarettes.

It was conceded by Mr. Pugh, appearing for the Company, that the claim is novel and not covered by any direct authority. The learned Counsel, however, added that the law of trade marks was of comparatively recent origin and had not yet reached the limits of its growth. But whether that be so or not, I confess myself unable to appreciate the reasoning by which the present claim is sought to be supported.

The misconception, which, as it seems to me, underlies the Company's case, consists in the exaggerated stress laid on the notion that the right to a trade mark is a right of property. The ground which I have numbered (1) in paragraph 15 of the plaint, is treated as if it were an independent ground of action. But given their right to the trade mark, the Company cannot succeed without proof of some such averment as that contained in the second ground. To meet the objection that no right to an importer's marks has been established, an attempt has been made in argument to give the averment a somewhat wider form and to say that in selling his cigarettes, Bonnan represents them to be the goods of the Company. The averment in that form, however, can only be supported in the circumstances by returning to the notion of property. The right to the trade mark is treated as conferring a monopoly, entitling the Company to protection under any and all conditions and against any and all kinds of injury, including injury by mere commercial competition. In my opinion, the short answer to the case is that in selling his cigarettes Bonnan does nothing which misleads or is calculated to mislead the public as to what they are buying.

The questions whether a right to a trade mark is a right of property and in what sense it can be so regarded, have been the subject of discussion, for instance, by Lord Parker in *Spalding* v. *Gamage* (5). But for the present purpose, the question of substance is what is the extent of this right? What constitutes infringement of a trade mark?

The extent of the right of, I will say, the owner of a trade mark, is doubtless to be measured by the correlative duty or obligation imposed on others. That obligation is expressed in the principle underlying all the cases, that "no body has any right to represent his goods as the goods of some body else." Lord Westbury certainly regarded the right to a trade mark as a right of property; but his way of putting the matter leads to the same result. He says in *Hall* v. *Barrows* (6), "Imposition on the public is indeed necessary for the plaintiff's title, but in this way only, that it is the test of the invasion by the defendant of the plaintiff's right of property, for there is no injury done to the plaintiff if the mark used by the defendant be not such as may be mistaken by the public for the mark of the plaintiff." I agree that no imputation of fraudulent intent is necessary; but over and above his right to the trade mark, the plaintiff must prove that the defendant is really imposing on the public. Trade marks are in the present respect on the same footing as trade names, and in *Singer Manufacturing Co.* v. *Loog* (7), Lord Watson said this :—"There is no authority, and, in my opinion, no principle for giving the trader any higher right. If he cannot allege and prove that the public are deceived, or that there is a reasonable probability of deception, he has no right to interfere with the use of the name by others." In *Spalding's case* (5) Lord Parker said: "The property, if any, of the so-called owner is, in its nature, transitory, and only exists so long as the mark is distinctive of his own goods in the eyes of the public or a class of the public."

Take as a concrete instance the case of *Reddaway* v. *Banham* (8). No doubt the defendant's description of his belting as "camel hair belting" was in a sense true, but the finding was that the defendant was guilty of a false representation and of passing off his goods as the plaintiffs', because the description was likely to mislead purchasers into the belief that his belting was the plaintiffs' belting, the fact being that the two beltings were of different manufacture and came from different factories. The words I have already quoted come from Lord Halsbury's judgment. "For myself," he said "I believe the principle of law may be very plainly stated, and that is, that nobody has any right to represent his goods as the goods of some body else" Lord Herschell cited the language of other Judges to the same effect and in the course of his judgment he observed: "I cannot help saying that, if the defendants are entitled to lead purchasers to believe that they are getting the plaintiffs' manufacture when they are not, and thus to cheat the plaintiffs of some of their legitimate trade, I should regret to find that the law was powerless to enforce the most elementary principles of commercial morality." Lord Macnaghten referred to the defendant as an "interloper who hoped to find more profit and less trouble in trading on another man's reputation than on his own merits." He said that the plaintiffs' belting had come to be known as "camel hair belting" all over the world and that it was almost an abuse of language to say that this description as applied to the defendant's belting was merely the simple truth. For the defendant's purposes, he added, the whole merit of the description lay in its duplicity.

Comparison with *Reddaway* v. *Banham* (8) shows how empty the present case is of substance or even of plausibility. The Company represent that the cigarettes which they import and sell are those of Wills & Co. Not having any distinctive reputation as importers, and not having used any distinctive importer's mark, the Company trade on the reputation of Wills & Co. Bonnan makes the same representation as regards his cigarettes, that they are the goods of Wills & Co. and he also trades on the reputation of Wills & Co. His representation is the simple truth and the whole truth. There is no duplicity or equivocation. No pur-

(6) (1863) 32 L. J. Ch. 548; 8 L. T. (N. S.) 227; 9 Jur. (N. S.) 483; 11 W. R. 525; 1 N. R. 543; on Appeal (1863) 4 D. J. & S. 150; 33 L. J. Ch. 204; 10 Jur. (N. S.) 55; 9 L. T. (N. S.) 561; 12 W. R. 322; 146 R. R. 248; 46 E. R. 873.

(7) (1882) 8 A. C. 15; 52 L. J. Ch. 481; 48 L. T. 3; 31 W. R. 325.

(8) (1896) A. C. 199; 65 L. J. Q. B. 381; 74 L. T. 289; 44 W. R. 638.

chaser, not the most unwary, has been or is likely to be deceived. The Company may regard Bonnan as an interloper but I cannot see that he is in any way trading on their merits or their reputation. He is not a pirate. He is not palming off his cigarettes as theirs or doing anything which is commercially immoral. He is not violating the good-will which the Company have no doubt acquired in India or infringing any of their trade marks. The mere fact, if it be a fact, that the Company have popularised Gold Flake cigarettes in India, does not prevent others, armed with the same cigarettes, from following them into the same market and competing with them there.

The case was put in argument whether if a traveller coming to India filled his portmanteau with Gold Flake cigarettes he could dispose of them thereto his friends. Learned Counsel could only say that he might give them to his friends but could not sell them, an answer which I think did not give complete satisfaction either to the learned Counsel himself or to the Court.

There may be another way of dealing with the claim equally fatal to the Company. Mr. Langford James contended on Bonnan's behalf, mainly, I think, on the authority of *Pinto* v. *Badman* (4), that the assignment of Wills & Co. in favour of the Company was invalid, because the trade mark was not assigned together with any manufactory in India and could not be assigned independently of the manufacture of the goods to which it related. If I do not adopt that contention *in toto*, it is because I am not sure as to the precise effect of section 22 of the British Trade Marks Act of 1905. But that is not to say that the contention has no force. I have assumed that Wills & Co. were in a position in 1910 to make, and did make, a valid assignment of the goodwill of their Indian business and that such an assignment would convey to the assignees the right to set up a manufactory in India turning out cigarettes with the same get-up as those of Wills & Co., and I have also said that as the Company have not exercised that right, they are not manufacturers. In the circumstances, it may be that they are in no better case than if they had taken merely an assignment in gross of Wills & Co.'s trade mark. It may be that they cannot rely on the assignment of the Indian goodwill because they have not acted upon it, and that they can only rely on such undertakings as those given by Wills & Co. in paragraph 4 of the agreement of 1910. In that case, their rights as assignees of the Indian business and the trade mark would be of no avail to them and they would be driven back to rights which are merely contractual If this be the true view, clearly the cases of *Richards* v. *Butcher* (9) and *Dental Manufacturing Company Limited* v. *C. De Trey & Co.* (1) would be direct authorities against the Company, even if Bonnan were passing off as the manufacture of Wills & Co.'s cigarettes, which were not the manufacture of Wills & Co. This result seems reasonable enough because, otherwise, the prohibition against the assignment of a trade mark in gross might easily be evaded as regards, say, a British possession by adding a merely colourable assignment of the goodwill in that possession of the business to which the trade mark relates.

If the Company can only depend on their contractual rights, those rights as Fletcher Moulton, L.J. points out in *De Trey's case* (1) "are not exclusive in any sense which affects the public", and the observations which he quotes from the judgment of Kay, J., in the other case would be in point. Kay J. was dealing with the exclusive right claimed by Richards as sole agent for the sale of Messrs. Heidsieck's wine' in England. "What does that mean?' he asked, "it only means that Messrs. Heidsieck have contracted that they will not sell any of their wine to any other persons in England, except Mr. Richards; but, it, by any means whatever, another person gets Heidsieck's wine, if he buys it in France, or buys it in Germany, or in England, or buys it of the plaintiffs, or buys it of any body else, he has a right to sell it. The plaintiffs cannot prevent him—nobody can. He has a perfect right to sell it; it is an article of commerce in which he has a perfect right to deal"

(9) (1890) 7 Pat Cas. 288;

But quite apart from the view of the case suggested by the learned Counsel for Bonnan, much of what was said in *De Trey's case* (1) has a close application to the present case and reinforces the ground on which I prefer to rest my decision. Granted that the Company have all the rights they claim in Wills & Co's trade mark, the mere possession of those rights does not, in the circumstances, justify them in asserting that Bonnan is representing his goods to be their goods. The assertion is not true in fact or substance.

No doubt the present case differs from *De Trey's case* (1) in two respects. In the first place, De Trey claimed no right as the Company here claim to any trade mark and no right higher than that of sole agent for sale. In the second place, the alleged infringing articles were not, as they are here, the genuine goods of the same manufacturer, but imitations. The second distinction is in Bonnan's favour. He is in no sense representing his goods to be other than what they are. Wills & Co. themselves could make no case against him for passing off. The first distinction is not, in my opinion, vital. In Lord Parker's words already cited, the Company's right to the trade mark or their right to protection "only exists so long as the mark is distinctive of their goods in the eyes of the public" As used, however, by the Company, the mark is distinctive not of their goods but of the goods of Wills & Co.

I might, therefore, follow Vaughan Williams, L. J., and say that there is nothing in the get-up of Bonnan's cigarettes which identifies them with the Company and there is a passage in the judgment of Fletcher Moulton, L. J., which is capable of easy adaptation to this effect :—"There is a right in a plaintiff to come to the Court to prevent any goods being passed off as his which are not his goods, and; when I say that, I include goods which he has manufactured, goods which he had purchased and sold—any goods that can fairly be called his goods. In respect of these he can restrain an attempt to pass off goods that are not his, as though they were his. But in this case it is clear that in no proper sense of the word were these goods ever regarded by the public as, nor were they in truth, (the Company's) goods, and there never was any representation on the part of (Bonnan) that the alleged infringing articles were (the Company's) goods." Or, again, I might conclude like Buckley, L. J., by saying, on the facts with even more force than he did, that "there was no representation whatever affording any ground for a passing off action."

It is not necessary to consider what the position would have been if the Company had manufactured their own cigarettes and Bonnan had brought into the market Wills & Co.'s cigarettes with the same or a similar get-up, but made and purchased elsewhere. Like Pearson, J., I doubt whether the issue would have been different. Bonnan's representation to purchasers would still have been true in simple fact, and, the formulæ and recipes for preparation, treatment and manufacture being the same, the cigarettes made in India would presumably have been identical in quality with those made elsewhere. The parties would have been selling goods of practically identical manufacture under practically identical marks. I doubt whether in such case it could have been said that Bonnan was passing off his cigarettes as those of the Company, and, apart from any question of passing off, he would still have been free to import Wills & Co.'s cigarettes obtained elsewhere into India.

It must be borne in mind that in India there are no statutory means of obtaining by registration an exclusive right to a particular trade mark. The Company have no statutory rights on which they can rely. They depend on the rights which the Common Law or the Commercial Law gives them [*Somerville* v. *Schembri* (10), *British American Tobacco Co., Ld.* v. *Mahboob Bux* (2)]. The case to which the learned Counsel referred of the *Imperial Tobacco Company (Newfoundland)* v. *Duffy* (11) was decided under the Newfoundland Trade Marks Act under which the trade mark there in question had been registered.

(10) (1887) 12 A. C. 453; 56 L. J. P. C. 61; 56 L. T. 454.
(11) (1918) A. C. 181; 87 L. J. P. C. 50; 118 L. T. 259; 35 R. P. C. 12.

GOKULDAS PITAMBER V. ODHAVJI GIGABHAI.

I have endeavoured to deal with some of the arguments presented to us, but in my view the only difficulty in the case lies in the enterprising length to which the right to a trade mark has been pushed by the Company. In my opinion, apart from legislation, no such barrier as the Company desire can, in the circumstances, be imposed on the importation of genuine Wills & Co.'s Gold Flake cigarettes into India.

I agree that the suit was rightly dismissed and that this appeal fails.

N. H. *Appeal dismissed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT NO. 1963 OF 1923.

June 28, 1923.

Present :—Mr. Justice Pratt.

GOKULDAS PITAMBER—PLAINTIFF

versus

ODHAVJI GIGABHAI—DEFENDANT.

Fraud—Suit to set aside decree—False evidence, decree based on.

The fact that a decree is based on false evidence does not amount to fraud vitiating the decree unless the effect of the false evidence was to prevent the other party from putting his case before the Court. [p. 207, col. 1.]

Mahomed Golab v. *Mahomed Sulliman*, 21 C. 612; 10 Ind. Dec. (N. S.) 1038 and *Flower* v. *Lloyd*, (1877) 6 Ch. D. 297; 46 L. J. Ch. 838; 37 L. T. 419; 25 W. R. 793, relied on.

Mr. *Binning*, for the Plaintiff.

Mr. *F. S. Taleyarkhan*, (with him Mr. *B. K. Desai*), for the Defendant.

JUDGMENT.—This is a suit by the plaintiff, the tenant, to set aside a decree obtained by the defendant, his landlord, on the ground of fraud. The decree was passed on December 15, 1922, requiring the plaintiff to vacate the premises on or before May 31 of this year. The defendant's requisition in that suit, which was Suit No. 3745 of 1922, was for his own occupation and the *bona fides* and the reasonableness for that requisition was the principal matter in issue. In the course of the hearing of that suit the defendant said in answer to cross-examination "I am the rent farmer and hold the premises under a lease. The lease has not expired: it will last two years more." The plaintiff says that that was false evidence, that the defendant was not a lessee, and that if he had a lease it did not last two years more and that the only document under which the defendant was in possession was the document Exhibit C according to which the defendant was not a lessee at all but a rent farming agent the period of whose agency expired in October 1923.

Now the agreement Exhibit C has been admitted, and under that agreement it does appear that the defendant was no more than an agent to collect the rent. The defendant's explanation in his affidavit, which by consent of the parties has been treated as evidence in this case, is that the owner of the premises had at first agreed to give him a lease for five years but that agreement was not carried out. The owner then desired to vary the term for one year and took a writing from him to that effect, and subsequently, just before the owner went to South Africa, the owner promised to let him remain in possession for two years. It is clear, therefore, even on defendant's admission, that the statements made in answer to cross-examination in the suit were not true, that the defendant was not a lessee, and that he had not a lease of the premises for two years.

The question then remains whether this false evidence is sufficient to justify the Court in holding that the decree made in that suit is vitiated by fraud. Now there are several decisions on the point as to whether false evidence is such fraud as to vitiate the decree passed in the suit in which it was given. The most satisfactory of the statement of the law is that in *Mahomed Golab* v. *Mahomad Sulliman* (1) where the High Court of Calcutta held that false evidence in a suit would not be fraud

(1) 21 C. 612; 10 Ind. Dec. (N. S.) 1038.

vitiating a decree unless the effect of that false evidence was to prevent the other party from putting his case before the Court. Indeed that must be so, for if every decree which was the result of the suit in which false evidence was given could be vitiated on that ground then, as has been said in *Flower* v. *Lloyd* (2), a large number of judgments supposed to be final would only be the commencement of a new series of actions. What I have to decide is whether by this false evidence the plaintiff in this suit is prevented from establishing his defence in the ejectment suit. Now the plaintiff's defence in that ejectment suit was really a defence denying the reasonableness and *bona fides* of the defendant's requisition of the premises for his own use and occupation. The plaintiff in that suit did not raise any question as to the defendant's title. If he had done so, he would have been debarred from raising the issue under the Rent Act as to the reasonableness and *bona fides* of the defendant's requisition. It seems to me clear that this was not a defence which the plaintiff intended to make and that he was not prevented by the evidence of which he complains from making that defence. Again, even supposing he had intended in the previous suit to question the defendant's title, it is not apparent how the false answers of the defendant to the questions put to him in the cross-examination prevented the plaintiff from investigating the defendant's title. It won't do to say that the plaintiff believed the defendant and, therefore, was induced not to make an investigation of title. Because it is very seldom that one party accepts as true any evidence that is given in a suit by the other party. It was quite surely just as easy for him to ascertain the true facts as to defendant's title during the course of that litigation as it has been for him to do so as soon as the litigation was over. The conditions are the same for the owner of the property is still in South Africa. I hold, therefore, that although the evidence given by the defendant in answer to the particular questions asked in cross-examination was not true yet it did not avoid the decree.

I accordingly find on the issues framed (1) whether the evidence of the defendant, assuming it to be false as stated in paragraph No. 4 of the plaint, prevented the plaintiff from putting his case before the Court, and if so, amounted to fraud invalidating the decree—in the negative: (2) whether the said evidence was as a matter of fact false—in the affirmative; and (3) whether the decree in Suit No. 3745 of 1922 was obtained by fraud as alleged in paragraph No. 4 of the plaint—in the negative.

Although I find that the evidence given by the defendant in the former suit was not true I do not depart from the ordinary rule as to costs. Because I think this suit is merely an attempt on the part of the plaintiff to put off the day for delivery of possession of the premises. Accordingly I dismiss the suit with costs.

Suit dismissed.

Z. K.

(2) (1877) 6 Ch. D. 297; 46 L. J. Ch. 838; 37 L. T. 419; 25 W. R. 793.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1862 OF 1918.

April 11, 1922.

Present:—Mr. Justice Scott-Smith and Mr. Justice Abdul Racof.

Musammat RAM PIARI AND OTHERS —DEFENDANTS—APPELLANTS

versus

SULTAN BAKHSH—PLAINTIFF— —RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 153, O. VI, r. 17, O. XLI, r. 27—Appeal—Amendment of grounds of appeal—Appellate Court, power of, to direct amendment—Commissioner to revise report of previous Commissioner—Additional evidence when can be admitted—Partnership suit—Interest, when can be allowed.

The Civil Procedure Code gives the Court full discretion to allow an amendment of pleadings at any stage, and where the grounds of an appeal are not sufficiently clear, the Appellate Court can direct the appellant to amend them. [p. 208, col. 2.]

RAM PIARI v. SULTAN BAKHSH.

Where mistakes and omissions are discovered in the report of a Commissioner appointed to examine accounts, an Appellate Court has power to direct another Commissioner to examine the accounts and to remedy the mistakes and omissions of the previous Commissioner. Such an order does not amount to the production of additional evidence under r. 27 of O. XLI of the Civil Procedure Code. [p. 208, col. 2.]

Where an Appellate Court is unable to decide an appeal on the record as it stands, it is justified in passing an order for the production of additional evidence under r. 27 of O. XLI. of the Civil Procedure Code. [p. 208, col. 2.]

Interest is not usually allowed in partnership suits except on sums advanced in excess of the capital agreed to be contributed. [p. 208, col. 2; p. 209, col. 1.]

Second appeal from a decree of the District Judge, Sialkot, dated the 26th April 1918, reversing that of the Subordinate Judge, First Class, Sialkot, dated the 22nd December 1914.

Bakhshi *Tek Chand* and Mr. *Mehr Chand Mahajan*, for the Appellants.

Mr. *Manohar Lal*, for the Respondent.

JUDGMENT.—The plaintiff Sultan Bakhsh brought the suit out of which the present appeal arises so long ago as the 5th December 1906, for rendition of accounts of partnership and for recovery of any sum which might be found due to him. The proceedings were extremely lengthy and the history of them is clearly given in the judgment of the learned District Judge, who found that Rs. 1,412-10-0 was due from the defendants and passed a decree for that sum, together with costs in proportion. He also ordered that the sum decreed should bear interest at 6 per cent. per annum from the date of institution of the suit till the date of realisation. From this decree the defendants have filed the present second appeal. There is also a cross-appeal by the plaintiff (No. 2266 of 1918), but, as Mr. Manohar Lal expressly said he would not press it, we need not say anything further about it, except that it is dismissed with costs.

The first point urged by Mr. Tek Chand on behalf of defendants-appellants was that the order of Mr. Rose, District Judge of the 20th August 1915 (pages 16-17 of the paper-book) was contrary to law. In that order Mr. Rose discussed some of the grounds of appeal and in the end confessed his total incapacity to deal with an appeal cast in that form and returned it for amendment within three months. It is contended before us that the plaintiff should not have been allowed to amend his grounds of appeal. The Civil Procedure Code, however, gives the Court full discretion to allow an amendment of pleadings at any stage, and if the grounds of an appeal are not sufficiently clear, we see no reason why an Appellate Court should not direct an appellant to amend them. After the plaintiff had filed his amended grounds of appeal Mr. Rose, by his order of the 4th April 1916, issued a commission to Lala Devi Daval instructing him to report on all the points raised in the applications filed by the parties in the District Judge's Court. Mr. Rose stated that the primary object of the Commissioner should be (1) to revise Lala Karm Chand's report which undoubtedly contained some mistakes, and (2) to complete it by taking into consideration monies realised (or paid out) on account of the partnership after it had been dissolved, but before it was finally wound up and its accounts closed (page 21 of the printed paper-book). Mr. Tek Chand objects to this order on the ground that it contravenes the provisions of O. XLI, r. 27 of the Civil Procedure Code. Mr. Rose, however, did not order or allow the production of any additional evidence, but merely directed another Commissioner to examine the accounts and to remedy certain mistakes and omissions made by the previous Commissioner. We cannot see anything illegal in his order. Moreover, we understand that Mr. Rose found himself unable to decide the appeal on the record as it stood at the time, and under these circumstances he would have been perfectly justified in passing an order for the production of additional evidence under r. 27 of O. XLI, had he thought it right to do so.

[Here their Lordships disposed of certain points not material for this Report.—*Ed.*]

The next point urged was that the defendants should not be made to pay interest on the sum decreed from the date of the suit to the date of realisation. In our opinion, no sufficient reasons have been given for allowing this interest. In the first place, none was claimed in the plaint. Secondly, interest is not usually allowed

in partnership suits, except on sums advanced in excess of the capital agreed to be contributed (see in this connection the Law of Partnership by Singhal, page 239). Thirdly, the delay in the decision of the suit has been due more to the plaintiff than to the defendants. Plaintiff alleged that the defendants' accounts were forged and this necessitated further examination thereof, and it was eventually held that the accounts were not forged. Again, there was a delay when the appeal of the plaintiff came before Mr. Rose owing to the grounds of appeal not being sufficiently clear. Fourthly, the defendants never refused to render accounts and placed all their *bahis* at the disposal of the Court at the very outset. Fifthly, they were not the original partners with Sultan Bakhsh, but undertook liability as the representatives of Lehna Singh with whom the plaintiff entered into partnership. The decree was passed on the 26th April 1918 and a few months later the amount decreed was paid into Court and was invested in war bonds upon which interest has been accruing. The plaintiff will be entitled to so much of the interest upon those bonds as is found to be in proportion to the sum held by us to be due to him. In addition to this we think that he should be allowed interest at 6 per cent. per annum from the date of the decree to the date on which the amount decreed was paid into the Executing Court.

The only remaining matter which Mr. Tek Chand argued was that of costs. He urged that the parties should have been directed to bear their own costs. Now, the ordinary rule is that costs shall follow the event, and it was within the discretion of the learned District Judge to pass any orders he thought fit in regard to the costs. We do not think that any sufficient reason has been made out for departing from the usual rule or for interfering with the discretion which the learned District Judge has exercised.

The result then is that we accept the appeal and deducting the sum of Rs. 238-15-0 from the amount decreed, we make the decree one for Rs. 1,173-11-0, with proportionate costs in all Courts, and we further direct that the defendants shall pay interest on this sum at 6 per cent. per annum from the date of the District Judge's decree until the date on which they paid the amount decreed into the Executing Court. The plaintiff's appeal, as already stated, is dismissed with costs.

Defendants' appeal accepted in part.

Z. K. *Plaintiff's appeal dismissed.*

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 859 OF 1921.

June 19, 1923.

Present :—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Kulwant Sahai.

Bibi KANIZ ZOHRA—PLAINTIFF—APPELLANT

versus

Saiyed MUJTABA HUSSAIN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Charitable endowments—Mutwalliship—Sajjadanashini — *Succession — Females, rights of— Usage.*

Under the Muhammadan Law a woman is disqualified by reason of her sex from the right to act as *mutwalli* of endowed property where the office involves the performance of the duties of a *sajjadanashin* as well, unless there is some local usage or custom to the contrary. **[p. 214, col. 1.]**

In Muhammadan endowments the *sajjadanishini* and the *mutwallishiip* are different offices. The former is a priestly office involving the performance of spiritual and religious duties, the latter a purely secular one involving the management of the trust property. [p. 210, col. 2.]

A woman is incompetent to be a *sajjadanishin* according to the Muhammadan Law but is not disqualified from performing the duties of a *mutwalli* as such. [p. 210, col. 2.]

The origin of the rule that a woman is not qualified to perform the functions of a *sajjadanishin* is based upon the consideration that it is unseemly for a Muhammadan lady to perform duties which bring her in close and intimate association with the general public of the opposite sex. The disqualification is not confined only to those cases in which the office requires that spiritual instruction should be given by the *sajjadanishin* to his disciples. [p. 212, col. 2.]

No woman is qualified to become a *sajjadanishin* whose office involves the performance of religious and spiritual duties, not only those of *piri muridi* (preceptor and disciple) but those of leading the *fateha* and offering prayers and incense in a place of public worship. [p. 212, col. 2.]

KANIZ ZOHRA *v.* MUJTABA HUSSAIN.

According to the Muhammadan Law the duties of *mutwalli* who has not to perform religious duties or spiritual functions may be discharged by a proxy. But the office of *sajjadanishin* requires peculiar personal qualifications and the duties of this office cannot be discharged by proxy. [p. 213, col. 2.]

Although a minor might succeed by inheritance to the office of *mutwalli*, a substitute being appointed to carry out the duties during his minority, where the succession is not by inheritance, but by appointment or selection, a minor cannot become *mutwalli*. [p. 214, col. 1.]

The devolution of the office of *mutwalli* depends in the first instance upon the provisions of the *wakfnamah*, or trust deed, but in its absence the order of succession must be determined according to the usage of the particular endowment in question. [p. 210, col. 2.]

Appeal from a decision of the District Judge, Bhagalpur, dated the 7th February 1921, affirming a decision of the Subordinate Judge, Bhagalpur, dated the 20th February 1920.

Messrs. *S. Ahmad* and *Sultan-ud-din Hussain* and *W. H. Akbari*, for the Plaintiff Appellant.

Messrs. *H. Imam* and *S. M. Tahir*, for the Respondents.

JUDGMENT.

Miller, C. J.—This is an appeal on behalf of the plaintiff from a decision of the District Judge of Bhagalpur affirming a decision of the Subordinate Judge dismissing the suit.

Bibi Kaniz Zohra, the plaintiff in the suit, is the daughter of the late Saiyed Ijteba Husain who died in the year 1913 leaving as his heirs his widow and the plaintiff and a younger daughter. During his life time the plaintiff's father and uncle were the joint *mutwallis* of certain *wakf* property dedicated to the maintenance of a mosque, an *imambara* and a *dargah*, or shrine, of a saint situated in the town of Bhagalpur. At the time of her father's death the plaintiff was about 8 years old. She claims that she succeeded by inheritance to a half share in the management of the *wakf* property or, in the alternative, that she is entitled to share jointly in the management with her uncle Saiyed Mujtaba Husain, the first defendant in the suit. She further claimed that if she did not succeed by inheritance she was in fact appointed by her relations and the assembled congregation after her father's death. She instituted the present suit in the year 1919 whilst still a minor suing through her mother as next friend to establish her right to a share in the *mutwallishp* of the endowed property. The defendants in the suit are her uncle and her younger sister. The former alone filed a written statement and contested the plaintiff's claim.

The endowment is an old one. It is proved to have been in existence at the beginning of the last century and its origin is probably of much earlier date. There was at one time a *Khanqah* or monastery attached to it and it is found by both the Trial Court and the first Appellate Court that there has all along been attached to the institution a *sajjadanashin* and that this office still exists. It is further found that the management or *mutwallishp* of the trust property goes with the office of *sajjadanashin*. The qualifications of the two offices are different. The *sajjadanashini* is a priestly office involving the performance of spiritual and religious duties which it is admitted cannot according to Muhammadan Law be performed by a woman. The functions of a *mutwalli* are purely secular involving the management of the trust property and a woman is not disqualified by reason of her sex from performing the duties of a *mutwalli* as such. The devolution of the office of *mutwalli* depends in the first instance upon the provisions of the *wakfnamah*, or trust deed. But in the present case the *wakfnamah* has not been produced in evidence and probably no longer exists. In its absence the order of succession must be determined according to the usage proved to have prevailed with regard to the endowment in question. It is found that the usual course for appointing the *mutwalli* was that after the death of an incumbent a relation of the late *mutwalli* was chosen by the other relations and the well wishers of the *wakf* after consultation with respectable neighbours and gentlemen of the neighbourhood and also, if necessary, by the advice of the *sajjadanashins* or *mutwallis* of other *wakf* properties, and that in any particular case either the whole of this procedure or a part of it only might have been carried out, that these were the

usual guiding principles in choosing the successor. It would appear, therefore, that the devolution was not strictly according to the rules of heredity but was by election out of a limited class and the office could only be held by one qualified to act as *sajjadanashin*. The plaintiff claimed to have been elected by the relations after consultation in the manner described above.

The Subordinate Judge before whom the case came for trial was of opinion that the plaintiff had failed to make out that she had been elected.

The District Judge on appeal took a different view upon this part of the case. He was of opinion that the plaintiff had sufficiently made out her case that she was in fact elected as co-*mutwalli* with her uncle Mujtaba Hussain, but that as she was not qualified to perform the office of *sajjadanashin* her election was not valid. It was the plaintiff's case that in the institution with which we are concerned the office of *sajjadanashin* had become extinct and had ceased to exist many years ago before the time of her grand-father who was the *mutwalli* of the *wakf* property, and the main contention in both the lower Courts centred round this issue. The Judge of the Trial Court in his judgment says "There is no dispute that the plaintiff cannot be a *sajjadnashin*; but her case is that this office has become extinct since the time of Irtiza Hussain and he with his successors has been in possession in the capacity of a *mutwalli* only". The learned District Judge on appeal also expressed the matter thus: "It is a common ground of both appellant and respondents that as Kaniz Zohra is a woman she cannot exercise the functions of a *sajjadanashin*. If, therefore, the *sajjadanashinship* has not become extinct then the appellant admittedly has no case. I will, therefore, deal first with this point and my finding upon it will decide the appeal." Both Courts found that in fact the office of *sajjadanashin* had not become extinct and as a woman was admittedly disqualified from performing the functions of that office the plaintiff's suit must fail.

In appeal before us it was argued that the real issue had not been properly understood by the learned District Judge and that although the office of *sajjadanashin* had not become entirely extinct the spiritual duties as distinct from the performance of religious ceremonies no longer existed and that the learned District Judge had not dealt with this aspect of the case. It was argued that the spiritual duties of a *sajjadanashin* were the only offices which the *mutwalli* as such was not competent to perform and that the *mutwalli* or indeed any Muhammadan might perform the religious duties, that is to say, leading the prayers, reading from the *Koran* and performing the *urs* and *fatcha* and carrying out the other duties required by the Muhammadan ritual. The learned Counsel for the appellant referred to the evidence of the defendant himself in which he admitted that there was no system of *piri muridi* in the family. The *pir* is the spiritual instructor and the *murid* is the disciple or pupil and the system referred to is that of giving spiritual instruction to the disciples. He contended that the origin of the rule that no woman could act as *sajjadanashin* was based upon the fact that by Muhammadan Law a woman may not allow her skin to be touched by a man outside the circle of her immediate blood relations whereas the spiritual instruction known as *piri-muridi* required that the pupils or disciples should on some occasions kiss the hand of the *sajjadanashin*. No authority for this limited disqualification was cited but a passage in Macnaghten's Principles and Precedents of Muhammadan Law, second edition, was quoted. The passage is contained in a note at page 343 and reads thus:—

"The meaning of the term *sajjadanashin*, which is synonymous with *gaddi nashin*, is thus given by *Meninski*:—*Considens in tapete sacras preces peracturus aliisque proeiturus antistes.*" This officer is frequently confounded with the *mutwalli*, that is, the trustee or superintendent of the endowment, although they are quite distinct; the one having charge of the spiritual, the other of the

temporal, affairs of the endowment. The office of trustee may be held by a woman, and the duties may be discharged by proxy, whereas the office of superior requires peculiar personal qualifications".

There is a further passage on page 332 of the same volume which was also relied upon. It is as follows:—

"Females are not competent to assume the office of superior of an endowment; and such an act is at variance with the usage of the country, because it is the duty of the superior to instruct and guide his disciples, to teach his scholars, and to keep their company continually in private and in public, and this cannot be done with propriety by a woman, whose duty it is to live retired and secluded."

The learned Counsel argues from this that the only obstacle in the way of a woman acting as *sajjadanashin* is that the duties of the office require the incumbent to keep company in private and in public with his disciples and that as there were no disciples in the present case the disqualification did not exist. A passage was also relied upon from the judgment of Abdur Rahim, J. in the case of *Sajjada Shah Mahamad Usuf v. Shaw Habit* (1) in which the question was whether the Court had power to remove a *sajjadanashin* and appoint some one else in the office. In that case the learned Judge speaking of the duties which were actually performed by the incumbent in the particular case before him says at page 680 of the report "In short the duties ordinarily attached to the office of a *sajjadanashin* did not appertain to the position which the defendant and his ancestors have been occupying. All that they had to do was to conduct the annual *urs* and to offer *fatehas* at tombs, and none of these could be said to be functions incapable of being performed by other Muhammadans. As regards maintenance of the daily service at the mosque or of the special services in the mosque on Fridays or on the occasion of the Ramzan, the Eedul Fitar and the Bakrid, the work was capable of being attended to by any *mutwalli* of a mosque." It cannot be supposed, however, that in delivering this opinion the learned Judge had in mind the question of whether a woman could perform the duties to which he was referring. That the duties referred could be performed by a *mutwalli* not specially qualified as a *sajjadanashin* may be conceded, but the opinion of Abdur Rahim, J., above quoted does not touch upon the question of sex disqualification. No doubt the origin of the rule that a woman was not qualified to perform the functions of a *sajjadanashin* is based upon the consideration that it is unseemly for a Muhammadan lady to perform duties which bring her in close and intimate association with the general public of the opposite sex but there seems to be no reason why the disqualification should be confined only to those cases in which the office requires that spiritual instruction should be given by a teacher to his disciples. Whatever may have been the exact nature of the objections upon which the disqualification of a woman to act as *sajjadanashin* was originally based it would appear to have become a settled rule at the present day that no woman is qualified to become a *sajjadanashin* whose office involves the performance of religious and spiritual duties, not only those of *pir muridi* but those of reading the *fateha* and offering prayers and incense in a place of public worship. In *Mujavar Ibramb bi v. Mujavar Hussain Sheriff* (2) it was held that a woman is not competent to perform the duties of *mujavar* of a *dargah* which are not of a secular nature. In that case the lands had been dedicated for the reading of the *fateha*, for the supply of water, lights, flowers, and other things requisite for the services to be performed at a *dargah* and for the support of those by whom the services should be performed. In that case the learned Judges stated:—

"It appears from the evidence that the office of *mujavar* entails the discharge

(1) 53 Ind. Cas. 677; (1919) M. W. N. 662;

(2) 3 M. 95; 5 Ind. Jur. 190; 1 Ind. Dec. (N. S.) 623;

of duties of a spiritual character, such as reading the *fateha*, offering prayers and incense, etc., which could not conveniently be performed by a woman. There is no satisfactory evidence that the office has ever been held by a woman, except in one instance, and that was at a different place, and in that case it is admitted there were in the family in which the office was hereditary no male members by whom its functions could be discharged.

"The question as to the competency of a female to hold the office was in reference to the same endowment considered and determined by this Court in the negative in *Hussain Bibi* v. *Hussain Sheriff* (3) where a claim was advanced by the widow of a deceased *mutavar* to be declared entitled to discharge in her turn the duties of the office and to obtain possession of a share of the endowed property. That decision notices the distinction which exists between a trusteeship for secular purposes, which can be held by a woman, and an office entailing religious duties, for which a woman is not eligible, and rests on the authority of Macnaghten (Muhammadan Law, 343, Note, and the cases cited in the appendix to that work.)"

On referring to Mr. Macnaghten's note already quoted it will be found that he makes no difference between spiritual and religious duties, the antithesis being between spiritual and temporal duties, the latter being capable of performance by a woman and the former not. The authority of other text writers also seems opposed to the view that a woman can perform the duties of a *sajjadanashin*. Mr. Syed Ameer Ali a text writer of repute states the matter thus: "The office of *mutwalli* is an office of personal trust, and a person who cannot discharge the duties of the trust personally, nor be responsible for their due discharge, cannot appoint a deputy. But where the *mutwalli* has to perform religious duties or spiritual functions in connection with the *wakf*, which, as regards men, can only be performed by a man, a woman cannot be appointed to the office. For example, if the *mutwalli* is also the superior of a religious establishment, and, as such, has to officiate on occasions of religious festivals, a woman is precluded by her sex from holding the *towliat*" In support of this opinion he relies amongst other authorities upon the case already referred to of *Muiawar Ibram Bibi* v. *Mujavar Hussain Sheriff* (2) (Muhammadan Law, 4th Edition, Vol. I, 443). Sir Roland Wilson in his treatise on Anglo Muhammadan Law, 5th Edition, page 357, paragraph 321, states the law thus—"A female may be the *mutwalli* of an endowment and so may a non-Muhammadan; but if the endowment be for the purpose of divine worship, neither females nor non-Muhammadans are competent to hold the office of *sajjadanashin*, or spiritual superior." Mr. P. R. Ganapathi Iyer in his book on Hindu and Muhammadan endowments, 2nd Edition, page 435, after pointing out that the office of *sajjadanashin* and *mutwalli* are separate and distinct says" The *sajjadanashin* has charge of the spiritual affairs of the endowment. But the *mutwalli* has charge of its temporal affairs. One consequence of this is that a woman may be a *mutwalli* but cannot be a *sajjadanashin*. According to the Muhammadan Law, the duties of *mutwalli* who has not to perform religious duties or spiritual functions may be discharged by proxy. But the office of *sajjadanashin* requires peculiar personal qualifications and duties attached to that office cannot be discharged by proxy, A woman, therefore, cannot be appointed to such office.... It may happen that in some cases the office of *mutwalli* and *sajjada* are combined in the same person. Then also a woman cannot be appointed."

It is found in the present case the *Mutwalliship* appertains to the office of *sajjadanashin* and as that office requires certain personal qualifications which cannot be performed by proxy the question does not arise in the present case whether a female could be appointed *mutwalli* delegating the performance of religious offices to a proxy. This question was considered in the case of *Munnavaru Begam Sahibu* v. *Mir Mahapalli Sahib* (4)

(3) 4 M. H. C. R. 23.

(4) 51 Ind. Cas. 489; 41 M. 1033.

where it was held that a religious office can be held by a woman under the Muhammadan Law unless there are duties of a religious nature attached to the office which she cannot perform in person or by the deputy. In that case Abdur Rahim, J., remarked: "The rule prohibiting women from being appointed to such offices is not confined to the office of *sajjadanashin* but there may be other offices which she may not be able to perform, for instance, that of an *Imam*, in a mosque where she would have to lead the congregation." The learned Judge was of opinion that the prohibition did not arise from any absolute injunction of Muhammadan religion or law but from local usages and customs. In the present case no local usage or custom has been proved which would entitle a woman to act as *sajjadanashin* nor was any instance given in which a woman had occupied that office in the mosque in question. In my opinion the plaintiff is disqualified by reason of her sex from the right to act as *mutwalli* of the property in suit by reason of the fact that the office involves the performance of the duties of a *sajjadanashin*.

Moreover there is, I think, another fatal objection to the plaintiff's claim. Although a minor might succeed by inheritance to the office of *mutwalli*, a substitute being appointed to carry out the duties during his minority, it seems to be settled law that where the succession is not by inheritance but by appointment or selection a minor cannot be appointed. Mr. Syed Ameer Ali, Muhammadan Law, Vol. I, page 445 says:—

"In the absence of any provision in the trust-deed as to the mode of succession, or of any evidence of usage, the *mutwalli* may, on his death-bed, nominate his successor, and such nomination will be valid without any judicial order. But in order that the nomination may be effective it is necessary that the person so appointed should be adult and possessed of understanding. All the authorities are agreed that a minor can not lawfully be appointed a *mutwalli*. The *Fatawai Alamgiri* lays down the principle thus:—

"'And it is a condition to the validity of the appointment of a *mutwalli* that he should be adult and possessed of understanding and thus it is stated in the Bahr ur-Raik.'

"So also in the *Radd-ul Muhtar*, the conditions necessary to the validity (of the appointment) are puberty (*bulugh*) and understanding (*aakl*)."

The learned author further points out that where the office of *mutwalli* devolves upon a minor by virtue of the provisions of a trust-deed, in such a case the appointment will remain in abeyance until majority is attained. So also when the *towliat* is hereditary in a family and a minor succeeds, the Kazi shall not remove him but shall appoint another to discharge the duties of the office during his minority. Mr. Tyabji's Principles of Muhammadan Law, page 410, also states clearly:—'Where an infant or person of unsound mind is purported to be appointed as a *mutwalli* his appointment is void. Where the office of *mutwalli* devolves upon a person who is a minor, the Court may appoint another *mutwalli* to act in his place during his minority." In the present case the plaintiff's right is based not upon succession but upon appointment and her minority appears to be fatal to the claim. In my opinion this appeal should be dismissed with costs.

Kulwant Sahai, J.—I agree.

Appeal dismissed.

N. H.

MADRAS HIGH COURT.

CIVIL APPEAL NO. 201 OF 1921.

October 5th, 1923.

Present:—Mr. Justice Phillips and Mr. Justice Venkatasubba Rao.

VEDLA VENKATASUBBAMMA
PLAINTIFF—APPELLANT
versus
VEDLA VENKAMMA AND OTHERS—
DEFENDANTS—RESPONDENTS.

Estoppel—Adoption by widow—Representation of authority to adopt by husband—Conduct.

A Hindu widow, who in adopting a boy to her husband represents that she was authorised

by her husband to do so and thereafter by her words and conduct holds out and treats the boy as the lawfully adopted son, is estopped from denying that she had the authority of her husband to adopt or that the adoption was a valid one. [p. 215, col. 2.]

Dharam Kunwar v. *Balwant Singh*, 15 Ind. Cas. 673; 34 A. 398; 16 C. W. N. 675; 9 A. L. J. 730; 14 Bom. L. R. 485; (1912) M. W. N. 641; 12 M. L. T. 95; 16 C. L. J. 60; 23 M. L. J. 200; 39 I. A. 142 (P. C.) and *Ramachari* v. *Saraswati Ammal*, 60 Ind. Cas. 246; 12 L. W. 544; (1920) M. W. N. 721, followed.

Appeal against a decree of the Court of the Subordinate Judge, Bezwada, in O.S. No. 68 of 1919.

Messrs. *T. R. Ramachandra Iyer* and *S. Srinivasa Iyer*, for the Appellant.

Messrs. *A. Krishnaswami Iyer* and *V. Suryanarayana*, for the Respondents.

JUDGMENT.—The plaintiff in this case is the widow of one Vedala Janakiramayya who is said to be the adopted son of the first defendant's husband. The first defendant has denied both the *factum* of the adoption and also its validity. The Subordinate Judge has found that the ceremony of adoption did actually take place and that the plaintiff's husband has been treated as an adopted son by the first defendant, but he has held that the first defendant not having had authority from her husband or from the *sapindas* to make the adoption, the adoption is invalid; and he has further found that the first defendant is not estopped from raising the plea of the invalidity of the adoption. In appeal, the *factum* of the adoption is not disputed and the only point which is seriously argued is that the authority given by the husband has not been actually proved, but it is contended that the first defendant by her conduct and acts from the time of the adoption until the present day, is estopped from denying that the plaintiff's husband was really her adopted son.

There are many facts which we think may be referred to in detail, as the question of estoppel must depend upon the evidence and we will proceed to mention the chief circumstances which would lead to an inference in coming to a decision. In the first place, when this boy was adopted his name and house name were changed. He took the house name of the first defendant's husband and the name of his adopted father's father. Immediately after the adoption, the first defendant performed his *upanayanam* ceremony. Some years later, the first defendant performed his marriage and also *graphpravesam* ceremony. The adopted boy performed the *shradha* for the first defendant's husband and it also appears that he had on share in the property belonging to his natural family. The partition in the natural family has not been actually proved but, from the only evidence available, it seems clear that Janakiramayya did not receive any of his natural family's property. There is thefurther circumstance that, when Janakiramayya's natural mother died, the plaintiff did not observe polution and, if Janakiramayya had been a member of that family, she must undoubtedly have done so. These circumstances are all very strong evidence that the first defendant did adopt the boy and treated him as a lawfully adopted son; his performance of the ceremonies mentioned was one that could only be done by an adopted son, and, therefore, the whole course of the conduct of the first defendant, and, as far as we know, of other people, shewed a recognition of the validity of Janakiramayya's adoption. In this connection we may refer to the case decided by the Privy Council in *Dharam Kunwar* v. *Balwant Singh* (1), which in many respects resembles the facts here. It is suggested in *Ramachari* v. *Saraswati Ammal* (2), that the remarks of the Privy Council in this case are mere *obiter dicta* but we think that is hardly so, although they decided the question in issue in two ways; once as a question of fact and again on the question of estoppel, which had been the only one decided by the Allahabad High Court. In that judgment we find the following passage relating to the widow who was held to be estopped from disputing the validity of the adoption which she had made: "She has asserted her authority in the most solemn manner under her hand and seal, and her conduct both before and after the

(1) 15 Ind. Cas. 673; 34 A. 398; 16 C. W. N. 675; 9 A. L. J. 730; 14 Bom. L. R. 485; (1912) M. W. N. 641; 12 M. L. T. 95; 16 C. L. J. 60; 23 M. L. J. 200; 39 I. A. 142 (P. C.).

(2) 60 Ind. Cas. 246; 12 L. W. 544; (1920) M. W. N. 721.

assertion has been of a like unequivocal character. She could not now be allowed to change her story without grave injustice ensuing to those who have acted in reliance upon her deliberate and repeated representations. The respondent is now severed from his natural family; he has undergone a change of social status which may or may not be beneficial to him, but which has certainly so altered his mode of life as to make a relapse into his former condition a grievous hardship upon him. He and his friends have been driven to expenses in the maintenance of the privileges with which the Rani purported to endow him. He married on the faith of this adoptive mother's word, and, no doubt, has creditors who have sold him goods or lent him money in like reliance on her good faith." Many of these facts we find in the present case and we think that they are sufficient to constitute an estoppel. It was contended by Mr. Krishnaswamy Aiyar for the respondent that the representation by the first defendant that the boy had been adopted was nothing more than a representation that the ceremony of adoption had taken place and that it could not be treated as a representation that that ceremony was validly performed. In the circumstances of this case we are not prepared to accept the plea. It would be very difficult at this late stage to prove the authority considering that the adoption took place as long ago as 1897; and, when the first defendant by her words and acts held out the boy as her adopted son, it is difficult to restrict that representation to a mere assertion that the ceremony of adoption had taken place. In addition to her conduct we have the deliberate statement made by her in Exhibit K, which is the earliest opportunity afforded to her to make a representation in public, that she had her husband's authority to adopt. There is also evidence that she asserted this authority at the time of the adoption, which we see no reason to discredit. This coupled with her conduct is quite sufficient to constitute an estoppel and we must hold accordingly that she is estopped from denying the adoption.

A further question is raised by the respondents as to Item No. 3, which the second defendant claims to have obtained under some arrangement with the first defendant in 1897. The second defendant has not been examined and the first defendant does not support his case, and we have only very vague indications from the evidence to enable such a case to be put forward It certainly has not been proved.

The appeal will be allowed and the plaintiff will have a decree for possession of the suit property and for mesne profits at the rate of Rs. 250 per annum from the date of plaint. As the first defendant is now dead, the mesne profits will be payable by the second defendant and defendants Nos. 3 to 6. The question of their respective liabilities will be determined in execution. The plaintiff will have her costs throughout against the second defendant and the second defendant will pay Government the court-fees on the plaint and the appeal memorandum.

V. N. V. S. D. *Appeal allowed.*

MADRAS HIGH COURT.

REFERRED CASE NO. 20 OF 1922.

September 25, 1923.

Present :—Sir Walter Salis Schwabe, KT., Chief Justice, and Mr. Justice Coutts-Trotter.

THE SECRETARY, BOARD OF REVENUE, LAND REVENUE AND SETTLEMENT (INCOME TAX)—REFERRING-OFFICER

versus

R. M. A. R. R. M. ARUNACHELAM CHETTIAR—ASSESSEE.

Income Tax Act (VII of 1918), s 3 (2) (viii)—Exchange profits—Assessment to Income tax—Casual profits.

A Nattukottai Chetty carrying on business in Madras and elsewhere as Banker and money-lender remitted from Madras sums aggregating over four lakhs of rupees to Penang through his banking agents, such sums being invested there in Straits Settlements dollars and ultimately reconverted into rupees and remitted back to Madras. The remittances were made on eight occasions and the

re-transfer to Madras on thirteen occasions. Owing to fluctuations of exchange between dollars and Rupees the Chetty made a profit of considerable amount on the transactions, and was assessed to income-tax. These dealings in exchange had become part of the assessee's general Banking business:

Held, that the income, not being receipts arising from business of a casual and non-recurring nature was rightly assessed to Income-Tax.

In considering whether a case comes under section 3 (2) (*viii*) of the Income Tax Act, receipts of a casual and non-recurring nature are only exempted when they are not receipts arising from business. The question to be considered is whether a particular receipt is properly brought into account or omitted in carrying the profits of a business. If the transactions form part of the ordinary business of the assessee, the profits or losses must be brought into account. But if the transactions are outside the scope of the ordinary business of the assessee, they need not be brought into account. The question is one of fact in each case whether the transactions form part of the ordinary business or not. [p. 217, col. 2; p. 218, col. 1.]

California Copper Syndicate Co., Limited v. *Harris*, (1904) 5 Tax Cas. 159; 6 F. 894, *Hudson's Bay Company* v. *Stevens*, (1909) 5 Tax Cas. 424; *Commissioner of Taxes* v. *Melbourne Trust, Limited*, (1914) A. C. 1001; 84 L. J. P. C. 21; 30 T. L. R. 685 and *Beynon* v. *Ogg*, 7 Tax Cas. 125, followed.

Case stated under section 51 (1) of the Income Tax Act of 1918 by the Secretary, Board of Revenue, Land Revenue and Settlement (Income-Tax) in I. T. A. No. 316 and S. T. A. 64 of 1921-22 in his letter dated the 16th October 1922.

The Government Pleader, for Referring Officer.

Messrs. *A. Krishnaswamy Aiyar* and *M. Patanjali Sastri*, for the Assessee.

JUDGMENT.

Schwabe C. J.—The assessee is a Nattukottai Chetty carrying on business in Madras and elsewhere as Banker and money-lender. In the year of assessment, he remitted from Madras sums aggregating over four lakhs of rupees to Penang, such sums being invested there in Straits Settlements dollars, and ultimately reconverted into rupees and remitted back to Madras. The remittances were made on eight occasions within a period of four months in 1919 and the re-transfer to Madras was on thirteen occasions covering a period of four months from the end of 1920 to the beginning of 1921. Owing to the fluctuations in exchange, which varied between 93 and 175 rupees per 100 dollars the assessee made a profit of a considerable amount on the transaction. He has been assessed to income-tax on that profit, and the question referred to this Court is whether he has been correctly assessed. Under section 51 (1) of the Income Tax Act which was then in force, any question which has arisen with reference to the interpretation of any of the provisions of this Act may be referred to the High Court. This action probably gives wider powers than section 66 of the Indian Income Tax Act of 1922, the consolidating Act now in force, which limits the references to the High Court to questions of law. It is not, however, necessary to consider the exact meaning of the words of these sections because, the facts having been found, the question whether or not they bring the income within the reach of any particular section of the Act is a question of law.

Section 3 of the Act applies to all income from whatever source it is derived, if it accrues, or arises, or is received in British India. Certain exceptions are set forth in section 3 (2) and among those exceptions is to be found (*viii*) "any receipts not being receipts arising from business or the exercise of a profession, vacation, or occupation which are of a casual and non-recurring nature." By the combined effect of sections 5 and 9, income derived from the business is chargeable to income-tax in respect of the profits of any business carried on by the assessee. In the United Kingdom, income-tax is payable on the balance of profits and gains derived from carrying on a trade or business. I can find no distinction in this matter between the laws of the two countries. The English Acts have not got the exception in so many terms of receipts of a casual and non-recurring nature; but, as by the words of section 3 (2) (*viii*) of the Indian Act, receipts of a casual and non-recurring nature are only exempted when they are not receipts arising from business, the question to be considered both in India and England is whether a particular receipt is properly brought into account or omitted in arriving at the profit of a business. If the transactions are business transactions and result in a profit or loss made in the carrying on of the business, they must be brought into account; otherwise not. The questions

which have arisen for decision have been whether particular transactions form part of a business carried on by the assessee. They need not be part of some already established business but they must together form business. If the transactions form part of the ordinary business of the assessee the profits or losses on them must, of course, be brought into account. But where the transactions are outside the scope of the ordinary business of the assessee it is often a difficult question to decide whether or not they are to be treated subject to income-tax. Profits may be made by the realisations of security or by the sale of land or moveable property and, in the case of one man they may be merely successful realisations of assets or alterations of investments while in the case of another man they may form part of the income of a business. To give a simple illustration a Barrister might buy a picture and at a later date when the works of the particular artist were in demand, sell that picture and realise profit. No income-tax would be payable on this profit. If a picture dealer bought a picture and on the same events happening sold it at a profit, that profit would be a profit earned in his business and would be liable to income-tax. So, too, profits made on isolated specualtiors are not liable to income-tax, but those made in speculation of a similar kind as a part of business would be liable. A difficult question may, however, arise as to whether the transactions are of such frequency as to amount to carrying on a business. The distinction is well illustrated by the cases of the *California Copper Syndicate Co., Limited* v. *Harris* (1) and *Hudson's Bay Company* v. *Stevens* (2). In the former a Company was formed for the purpose of acquiring and reselling mining property and also for working such property. It acquired and worked various properties and then re-sold the whole at a profit, and it was held that such profit was liable to income-tax and Lord Justice Clarke Macdonald in the course of the judgment subsequently approved by the Privy Council in *Commissioner of Taxes* v. *Melbourne Trust Limited* (3) said: "The question to be determined being is the sum of gain that has been made a mere enhancement of value by realising a security or is it a gain made in an operation of business in carrying out a scheme for profit-making." In the latter, a Company received by grant from the Crown and as consideration for surrender of their charter, large tracts of land and then proceeded over a period of time to sell that land in small lots and it was held that the profits made on these cases were not liable to income-tax, the sales being merely realisation of assets, the Company not carrying on trade in buying and selling lands. In *Beynon* v. *Ogg* (4) a Company whose ordinary business was that of coal merchants, Insurance Brokers and Agents of colliery Companies purchased on its own account as a speculation 250 Railway Coal Trucks and subsequently got rid of them at a profit. It was held that the profit was made in the operation of the Company's business. It was pointed out by Sankey, J., that though in most cases an isolated transaction does not fall to be chargeable, it was not possible to say that the mere fact that it was an isolated transaction at once takes it out of the category of chargeable property and it was necessary to look at the number of the wagons bought, the amount invested and how they were sold, and, in fact, to look at the whole circumstances to say whether the assessee had embarked on the purchase of Railway wagons as part of his business.

Turning to the facts of this case, the assessee was a dealer in money and had by reason of his dealings with the Straits Settlements facilities at hand for dealings in exchange between Madras and the Straits Settlements. He had at Penang agents, themselves bankers, who were in the habit of collecting for him outstandings in his money-lending business, and as and when required remitting them to India and in a process converting dollars into rupees. During the periods in question in this case, he got regular information by letter

(1) (1904) 5 Tax Cas. 159; 6 F. 894.
(2) (1909) 5 Tax Cas 424.
(3) (1914) A. C. 1001; 84 L. J. P. C. 21; 30 T. L. R. 685.
(4) 7 Tax Cas. 125.

RAJEPPA RANAPPA KUNDAGOL *v.* GANGAPPA JOTAPPA MANDWE.

and cable from these agents as to the movements of exchange in the Straits Settlements. He sent large sums of money extending over a period of four months. At first the market went against him and he sent increasing quantities of rupees, no doubt with a view to averaging the cost of the dollars. The dollars were by arrangement with the agent left on deposit carrying interest, a fact not in itself conclusive and when he got them back, by reason of the increase in the value of the rupee he was able to realise by degrees an increasing profit. Taking all these facts into consideration, I think that the right inference to be drawn is that in this case these dealings in exchange had become part of the assessee's Banking business, and I think that even looked at apart from his ordinary business, he did not enter into these transactions as an isolated investment or capital or speculation, but as a business of a dealer in exchange.

On these grounds, I hold that the decision of the Commissioner is correct. The assessee must pay the costs.

Coutts-Trotter, J.—I agree.

Reference answered.

V. N. V.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 483 OF 1921.

April 10, 1922.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

RAJEPPA RANAPPA KUNDAGOL—PLAINTIFF—APPELLANT

versus

GANGAPPA JOTAPPA MANDWE—DEFENDANT—RESPONDENT.

Hindu Law—Bombay Presidency—Inheritance—Atmabandhus—*Mother's brother's son and mother's sister's son.*

According to the Mitakshara, as interpreted in the Bombay Presidency, mother's brother's son and mother's sister's son, being *atmabandhus* are equally distant and, therefore, are entitled to inherit the property equally. [p. 222, col. 1.]

Appandai Vathiyar v. *Bagubali Mudaliar*, 5 Ind. Cas. 280; 33 M. 439; (1910) M. W. N. 44; 7 M. L. T. 203; 20 M. L. J. 275; *Ram Charan Lal* v. *Rahim Bakhsh*, 34 Ind. Cas. 108; 38 A. 416; 14 A. L. J. 538; *Mohandas* v. *Krishnabai*, 5 B. 597; 3 Ind. Dec. (N. S.) 393 and *Tirumalachariar* v. *Andal Ammal*, 30 M. 406; 2 M. L. T. 357; 17 M. L. J. 285, dissented from.

Dattatraya v. *Gangabai*, 77 Ind. Cas; 17, 24 Bom. R. 69; 46 B. 541; (1922) A. I. R. (B.) 321, referred to.

Second appeal from the decision of the District Judge, Dharwar, in Appeal No. 232 of 1919, reversing the decree passed by the Assistant Judge, Dharwar, in Civil Suit No. 31 of 1919.

Mr. *R. A. Jahagirdar*, for the Appellant.

Mr. *Y. N. Nadkarni*, for Mr. *K. H. Helkar*, for the Respondent.

JUDGMENT.

Shah, J.—The question of law arising in this appeal is as to how the property of a Hindu would devolve when the nearest relations of the deceased are his mother's sister's son and mother's brother's son.

The facts are not in dispute. Nagapa was the last male holder and the adopted son of Jivapa. On his death the property devolved on his adoptive mother Pirava. She alienated the property in suit to her brother's son who is defendant No. 1. She died, and thereafter defendant No. 2, who is found to be her sister's son, sold the property to the plaintiff. On Pirava's death the inheritance is to be traced to Nagapa. The plaintiff claims through the adoptive mother's sister's son and defendant No. 1 claims as the mother's brother's son. The alienation by Pirava ceased to be operative on her death.

The Trial Court held that the mother's sister's son was the preferential heir, and decreed the plaintiff's claim. The lower Appellate Court held that the mother's brother's son was the preferential heir and accordingly dismissed the plaintiff's suit with costs.

In the appeal before us the same question arises, and we have to decide as to what are the rights of the competing heirs to the inheritance of Nagapa.

The view of the Trial Court is in accordance with the decision of the High

Court of Madras in *Appandai Vathiyar* v. *Bagubali Mudaliar* (1) and the view of the Appellate Court is supported by the decision of the Allahabad High Court in *Ram Charan Lal* v. *Rahim Bakhsh* (2). There is no decision of this Court on the point. The only decision to which a reference may be made is the case of *Mohandas* v. *Krishnabai* (3) in which the mother's brother (an *atmabandhu* not expressly mentioned) was preferred to the mother's sister's son (an *atmabandhu* expressly mentioned) on the ground of propinquity.

Here we have to consider the claims of the mother's sister's son and the mother's brother's son. Both are males, both are *atmabandhus* expressly mentioned in the Mitakshara and the Vyavahara Mayukha, both are equally removed from the propositus and they are both related on the mother's side.

Considering the point with reference to the texts exclusively, apart from the decisions, it is clear from the Mitakshara Chapter II, section 6, placita 1 and 2 (Stokes' Hindu Law Books, page 448) that both are *atmabandhus*, and there is nothing to guide us beyond this that by reason of near affinity the cognate kindred of the deceased himself are his successors in the first instance; on failure of them his father's cognate kindred; or if there be none, his mother's kindred." The only ground for determining the preference of one *bandhu* over the other is 'near affinity' or 'propinquity' the word in the text for it being *antarangatva*. It is now settled beyond controversy that the lists of *bandhus* are merely illustrative and not exhaustive and that nothing is laid down by Vijnansevara beyond this that *atmabandhus* are to be preferred to *pitribandhus* and that *pitribandhus* are to be preferred to the *matribandhus*, and that the reason of the preference is propinquity. In the Vyavahara Mayukha also we find the same thing, and nothing more. (See Mandlik's Hindu Law, page 82). After referring to the Smriti texts, specifying the different classes of *bandhus*, which have been quoted by Vijnanesvara in the Mitakshara, the author of the Mayukha says that the order (of succession) is as stated in the text. I have given the English translation of this passage as rendered by Mr. Mandlik, who has added a foot-note expressing his opinion that the order must be taken to have been specified in the texts even as regards each class of *bandhus*. Apart from the argument based on this note, there is nothing in the Vyavahara Mayukha which throws any further light on the point now under consideration. It is not necessary to refer to other works on Hindu Law. It is enough to point out that there is nothing in the texts or the commentaries which are accepted as authorities in this Presidency to show that any test for determining the question of preference among *bandhus* of the same class other than that of propinquity is laid down.

All other considerations to be found in modern books on Hindu Law are useful in determining the nearness of affinity: but there is no express reference thereto to be found in the texts, the only test mentioned being propinquity. Speaking with reference to this Presidency I think that the only test that has been applied, and that ought to be applied, is propinquity to the deceased. Applying that test to the facts of this case without reference to any other consideration it seems to me that both are equally removed from the propositus.

It is urged, however, that when that is the case, considerations of the relative religious efficacy of the oblations offered by these relations ought to be considered. Both the Madras and Allahabad High Courts have rejected the argument of relative religious efficacy in the case of these two *bandhus*. It is held that it affords no safe basis for preferring one to the other. I do not consider it necessary to deal with this argument at length. In this Presidency the test has not been accepted as sound in the case of distant relations—like *bandhus*. Its application is apt to lead to confusion: also the test when applied to the case of the two *bandhus* that we are con-

(1) 5 Ind. Cas. 280; 33 M. 439; (1910) M. W. N. 44; 7 M. L. T. 203; 20 M. L. J. 275.
(2) 34 Ind. Cas. 108; 38 A. 416; 14 A. L. J. 538.
(3) 8 B. 397; 3 Ind. Dec. (N. S.) 393.

cerned with fails to yield any such result as would justify the preference of one over the other. It is enough to state that on this point I accept the view of the Madras and Allahabad High Courts.

It is next urged that on the ground stated in the foot-note in Mr. Mandlik's book on Hindu Law, to which I have already referred, the mother's sister's son should be preferred to the mother's brother's son as having been mentioned first. Though there is no express reference to this foot-note in the judgment in *Mohandas* v. *Krishnabai* (3) it appears that as far back as 1881 the opinion was expressed with reference to the words used by Nilakantha in the Vyavahara Mayukha that thereby he seems to intend no more than is stated in the Mitakshara. It is difficult to assume that the foot-note in Mandlik's Hindu Law, which was published in 1879, was not brought to the notice of the learned Judges. Apart from that, however, I think that the opinion expressed with reference to the meaning of the words used in the Vyavahara Mayukha is correct, if I may say so with respect. I do not desire to discuss this point in detail. I do not think it is reasonable to apply the rule referred to in the foot-note to the order mentioned in the Smriti texts relating to the illustrative lists of *bandhus*. I can understand the force of this argument when applied to a text like the well-known text where the different heirs are mentioned in their order. But where the *bandhus* are only intended to be indicated, it seems to me that it is not right to attach any importance to the order in which they are mentioned in each class. I feel justified in taking this view by the fact that Vijnanesvara does not refer to this order as having any significance though he expressly points out that the order is indicated as regards each class of *bandhus*.

It is further urged on behalf of the respondent that as two females intervene between the propositus and the defendant No. 2, he should rank after defendant No. 1 as an heir, and the decision in *Tirumalachariar* v. *Andal Ammal* (4) has been relied upon in support of that general consideration. The Allahabad High Court has decided in favour of the mother's brother's son relying to a certain extent upon this ground. It seems to me, however, that there is no basis in the Mitaksahra or the Vyavahara Mayukha for the general proposition which has been stated in the above Madras case somewhat too broadly. I quite admit that the circumstance of more females than one intervening would render it easy for the Court in many cases to apply the test of propinquity, and to decide who is the nearer *bandhu*. But I do not think that a *bandhu* could be necessarily described as being more remote than another on the mere ground of two females intervening between him and the propositus. It depends upon the particular relationship. No doubt among the modern writers on Hindu Law there is weight given to this consideration; and in the various tables that are to be found the effect of this consideration is apparent. But all the writers are by no means agreed, for instance it appears from Golap Chandra Sarkar Sastri's Treatise on Hindu Law, page 96 (4th Edition), that in his opinion there is no basis for preferring one to the other on this ground. I refer to this opinion as showing that the proposition is not universally accepted. But I base my view upon the fact that the propinquity is the only test sanctioned in the Mitakshara and no general proposition which is not in terms sanctioned by Vijnanesvara can be laid down as being decisive. I think that each case should be dealt with on the basis of the particular relationships existing between the *bandhus* and the propositus: and speaking with reference to these two *bandhus* in particular, I do not think that the mother's brother's son can be said to be nearer to the propositus than the mother's sister's son. In the recent case of *Dattatraya* v. *Gangabai* (5) in which this Court had to consider the subject of the succession among *bandhus*, we declined to prefer one *bandhu* to the other on the ground of

(4) 30 M. 406; 2 M. L. T. 357; 17 M. L. J. 285.

(5) 77 Ind. Cas. 17; 24 Bom. L. R. 691; 46 B. 541; (1922) A. I. R. (B.) 321.

the mother of the one being a preferential heir to the mother of the other. If the preference which may exist among the mothers is not to have any decisive significance, I do not see how the fact of the father of one *bandhu* being a preferential heir to the mother of another *bandhu*, if those persons were alive, could be allowed to determine the relative rights of their respective sons. As regards these particular *bandhus*, I think that this consideration is not sufficient to justify the preference of one to the other. The *antarangatva* (near affinity) of these two relations is much the same, and I am unable to discover any substantial ground for ranking one above the other. The result is that both are equally distant, and are equally entitled. It is clear that in the texts in which these *bandhus* are mentioned as illustrative of the class, there is no indication as to their relative rights *inter se*, and generally speaking it may be said that where the relationship is equally distant and there is no firm basis to prefer the one to the other, there is no reason why both should not be allowed to take equally. Just as nothing is indicated as to the order in which the *bandhus* in each class are to take *inter se*, nothing is indicated as to their taking equally in some cases. This alternative has been generally ignored in the discussions as to succession among *bandhus*, and sometimes the order is settled as if this alternative was not open at all. It seems to me, however, that in the case of these *bandhus* when there is nothing definite to enable the Court to decide the question of preference, there is no reason why we should go out of our way to find out some possible ground for such preference. In such a case there can be no objection to give effect to the view that as both are equally near to the propositus they ought to take equally.

I would, therefore, allow the appeal to that extent, set aside the decree of the lower Court and direct that the property of Nagappa be equally partitioned between the defendant No. 2 and defendant No. 1 and that the property sold to plaintiff be assigned to the share of defendant No. 2 as far as possible and handed over to the plaintiff.

Each party to bear his own costs throughout. The partition of lands liable to pay assessment to be effected by the Collector as provided by the Code of Civil Procedure.

Macleod, C. J.—I have nothing to add. I entirely agree with the conclusions arrived at in the judgment which has just been read.

N. K. *Appeal allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1705 OF 1921.

March 3, 1922.

Present:—Mr. Justice Scott-Smith.

HASTI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HIRA AND OTHERS—DEFENDANTS—RESPONDENTS.

Adverse possession—Remote reversioner.

An adverse possession of the property of the last male holder is not adverse to a remoter reversioner during the lifetime of the nearest reversioner, that is so long as his right to possession does not accrue. [p. 223, col. 2.]

Sundar v. *Salig Ram*, 9 Ind. Cas. 300; 26 P. R. 1911; 34 P. L. R. 1911; 33 P. W. R. 1911 and *Roda* v. *Harnam*, 18 P. R. 1895 (F. B.), followed; *Kaka* v. *Labh Chand*, 106 P. R. 1906; 162 P. L. R. 1906, not followed.

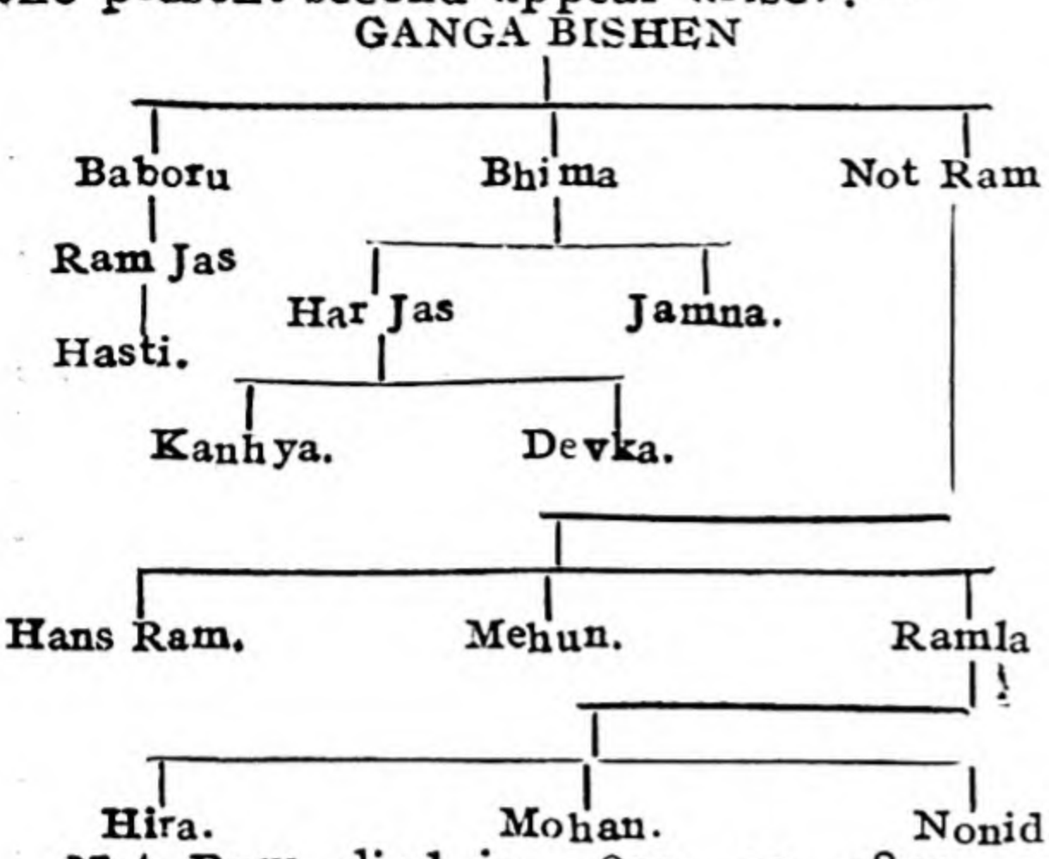
Second appeal from a decree of the District Judge, Delhi, dated the 16th May 1921, reversing that of the Munsif, First Class, Delhi, dated the 8th February 1921.

Mr. *Badri Nath Kapur*, for Dr. *Nand Lal*, for the Appellant.

Mr. *Raj Krishna*, for the Respondent.

JUDGMENT.—The following pedigree-table will be of assistance in understanding the facts of the case out of which

the present second appeal arises:—



Not Ram died in 1890 or 1891 and mutation of his land was sanctioned in favour of Hans Ram, Mehun and the sons of Ramla who had predeceased his father. At that time the whole of the land left by Ganga Bisken was joint, but in 1894 or thereabouts there was a private partition and the share of the descendants of Not Ram was separated off from the shares of Ganga Bishen's other two sons. In 1903 Mehun died and his land was mutated half in favour of Hans Ram, and half in favour of the sons of Ramla with Hans Ram's consent. The collaterals sued to contest this mutation but withdrew their suit with permission to sue again. In 1911, Jamna and others revived the suit of 1904 and got a declaratory decree protecting their reversionary rights in Mehun's land against the sons of Ramla, it being held in that suit that Ramla was a *pichhlag* and not the real son of Not Ram. Hans Ram's line has now died out, his widow having died in June in 1919. Hasti, Kanhya, Devka and Jamna brought the present suit for the land which came to the sons of Ramla upon the death of Not Ram in 1891. The first Court held that the suit was within time as the plaintiff's right to sue for possession only accrued upon the dying out of the line of Hans Ram. The lower Appellate Court holds that the suit on the ground that the plaintiffs are reversioners is not barred by limitation for the plaintiffs had no right to possess the land until the line of Not Ram died out. At the same time, the Court held that the descendants of Ramla had been in adverse possession of the land against the whole world since they obtained it upon the death of Not Ram, and that, therefore, the suit was barred by time. The plaintiffs have filed a second appeal in this Court and it is urged that though the possession of the sons of Ramla may from the very beginning have been adverse to Hans Ram and Mehun, the suit of the plaintiffs is not barred by time because they had no right to sue for possession until the line of Hans Ram had died out.

It is common ground that the question whether Ramla is the son or stepson of Not Ram is *res judicata*. The lower Appellate Court appears to have held that Ramla's sons got a share in the land by virtue of a gift from their uncles. But this was never pleaded in the Trial Court and their Counsel frankly admits that they had not relied upon any allegation of gift. In my opinion, the theory of the gift is not warranted by the facts. It is not shown that Hans Ram and Mehun got possession of the whole of the land on Not Ram's death and made a gift of a portion of it to their nephews. On the contrary, it is clear that the sons of Ramla were allowed to succeed to one-fourth share of Not Ram's estate. There was no alienation in their favour by their uncles, and, therefore, Punjab Act I of 1900 does not apply. Counsel for the appellants relies upon *Sundar* v. *Salig Ram* (1). In that case it was held, following the principles underlying *Roda* v. *Hurnam* (2), that the claim was not barred under Art. 144 of the Limitation Act inasmuch as the plaintiff's right to sue for possession was not derived from or through *B*, the nearest reversioner of the last male-owner, and, secondly, the defendant's possession though adverse to *B* could not be adverse to the plaintiffs until after his death, when their right to possession accrued. Now, relying upon this Counsel urges that though the possession of Ramla's sons was adverse to their uncles from 1890 or 1891, still inasmuch

(1) 9 Ind. Cas. 300; 26 P. R. 1911; 34 P. L. R. 1911; 33 P. W. R. 1911.
(2) 18 P. R. 1895 (F. B.);

as the plaintiffs' right to sue for possession was not derived from or through them, the possession of the sons of Ramla could not be adverse to them until after the dying out of Hans Ram's line when their right to possession accrued. Counsel for the respondents cites *Kaka* v. *Labh Chand* (3) which is certainly in support of his contention that the suit is barred by time, but that decision was considered and dissented from in the Full Bench Ruling of 1911. He also refers to *Mahmu* v. *Shihan Singh* (4), but in that case the Division Bench apparently distinguished *Sundar* v. *SaligRam* (1) and the facts, moreover, do not appear to be on all fours with the present case. I have no difficulty in holding that the Full Bench Ruling of 1911 governs the present case and that the plaintiffs' suit is, therefore, within time.

I accordingly accept the appeal and setting aside the decree of the lower Appellate Court restore that of the First Court decreeing the plaintiffs' suit with costs in all Courts.

N. H. *Appeal accepted.*

(3) 106 P. R. 1906; 162 P. L. R. 1906.
(4) 52 Ind. Cas. 857; 76 P. R. 1919.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 16 OF 1922.
July 12, 1923.

Present :—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Kemp.

HARIBHAI GULAB—PLAINTIFF—APPELLANT
versus
MATHURA LALLU AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Mayukha—*Succession*—*Uncle and nephew*—*Priority.*

According to the Vyavahara Mayukha the only test of preference among the distant Sapindas is the test of propinquity to the propositus so that an uncle being nearer to the propositus will exclude a nephew from succession.

First appeal from the decision of the First Class Subordinate Judge at Broach, in Suit No. 396 of 1919.

Messrs. *G. N. Thakor* (with *R. J. Thakore*), for the Appellant.

Mr. *P. B. Shingne*, for the Respondents.

JUDGMENT.—The only question argued in this appeal is that Haribhai, the plaintiff, would take equally with his uncle Lallu as reversionary heir to the deceased Varadhbhai who was the first cousion of Lallu's father. The relationship of the parties is given at page 3 of the print in the judgment of the lower Court, and according to the relationship it is clear that Lallu is nearer by one degree to Varadhbhai, Haribhai being the son of Lallu's brother Gulab who was dead at the date the inheritance opened.

It is urged on behalf of the plaintiff, who raised this contention in the lower Court without success, that as according to the rule under the Vyavahara Mayukha a brother's son takes with the brother when the inheritance to another deceased brother opens, by the same analogy in the case of distant *sapindas* the same rule should be adopted. It is a contention which is not supported by any authority. It seems to us to be entirely opposed to the whole scheme of the rules of inheritance. It is enough to refer to the passage in the Vyavahara Mayukha itself at page 82 in Mandlik's Hindu Law, where it is stated. "All the *sapindas* and the Samanodakas follow in the order of propinquity." and after the specified heirs when we come to the agnates, the only test is the test of propinquity. Applying that rule, it is clear that Lallu would be a nearer heir than Haribhai, and would exclude him. This contention is so opposed to the plain meaning of the Vyavahara Mayukha that we are not surprised that the learned Counsel for the appellant has not been able to rely upon anything better than the analogy of brother and brother's son in support of this proposition. A case like the present is not of uncommon occurrence and if the analogy had ever been extended in this Presidency in the districts governed by the Vyavahara Mayukha, there would be some decision in favour of such a proposition. But the absence of such a decision indicates that the contention is not sound. We therefore, confirm the decree of the lower Court and dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

BADAN SINGH *v.* EMPEROR.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 556 OF 1922.

June 20, 1922.

Present:—Mr. Justice Scott-Smith.

BADAN SINGH—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 463, 464, 465—Fabricating false document—Forged document, what is—Assertion by creditor in his own book—Offence.

Every false or fabricated document is not a forged document. There must be acts that constitute the document a false or fabricated one, that is to say, the case must fall within the definition of making a false document in section 464 of the Penal Code, and such false document must also possess a certain character or tendency, that is to say, the character described in section 463 of the Code.

Complainant purchased a bullock from the accused and promised to pay the price on a certain date. An entry to that effect was made in the *bahi* of the accused and was thumb-marked by the debtor. Subsequently, the accused added a clause on the credit side of the *bahi* to the effect that if the amount was not paid as agreed upon interest at a certain rate would be charged:

Held, that as the addition was merely an assertion by the creditor himself and did not purport to be an agreement by the debtor to pay interest, it did not operate to impose any liability on the debtor, and, therefore, did not amount to a false document within the meaning of section 464 of the Penal Code.

Jawala Ram v. *Queen-Empress*, 12 P. R. 1895 Cr., followed.

Revision from an order of the Sessions Judge, Ludhiana, dated the 16th March 1922, affirming that of the Magistrate, First Class, Ludhiana, dated the 24th February 1922.

Mr. *Jai Gopal Sethi*, for the Petitioner.

JUDGMENT.—This is a petition by Badan Singh for revision of the order of the Sessions Judge of Ludhiana, upholding on appeal an order of the Magistrate convicting him of an offence under sections 471 465, Indian Penal Code.

Briefly the facts were as follows:—Bhana and Puran bought a bullock from the petitioner for Rs. 40 and paying one rupee as earnest promised to pay the remaining Rs. 39 at *Namani Sambat* 1976. An entry to this effect was made in Badan Singh's account-book and was thumb-marked by the debtors. Subsequently a clause was added on the credit side of the *bahi* which said that if the amount was not paid as agreed upon then the creditor would take 1½ times the principal including interest.

The sole argument, according to the learned Sessions Judge, raised in his Court was that the addition was made on the credit side and with the permission of the debtors. It has been found as a fact that the debtors did not sanction the addition of the condition about interest. It is contended in revision that even accepting the finding of the lower Courts, no false document has been made within the meaning of section 464, Indian Penal Code. The words of the addition are as follows:—*Agar iqrar guzar jawe to biaj semt deorhe lene.* It is argued that these words do not purport to contain an agreement by the debtors, but merely represent an assertion by the creditor that if the amount due be not paid as agreed upon, he will take 1½ times the amount. Counsel has referred to *Jawala Ram* v. *Queen-Empress* (1) as an authority for the proposition that every false or fabricated document is not a forged document. There must be acts that constitute the document a false or fabricated one, that is to say, the case must fall within the definition of making a false document in section 464, Indian Penal Code, and such false document must also possess a certain character or tendency, that is to say, the character described in section 463, Indian Penal Code. As in that case, so here, the addition complained of is merely an assertion or allegation in writing by the creditor himself and it is to the effect that if the debt is not paid as agreed upon, he will take 1½ times the amount. This entry does not operate to impose any liability to pay interest upon the debtors and, therefore, would not have the tendency referred to in section 463, Indian Penal Code, in other words, it would not cause damage or injury to the debtors, because it does not purport to be any agreement by them to pay interest. I, therefore, hold that no false document has been made within the meaning of section 464, Indian Penal Code. It is possible that the petitioner might have been charged with an attempt

(1) 12 P. R. 1895 Cr.

to cheat or with fabrication of false evidence but he has not been so charged and the circumstances of the case do not warrant any further trial of him. He has already been sufficiently punished.

I allow the revision and, setting aside the order of the lower Courts, acquit the petitioner and direct that he be discharged from his bail.

Z. K. *Revision accepted.*

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION NO. 98 OF 1923.

July 19, 1923.

Present:—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Coyajee.

NEMCHAND NATHA—ACCUSED —APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Bombay Primary Education (District Municipalities) Act (I of 1918), ss. 7, 8, 9, 10, scope of —School Committee, powers and duties of—Attendence order, failure to obey—Reasonable excuse —Instruction, meaning of—Duty of Court.

The two necessary conditions of a valid conviction under section 10 of the Bombay Primary Education (District Municipalities) Act are: (1) that there must be an order passed by the School Committee under section 9 of the Act, that is an order passed in strict compliance with the procedure laid down in that section; and (2) that the parent must be shown to have failed to comply with the provisions of section 7 of the Act on and after the date specified in such order. [p. 227, col. 2.]

The powers conferred on the School Committee by the Bombay Primary Education (District Municipalities) Act are wide. They are in curtailment of the right of the parent to give efficient instruction to his child according to his own ideas. It is, therefore, essential that an attendance order passed by the Committee must be shown to have been passed in strict compliance with the procedure therein prescribed, namely "after giving the parent an opportunity of being heard and after such enquiry as it considers necessary" as laid down in section 9 of the Act. The direction as to enquiry in the section is not merely permissive, it has a compulsory force. [p. 227, col. 2.]

It is not essential that the "instruction" referred to in section 8 (*b*) of the Bombay Primary Education (District Municipalities) Act, in order to be efficient should conform to the standards as adopted in the recognised primary schools. [p. 229, col. 2.]

When a complaint is made to a Court under section 10 of the Bombay Primary Education (District Municipalities) Act, it is the function of the Court to see whether it is proved that the parents failed to send the child to a recognised school, without reasonable cause, on or after the date specified in the attendance order. [p. 229, col. 1.]

Criminal application against conviction and sentence recorded by the Sub-Divisional Magistrate, N. P., Surat.

Mr. *G. N. Thakor* (with him Mr. *M. B. Dave*), for the Applicant.

Mr. *Kanga*, Advocate-General (with him Mr. *S. S. Patkar*, Government Pleader,) for the Crown.

JUDGMENT.

Coyajee, J.—The applicant in this case asks this Court to set aside an order of conviction made against him by the Sub-Divisional Magistrate, N. P. Surat, under section 10 (1) of the Bombay Primary Education (District Municipalities) Act, 1918. The following are the material facts.

In compliance with the provisions of section 3 of the said Act, primary education of girls was made compulsory in the Municipal District of Surat, from January 1, 1920. A School Committee has been duly appointed—its duties being, among others, to enforce the provisions of the Act respecting the attendance of children at school. It is admitted that by section 7 of the Act the applicant was bound to cause his daughter Bai Parson to attend a recognized primary school in the absence of a reasonable cause.

On January 3, 1923 the School Committee sent a notice (Exhibit D) to the applicant requiring him to appear before them on the 9th idem to show cause why he should not cause Bai Parson to attend a recognized primary school. The notice was signed by the school attendance officer on behalf of the Committee. The applicant failed to appear. The Committee thereupon resolved, on January 9 (Exhibit E), that an order should be served on him directing him to cause the child to attend a recognized primary school on or before the 18th of that month. An order to that effect (Exhibit F) was served on him on the 13th; but it is said he refused to acknowledge its receipt.

On January 17, the applicant wrote to the attendance officer as follows:

"I have got your notice .....My daughter Parson goes to study in the Swaruprani School of the Rashtriya Kelavni Mandal and that is known to you.....We are certainly eager to give education to our daughter and our girl is already receiving proper education.....You should note that our daughter is receiving education."

No enquiry seems to have been made by the Committee at any time either as regards the truth of the statement made in Exhibit G or as to the efficiency of the instruction imparted in the school which the girl was said to have been attending. It is necessary to set out here the following facts which appear in the evidence given by the attendance officer before the Magistrate in this case.

"The Swaruprani School is national . . . Neither I nor my Committee have by writing the national school ascertained what books are being taught in their schools...Neither I nor my Committee have at any time inspected any of the national schools. We have not asked for the curriculum that has been laid down in the schools. I do not know what are the qualifications of the teachers employed at the national schools. The School Committee has not made any enquiry as regards the fitness of the teachers employed in those schools. I do not say that a child that is taught at an unrecognized (school) is not in receipt of adequate education. There is no resolution of the School Committee to the effect that the education given in national schools is not efficient. I was present when the School Committee met on the 9th of January...The proceeding Exhibit E, was written then and there. The order, Exhibit F, was resolved to be issued after the girl's absence had been noticed. No further enquiry had been made about this girl."

The applicant did not carry out the attendance order, Exhibit F. On January 20, the Chairman of the Committee authorized the attendance officer to make a complaint to the Magistrate under section 10. This was done, with the result that he applicant was convicted and ordered to pay a fine of one rupee.

The question now before us is whether the conviction is valid in law. The two necessary conditions of a valid conviction under section 10 are: (1) there must be an order passed by the School Committee under section 9, *i. e.*, an order passed in strict compliance with the procedure laid down in that section; (2) the parents must be shown to have failed to comply with the provisions of section 7 *on and after the date* specified in such order. In my opinion the prosecution has failed to establish that those conditions were fulfiled in this case.

The order, Exhibit F, was passed by the Committee without regard to the imperative requirements of section 9. That section is in these terms.

"Where the School Committee is satisfied that the parent of any child who is bound under the provisions of section 7 to cause such child to attend a recogized primary school, has failed to do so, the School Committee, after giving the parent an opportunity of being heard and after such inquiry as it considers necessary, may pass an order directing the parent to cause such child to attend a recognized primary school on and from a date which shall be specified in the order."

The powers conferred under the Act on the School Committee are wide. They are in curtailment of the right of the parent to give efficient instruction to his child according to his own ideas. It is, therefore, essential that an attendance order passed by the Committee must be shown to have been passed in strict compliance with the procedure therein prescribed, namely, "after giving the parent an opportunity of being heard and after such enquiry as it considers necessary." In this case the Committee did give the applicant an opportunity of being heard on January 9, but he did not accept it. The record satisfies me—as it satisfied the learned Magistrate—that his failure to do so was due to a spirit of recalcitrancy and to no worthier motive. But he seems to have soon realized it; for, on January 17, he wrote the letter, Exhibit G, stating that it was known to the attendance officer and others that the girl had actually been attending the Swaruprani School. In his evidence the attendance officer admits:

"From the register of absentee children I had come to know that the daughter of Nemchand" (*i. e.* the applicant) "was attending national school." The Committee made no enquiry at any time to enable them to form an opinion as to the efficiency of the education imparted in that school. This is clear on the evidence of the attendance officer which I have set out above. The attendance order required the applicant to send his child to a recognised school on the 18th; he sent the letter, Exhibit G, on the 17th; the complaint to the Magistrate was not made until the 20th. There was nothing to prevent their making the necessary enquiry before making the complaint. They had made none before passing the order, Exhibit F. In my opinion that order was not made in compliance with the requirements of section 9. I do not read the words "and after such enquiry as it considers necessary" as merely permissive. That expression has a compulsory force, regard being had to the object of the enactment, to the wide powers conferred on the Committee in derogation of the parent's rights, and to the language of section 9 itself. In the circumstances, the fact that the Committee passed the order, Exhibit F, does not by itself lead to the inference that it had made an enquiry in the spirit of the enactment.

The second requirement of section 10 is that it must be shown that the parent has failed to comply with the provisions of section 7 *on or after the date* specified in the attendance order passed by the Committee. Section 7 imposes on a parent the duty of causing his child to attend a recognized primary school "in the absence of a reasonable excuse as hereinafter provided." I think the effect of section 10 is the same as that of section 12 of the Elementary Education Act, 1876 (39 and 40 Vic, c. 79), which is in these terms: "Where an attendance order is not complied with, without any reasonable excuse within the meaning of this Act, a Court of summary jurisdiction, on complaint made by the local authority," may inflict a penalty on the parent

What, then, is a "reasonable excuse"? This expression is not specifically defined in the definition clause, section 2. The 8th section, however, gives its meaning in these terms:

"8. A parent shall be deemed to have a reasonable excuse for failure to cause a child to attend a recognized primary school in any of the following cases:—

(*a*) where the child is prevented from attending school by sickness, infirmity or other unavoidable cause;

(*b*) where the child is receiving, otherwise than in a recognized primary school, instruction which in the opinion of the School Committee is efficient, or has already completed his primary education;

(*c*) where there is no recognized primary school within one mile, measured according to the nearest road, from the residence of the child."

For purposes of this case it is unnecessary to decide whether the three cases there set out are meant to be exhaustive, or they are merely three illustrations of reasonable excuse. The languaga of section 7 might indicate that they are exhaustive. However that may be, we are here concerned with section 8, case (*b*) only, for according to the applicant his child had at all material times been receiving education otherwise than in a recognized primary school. It is not shown that either before or after passing the order, Exhibit F, the Committee made any enquiry for the purpose of deciding whether in its opinion the instruction which the child had been receiving elsewhere was or was not efficient; for, the Committee has to form its opinion not capriciously but on sufficient grounds and for substantial reasons. It is not shown that the Committee has formed its opinion on the subject in the spirit of the enactment, or, at all. It appears to me that the learned Magistrate has not rightly appreciated the second requirement of section 10. I agree with him in holding that the Legislature has cast on the School Committee the duty of deciding whether the instruction received by a child otherwise than in a recognized primary school is efficient or not. I, however, decline to assume that the

Committee must be held to have discharged that duty merely because they passed the attendance order. Moreover, it is clearly the function of the Court—when a complaint is made under section 10—to see whether it is proved that the parent failed to send the child to a recognized school, without reasonable cause, on or after the date specified in the attendance order. The Act does not inflict penalty on a parent for a mere failure to carry out an attendance order passed under section 9. For, it is not to be supposed—unless the Statute clearly said so, which in this case it does not—that once an attendance order is made by the School Committee under section 9, the parent is for all time deprived of the right to give efficient instruction to his own child otherwise than in a recognized primary school. The Magistrate concedes that the Court must consider a case falling under section 8 (*a*); it must, in my opinion, also consider a case coming under section 8 (*b*). Dealing with this question the learned Magistrate observes:—

"There is however one thing in this connection that has to be mentioned as pointed out by the learned Pleader for the prosecution. He pointed out that in clause (*b*) the word used is "instruction" *i. e.* instruction in primary education and nothing else and primary education is defined in the Act, section 2 (5), so that it is not merely the curriculum laid down in any particular school that was necessary to be proved but that the curriculum and the whole of the teaching has to be in conformity with the standards as laid down and fixed and recognized by Government as such. Merely the curriculum did not matter, certain other rules laid down by Government in this respect had to be observed which he said were not being followed by this school in particular as also other schools under this particular "mandal" as was evident from the replies of the defence witness in this respect. When that was so, therefore, he made out that it could not at all be said that the primary education given to the girl in question was such as was contemplated by the Act. I think there is a good deal in all that has been urged in this respect."

I am unable to accept this narrow interpretation put upon the word "instruction" occurring in section 8 (*b*). The expression used in that section is "instruction" not "primary education," it is an expression bearing a much wider import. Its efficiency is to be decided by "the opinion of the School Committee," not by its compliance with some standard fixed and recognised by Government. The main object of the enactment is to see that a child is not left without the benefit of education. It is sufficient if it is receiving efficient instruction elsewhere than in a recognised primary school. I see no reason for giving to that expression, as used in section 8, case (*b*), the narrow meaning which was contended for by the Public Prosecutor before the lower Court and accepted by the Magistrate. In my opinion the prosecution has failed to satisfy the second requirement of section 10 also.

In this view of the case I consider it unnecessary to express an opinion on the question whether the resolution, Exhibit P, passed by the School Committee on January 11, 1922, and relied on by the applicant, is still in force.

I would set aside the conviction and order the fine, if paid, to be refunded.

Shah, Ag. C. J.—I entirely agree. I desire to make it clear with reference to the resolution of the School Committee dated January 11, 1922 (Exhibit P), that we do not accept one of the two grounds upon which the learned Magistrate has held it to be invalid, as it is not essential in our view that the instruction in order to be efficient within the meaning of section 8 (*b*) should conform to the standards as adopted in the "recognised primary schools." The other ground relates to the power of the School Committee at that date to act as such under the Act of 1918. The learned Magistrate has held that in view of the Commissioner's order dated December 17, 1921 (Exhibit L), the School Committee ceased to exist, and the learned Advocate-General has urged that that view is correct.

In the view we take of the case, it is not necessary to decide this question: so I express no opinion about it. I do

not wish to be understood as accepting the view of the learned Magistrate on this point.

Conviction set aside.

Z. K.

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 672 OF 1922.

October 30, 1922.

Present :— Mr. Justice Scott-Smith and Mr. Justice Harrison.

EMPEROR—APPELLANT

versus

BASTA SINGH—RESPONDENT.

Arms Act (XI of 1878), ss. 5, 19 (a)—Arms Rules, Sch. II—Manufacture of kirpans *by Sikhs—Offence.*

The entry in Schedule II to the Arms Rules which excludes "*kirpans* possessed or carried by Sikhs" from the prohibitions and directions contained in the Arms Act, refers to *kirpans* actually in existence and in the possession of or carried by Sikhs. In other words, a Sikh can possess or carry a *kirpan* without a license, and is not prevented by any provisions in the Arms Act from dealing with a *kirpan* which he possesses in any way he likes. But the entry does not exempt the manufacture of *kirpans* from the operation of the prohibition contained in section 5 of the Arms Act. [p. 230, col. 2.]

The manufacture of *kirpans*, therfore, without a license, is an offence falling under clause (*a*) of section 19 of the Arms Act. [p. 231, col. 1.]

Appeal from an order of the Sessions Judge, Ambala, dated the 17th June 1922, reversing that of the Magistrate, First Class, Rupar, District Ambala, dated the 12th May 1922.

Mr. *Carden Noad*, Assistant Legal Remembrancer, for the Appellant.

Mr. *G. S. Salariya*, for the Respondent.

JUDGMENT.

Scott-Smith, J.—This is an appeal by the Local Government from the order of the Sessions Judge of Ambala setting aside the conviction of Basta Singh, who was convicted of an offence under section 19 (*a*) of the Indian Arms Act. Basta Singh is a Sikh and was convicted by a Magistrate of having manufactured and sold *kirpans* without a license. The learned Sessions Judge set aside the conviction and acquitted him having regard to the entry in the Second Schedule annexed to the Indian Arms Rules, which shows that *kirpans* possessed or carried by Sikhs are excluded from the operation of all the prohibitions and directions contained in the Arms Act.

In appeal it is contended on behalf of the Government that the exemption only applies to *kirpans* actually in existence and possessed or carried by Sikhs and not to the manufacture of *kirpans* by Sikhs. Mr. G. S. Salariya, on the other hand, who appeared for Basta Singh, urged that the decision of the learned Sessions Judge was correct, and that the entry in the third column of the Second Schedule showed that *kirpans* possessed by Sikhs were excluded from all the prohibitions contained in the Act, and that this included the prohibition as to manufacture contained in section 5.

Schedule I to the Indian Arms Rules gives a list of persons exempted from certain prohibitions and directions contained in the Act, whereas Schedule II contains a list of Arms, Ammunition and Military stores which are excluded from the operation of certain prohibitions and directions contained in the Act. Sikhs as such are not exempted under Schedule I, and it is necessary to examine what the exemption upon which Basta Singh relies actually is. The arms excluded from the prohibitions and directions contained in the Act are "*kirpans* possessed or carried by Sikhs." This, in my opinion, clearly refers to *kirpans* actually in existence and in the possession of or carried by Sikhs. In other words, a Sikh can possess or carry a *kirpan* without a license. Further, he is not prevented by any provision in the Arms Act from dealing with a *kirpan* which he possesses in any way he likes. A Sikh, however, is not in my opinion exempted by the entry in Schedule II from the operation of the prohibition as to manufacture contained in section 5 of the Act. If Government had intended so to exempt him, it would have done so by an entry in Schedule I. The exemption extends to existing arms only, whereas Counsel for the respondent wishes to make it applicable to a class of persons as well. I am unable to agree with his interpretation of the law in this

respect. I agree that in the view of the law which I take, it is meaningless to exclude from the operations of the prohibition in section 5 an existing *kirpan*, because you cannot manufacture what already is in existence. But the same applies to the first entry in Schedule III.

I would, therefore, accept the appeal and restore the order of the First Court convicting Basta Singh of an offence under section 19 (*a*) of the Indian Arms Act. As there was a reasonable doubt as to the interpretation of the law, I think a heavy sentence is not required in the present case. Basta Singh has already undergone more than a month's rigorous imprisonment and I would, therefore, sentence him to the term of imprisonment already undergone and would remit the fine.

Harrison, J.—I agree entirely with the view taken by my learned brother. Before the exemption can operate in a case such as this the arm in question must conform to the description given in the second column of the Schedule, that is to say, it must both be a *kirpan* and must be possessed or carried by a Sikh. To take an analogy from an exemption, which occurs earlier in the same Schedule "*katyars* used in Mahratta marriage processions" are exempted from all prohibitions. If a man were to be prosecuted for manufacturing *katyars* without a license, it would be no valid defence to urge and prove that they were intended to be used in such marriage processions, for at the time the offence was committed, the article in question would not come within the four corners of the definition. When the use to which the arm is to be put affects the exemption a distinct provision is inserted in the schedule as when "uniform swords, etc., intended to be supplied to persons entitled to wear them" are exempted as such. So here, as soon as the process of manufacture was complete and the arms had reached that stage in their development at which they could be described as *kirpans* no further offence could be committed provided that and as long as they were possessed or carried by Sikhs.

It might be urged that if this be the correct view, it is an offence to manufacture any article which is exempted unconditionally and without any qualification such as a bow and arrow or a toy cannon, but this is not the case. To manufacture an article of this nature is no offence and if the arm exempted in this case were a *kirpan* and nothing more the manufacture would be no offence. It is, however, a *kirpan* possessed or carried by a Sikh and in the nature of things it is as impossible to manufacture this arm as it is impossible to manufacture a *katyar* used in a marriage procession and, therefore the exemption does not cover or include manufacture by a Sikh or any other person, for the wording of the notification shows that it is only when the arm has assumed its final form and has become a *kirpan* that the exemption begins to operate.

Z. K. *Appeal accepted.*

CALCUTTA HIGH COURT.

CRIMINAL APPEAL NO. 430 OF 1922.

December 7, 1922.

Present:—Mr. Justice Newbould and Mr. Justice Suhrawardy.

BILASH CHANDRA BANERJEE—ACCUSED—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 235—Penal Code (Act XLV of 1860), ss. 218, 403, 409, 477A—Joinder of charges—Offences committed in the same transaction.

The accused, a Sub-Inspector of Police, took charge of certain property belonging to a deceased person. He subsequently returned the greater portion of it to his heir, but misappropriated certain items, and destroyed and altered certain portions of the diaries and lists in order to show that those items had never been received. He was charged with and tried at one trial for offences under sections 218, 403, 409 and 477A of the Penal Code:

Held, that all the charges related to acts which were so connected together as to form one transaction and the joinder of charges was, therefore, permissible under section 235 of the Criminal Procedure Code. [p. 232, col. 2.]

BILASH CHANDRA *v.* EMPEROR.

Criminal appeal from an order of the Subordinate Judge, Mymensingh, dated the 8th September 1922.

Babus *Monmotha Nath Mukherjee* and *Benoy Kumar Ghose*, for the Appellant.

Mr. *Orr*, for the Crown.

JUDGMENT.—The appellant has been convicted of offences punishable under sections 477A and 218, Indian Penal Code and sentenced to twelve months' rigorous imprisonment for each offence, the sentences to run concurrently.

The appellant was put on his trial on several charges, and it is contended that the trial is bad for misjoinder of charges. In order to understand this contention and the nature of the charges the following facts may be shortly stated:—The accused was the Sub-Inspector in charge of the Netrokona Police Station. On the 7th February last a prostitute named Kamini died in Netrokona town at about 2 P. M. in the afternoon. She had executed a registered deed of gift covering most of her properties to one Purna. The case for the prosecution is that on her death the Sub-Inspector took charge of the properties left by Kamini and removed them to the *thana* shortly after her death. A telegram was sent to Purna who was 17 miles away and he came to the *thana* on the morning of the 8th between 10 and 11. That evening he took away the properties claimed by him except three specific ornaments, a gold *gopahar*, a pair of gold *ananta* and silver *rates* which were retained by the Sub-Inspector. Entries had been made in the Police General Diary recording that this property of Kamini had been taken charge of, but the pages containing these entries were torn out and fresh pages were written from which it will appear that the property was never taken to the *thana* and that it was made over to Purna at 10 A. M. on the 7th February.

On these allegations the accused was charged firstly with having committed criminal misappropriation of the three ornaments belonging to Kamini which had not been delivered to Purna. He was secondly charged with having framed the record in a manner which he knew to be incorrect, namely, the entry No. 173 which related to the delivery of Kamini's property to Purna. He was thirdly charged under section 477A with having destroyed the original entries in the General Diary and with having altered the entry No. 173 already referred to. Further there were three charges of criminal breach of trust by a public servant punishable under section 409, the first relating to the properties left by Kamini and not covered by the deed of gift in favour of Purna, the second relating to the three specific ornaments already mentioned and the third relating to the properties mentioned in the deed of gift.

It is contended that the offence described as punishable under section 218 differs from the offence charged as punishable under section 477A, Indian Penal Code. Naturally there must be some difference in the charges as the facts are set out so as to make different sections applicable. In the former of these charges the charge relates to the framing of the record in a manner known to be incorrect, using the actual words of the section. In the charge under section 477A the words of the section are again used and the accused is charged with having destroyed certain entries in the original pages and also having altered one entry. We think that as regards these charges they fall under two separate definitions of the law and the accused can be jointly charged and tried at one trial for these offences under section 235. We also think that the joinder of the other charges is covered by the provisions of that section. All the charges relate to acts which are so connected together as to form one transaction The charge of criminal misappropriation relating to the same articles as the charge of criminal breach of trust by a public servant and the other charges of criminal breach of trust in respect of the property covered by the deed of gift and those not covered by the deed of gift would be legally joined and tried at one trial.

It is also contended that there has been misdirection in stating to the Jury what was the defence set up by the accused. The accused was defended and he made a statement in Court. In that statement the main line of defence was that he had several enemies and they had conspired to get him into trouble. But in his

defence no answer was given to the specific allegations that were made against him. It is, therefore, not clear what his actual defence was on the points where there has been said to be misdirection. We find that during the course of his summing up the learned Judge made a mistake as regards a certain date and was corrected by the learned Pleader for the defence and he admitted his error. We cannot understand if he had misdirected the Jury as is now alleged that mistake should not have been corrected then and there. We are not satisfied there was any misdirection in this respect.

The other points taken in this appeal are based on an affidavit that has been filed by one of the Pleaders who appeared on behalf of the appellant at the Sessions trial. It appears that after the Jury had retired to consider their verdict they wished for further direction on certain points of law. They were first seen by the Judge in his private Chamber and they there asked him one question on a point of law. The Judge then sent for the Pleaders and on their arrival they pointed out to him that further directions to the Jury should be made in open Court. The Judge and the Jury then went into the Court room and certain questions which were put by the Jury and the answers given by the Juge were duly recorded. We hold that this fact that one question was put to the Judge not in open Court was no more than an irregularity and did not vitiate the trial.

It is further contended that the Judge did not comply with the provisions of section 303, Criminal Procedure Code, since he did not ask the Jury questions to ascertain what their verdict was or the three charges under section 409, Indian Penal Code. The verdict of the Jury as recorded is not guilty under sections 409 and 403, but guilty under sections 218 and 477 A. That seems to us a sufficiently clear verdict. The Jury were taken by the Judge and rightly taken to mean that they acquitted the accused on all charges under section 409 and the charge under section 403, Indian Penal Code, and there was no necessity for any question to ascertain their verdict was. It is said in the affidavit that the learned Judge asked the Jury some questions as to their reasons and they gave some answers which were not recorded. This has been denied by the learned Judge and we must accept his statement. It is pointed out to us that in the judgment passed by the Judge after the verdict was recorded he has given the reasons of the Jury for their verdict and that this indicates that the statement in the affidavit is correct. We are unable to accept this contention. The Judge remarks that the Jury found the accused not guilty on charges under sections 409 and 403, Indian Penal Code, holding clearly that it is not possible to accept the evidence as to the particular way in which the items of property were disposed of by the accused. To us the words used by the Judge indicate that he is not repeating what he has heard from the Jury but is stating what he believes to have been the motive which actuated them.

We hold, therefore, that there are no ground for interfering with the verdict of the Jury and dismiss this appeal.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

CRIMINAL REVISION NO. 561 OF 1922.

June 16, 1922.

Present:—Sir Shadi Lal, KT., Chief Justice.

JAFAR—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Workman's Breach of Contract Act (XIII of 1859), s. 2—Carrier, whether workman.

A contract to carry stones cannot be described as a contract of an artificer, workman or labourer, within the meaning of section 2 of the Workman's Breach of Contract Act.

Devappa Ramappa Naik v. *Emperor*, 50 Ind. Cas. 492; 43 B. 607; 21 Bom. L. R. 277; 20 Cr. L. J. 316, relied on.

Criminal revision reported by the Sessions Judge, Dera Gazi Khan, with his No. 278 J, dated the 7th April 1922.

FACTS.—Jafar accused is a carrier. He was paid Rs. 53-13-0 to carry stones on his camels.

Gurandita Mal, complainant, instituted a complaint on account of this advance of

Rs. 53-13-0. On 2nd November 1917 the Magistrate gave Jafar three months within which to work off the advance.

On the 14th July 1919 complainant made a second complaint that the advance had not been worked off. On 8th October 1919 Jafar was ordered to pay the advance within a month or undergo one month's simple imprisonment. On the 8th November 1919 the complaint was dismissed in default. On 2nd February 1920 an application for restoration was rejected. On 24th November 1921 the complainant brought a fresh complaint alleging a balance due of Rs. 31-2-6 out of the original Rs. 53-13-0.

On 20th January 1922 Jafar was sentenced to one month's rigorous imprisonment.

GROUNDS—(*a*). The Act does not apply to carriers.

(*b*). The complainant's own conduct in allowing the case to slide for four years has put him out of Court.

The accused is on bail of Rs. 50 since.

JUDGMENT.—The accueed was employed by the complainant to carry stones on his camels and I do not think that a contract of this kind can be described as a contract of an artificer, a workman, or a labourer, within the meaning of the Workman's Breach of Contract Act (XIII of 1859) *vide, inter alia, Devappa Ramappa Naik* v. *Emperor* (1). Accordingly I accept the application for revision and quash the order of the Magistrate sentencing the accused to one month's imprisonment.

Application allowed.

Z. K.

(1) 50 Ind. Cas. 492; 43 B. 807; 21 Bom. L. R. 277; 20 Cr. L. J. 316.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 246-B OF 1923.

October 10, 1923.

Present:—Mr. Baker, Offg. J. C.

DADDIPRASAD—ACCUSED—APPLICANT

versus

DISTRICT MAGISTRATE, YEOTMAL —NON-APPLICANT.

Extradition Act (XV of 1903), applicability of—Berar and Hyderabad State.

A case of extradition from Berar to Hyderabad State is governed by the Extradition Treaty of 1867 between the Indian Government and the State and not by the Extradition Act. [p. 235, col. 2.]

Revision against an order dated the 8th September 1923, passed by the District Magistrate, Yeotmal, in Extradition Case pending on his file.

Mr. *S. C. Hosall*, for the Applicant.

ORDER.—The facts are that the applicant was arrested on 8th July 1923 by the Sub-Inspector, Pusad, under section 54, clause (7), of the Code of Criminal Procedure, on suspicion of having received cattle stolen in the Hyderabad State.

On 9th July he was placed before the First Class Magistrate, Pusad, and remanded till 21st July, on which day he was ordered by the Magistrate to be placed before the District Magistrate, Yeotmal. The applicant is a resident of the Basim Taluka of the Akola District.

On the 26th July 1923 the applicant was placed before the District Magistrate, Yeotmal who remanded him till 8th August 1923 and requested the Commissioner, Berar, to move the State authority to send the extradition warrant with evidence of criminality within two months, otherwise the accused would be released. The accused was kept in custody and remanded from time to time.

On August 28th, 1923 evidence of criminality was received from the District Magistrate, Nanded in Hyderabad State, and was sent to the Commissioner. An application for bail was made on 3rd Septem-

ber 1923 and was refused on 8th September 1923, on which day a wire was received from the Commissioner to detain the accused in custody till the arrival of the Hyderabad State Police.

On 20th September 1923 the extradition warrant together with evidence of criminality was received from the District Magistrate, Nanded, but in the meantime an application had been made to this Court for bail and for quashing the proceedings and an order had been issued that the accused should not be handed over to the Hyderabad Police pending the disposal of the application.

The District Magistrate sent in a reply to the Rule issued to him to show cause, but was not represented at the hearing. The matter being of some importance I ordered notice to issue to the Standing Counsel to represent the Crown and the application has now been fully argued on both sides.

It is contended on behalf of the applicant that the proceedings are governed by the Indian Extradition Act XV of 1903, which has been applied to Berar.

The arrest of the accused falls under the provisions of section 23 of that Act and must, therefore, be dealt with under section 10. The provisions of section 10 have not been complied with, because the Magistrate has not made any enquiry, no report has been made to the Political Agent, Hyderabad, and the accused has been detained more than two months in custody before the arrival of the warrant referred to in section 7 of the Act. It was also contended at the first hearing that the warrant was from the District Magistrate, Nanded, and not from the Political Agent.

The case for the applicant has been argued on the supposition that the Extradition Act applies, but this is not so. This is a case of extradition from Berar to Hyderabad State and is governed by Treaty. Section 18 of the Extradition Act specially excepts cases governed by Treaty. The procedure will be found in the Criminal Circulars of this Court Part II, No. 6, page 37, which is printed in the Chief Commissioner's Book Circulars (Edition 1917, Vol. II, Part VIII, No. 4, paragraphs 9-11, pages 20 and 21).

Extradition between His Exalted Highness the Nizam's Dominions and Berar is governed by the Extradition Treaty of 1867 (Aitchison's Treaties, Vol. IX, page 108). Certain offences have been added to those mentioned in the Treaty by an arrangement in 1915 between the Central Provinces Administration and the Nizam's Government, but we are not concerned with that, as the offence (cattle stealing) with which the accused is charged is in the original Treaty. The procedure laid down is that when an accused person is arrested in Berar by or at the instance of the Nizam's Police he is kept by the Berar Police till a requisition is received by the District Magistrate for his surrender. This requisition is sent by the Nizam's authority, the Talukdar, to the District Magistrate through the Commissioner of Berar, together with the evidence of criminality. The District Magistrate on receiving the requisition from the Commissioner surrenders the accused person. On no account may he comply with a requisition made direct to him by the Nizam's authorities.

This procedure has been followed in the present case. The evidence of criminality along with the requisition has been sent by the Dsitrict Magistrate, Nanded, who is also the Talukdar, to the District Magistrate, Yeotmal, through the Commissioner, Berar, and the District Magistrate is, therefore, bound to surrender the accused.

No time limit is laid down and there is no necessity of a warrant from the Political Agent.

There are, therefore, no grounds for interference; supposing this Court to have the power to interfere, which is very doubtful, this being a matter governed by Treaty and not under the ordinary law. This Court may have power under section 491 of the Amended Criminal Procedure Code, but to justify its exercise it would have to be shown that the accused was illegally or improperly detained in custody, which does not appear to be the case. I am, therefore, of opinion that I cannot interfere.

Even under section 15 of the Extradition

CHANDU LAL V. EMPEROR.

Act the power of this High Court to interfere is ousted except in very special circumstances. The learned Standing Counsel is prepared to show that even if the Extradition Act applied the proceedings are regular as the accused was remanded by the District Magistrate on 26th July and the warrant was received on 25th September, within two months.

I agree with him that section 10 of the Act does not compel the Magistrate to hold an enquiry and in any case the evidence of criminality was received on 28th August 1923, but I can hardly follow his argument that the period from 8th July to 26th July, during which the accused was in custody, must be excluded, as section 23 makes it clear that a person arrested under section 54, clause (7), Criminal Procedure Code, may be detained subject to the same restrictions as are contained in section 10, that is for not more than two months, and I am of opinion that the two months would run from the date of arrest, 8th July.

However, it is not necessary to go into this point, as the Extradition Act does not apply.

With regard to the prayer for bail it was rejected by the Magistrate on the ground that he had evidence before him which led him to believe that the applicant had committed two offences of cattle theft or of receiving stolen cattle in the Nizam's Dominions and there is nothing to show that his opinion is incorrect.

Apart from this, once the warrant from the Nizam's State authority has been received the Magistrate has no power to admit to bail even under the Extradition Act except under sections 8 and 8 (*a*) and, therefore, unless the Nizam's authority directs bail to be taken, the Magistrate can only do so if he reports the case to the Local Government. I may refer to *In re Murlidhar Bhagwandas* (1).

The result is that there are no reasons for interference. The application is dismissed and the papers should be forthwith returned to the District Magistrate, Yeotmal.

G. R. D. *Application dismissed.*

(1) 48 Ind. Cas. 674; 43 B. 310 at p. 320; 20 Bom. L. R. 1009; 20 Cr. L. J. 34.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 255 OF 1923.

July 24, 1923.

Present:—Mr. Justice Daniels.

CHANDU LAL—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 84—Unsoundness of mind—Burden of proof.

The plea of insanity being of the nature of a general exception, an accused person relying on it must establish it.

Criminal revision from an order of the Sessions Judge, Saharanpur, dated the 10th March 1923.

Mr. *S. A. Haider*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This a somewhat curious case. The applicant committed an assualt on the wife of a Civil Surgeon and was sentenced to nine months' rigorous imprisonment. The defence of insanity was raised at the trial. The medical evidence regarding the accused was conflicting. One Doctor thought him insane, but on the other hand the Superintendent of the Bareilly Lunatic Asylum, under whose supervision he was placed, reported and gave evidence that he was not insane. Under these circumstances the learned Sessions Judge says that if the burden of proving affirmatively the man's unsoundness of mind had been on the prosecution he would say that it had not been discharged, but insanity being of a nature of a general exception which must be proved by the accused, he was of opinion that the defence had failed to prove insanity. This is a correct statement of the law and in view of the evidence of the Superintendent of the Lunatic Asylum I do not think that it can be challenged on the evidence. I may add that the case was again reported to Government by the Sessions Judge for such action as Government might take and Government has since returned the record stating that it is advised that the man is not insane. Under the circumstances I do not see my way to interfere with the order passed by the Court below.

I accordingly dismiss the application.

Z. K. *Application dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION NO. 234-B OF 1923.

September 28, 1923.

Present:—Mr. Prideaux, A. J. C.

TUKARAM—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 379—Theft—Bona fide claim—Minor's property held by others—Guardian's duty.

A removal of property in the assertion of *bona fide* claim of right, though unfounded in law and fact, does not constitute theft. But a mere colourable pretence to obtain or keep possession of property does not avail as a defence. [p. 238, col. 1.]

Though it is the duty of a guardian of a minor's property to get into his own hands all the property of the minor, it is not his duty to take forcible possession of it but to resort to the Law Courts if it is held against him by others. [p. 238, col. 1.]

Criminal revision against an order of the Sessions Judge, West Berar, Akola, in Criminal Revision No. 11 of 1923, dated the 15th June 1923.

Mr. *V. N. Bapat*, for the Applicant.

ORDER.—This arder also disposes of Criminal Revisions Nos. 235-B to 238-B of 1923. The five applicants, namely, Tukaram, Vishnu, Pandurang, Narayan and Gunwant have been convicted of theft and sentenced to fine. One Sakharam Gurao of Ganeshpur died leaving behind him two widows, *Musammats* Dwarkabai and Tanabai, and minor son. He possessed certain land at Ganeshpur, Tahsil Murtizapur, among which was field Survey No. 28 and at his death his minor son became owner. That son died, and the widows were in possession. Each of them adopted a son; one Ramrao is said to have been adpoted by *Musammat* Dwarkabai and one Bhaurao by *Musammat* Tanabai. Then dispntes arose between *Musammat* Dwarkabai and Ramrao which reached the Civil Court which appointed one Narayan Sitaram as guardian of Ramrao, authoring him, it is said, to take charge of the minor Ramrao's property. This order was passed on 23rd March 1922 by the District Judge, Akola. It is alleged that the co-widows in an attempt to act to the detriment of the minor Ramrao dealt with the property. Dwarkabai leased field Sarvey No. 28 to one Raghunath Marwari who sub-leased the same to Sakharam Jairam and the complainant Tukaram Yadoji. The prosecution story is that these cultivated it in 1922-23 and that the five accused obstructed the complainant in the cultivation and removed the crops in December 1922. The Magistrate finds that the complainant Tukaram had cultivated and was in possession at the time. The Magistrate states in his judgment:—

"Though under the orders of the District and Sessions Judge (*vide* Exhibit D-1) the accused Narayan Sakharam was authorized to take possession of the minor (Ramrao's) property, evidently he did not do so, for on 12th December 1922 he put in an application in the Court of District and Sessions Judge, Akola, stating that he was not yet given possession of the property. From this it is also clear that the accused did not believe that they could take possession on the strength of District Judge's order, *viz.* Exhibit D-1. The plea of the defence Counsel, Mr. Pingle, that the accused took possession because of the aforesaid orders believing *bona fide* that they could do so, cannot be allowed. The accused were not acting *bona fide*. They in fact took the law into their hands and took possession of Survey No. 28 and removed the crops without even waiting for District and Sessions Judge's order on the accused Narayan's application put on 12th December 1922.....They thus wrongfully deprived the complainant of the cropsgrown by him. The dishonest intention of the accused is, therefore, clearly made out."

The accused were found guilty of theft and were each fined Rs 30 except Narayan who was fined Rs. 50 and in default of payment two months' rigorous imprisonment was ordered and Rs. 100 out of the fine was to be awarded to the complainant as compensation. An application for revision was made to the Sessions Judge who declined to interfere. Hence the present application for revision.

It is here contended that as the accused acted in the interests of Ramrao, acting through his guardian Narayan, who had been appointed the guardian by the District Judge, no offence of theft can possibly have been committed. I am

referred to *Algarasawmi Tevan* v. *Emperor*, (1), *Suraj Alt* v. *Arfan Ali* [*Arfan Ali* v. *Emperor*] (2), *Queen-Empress* v. *Nagappa* (3) and *Empress of India* v. *Budh Singh* (4). *Suraj Ali* v. *Arfan Ali* [*Arjan Ali* v. *Emperor* (2)] lays down that "the removal of property in the assertion of a *bona fide* claim of right, though unfounded in law and fact, does no constitute theft. But a mere colourable pretence to obtain or keep possession of property does not avail as a defence."

The principles enunciated in these published rulings are undoubtedly correct but they do not seem to me to help the applicants in the present case. It is well known that when a person has been appointed guardian of a minor's property his duty is to get into his own hands all the property belonging to the minor that he can. But if it is held against him by others it is not his duty to take forcible possession of it but to resort to the Law Courts. Here Narayan was appointed guardian on 23rd March 1922. He allows the lessees of the field to prepare the land, sow and cultivate it and then when the crops are ripe with his companions takes forcible possession. The crops did not belong to the minor, the widow who leased the fields might be responsible to the minor for their crops or the letting of the land, though it is presumed that the widow is entitled to maintenance. But the facts did not justify anybody acting on behalf of the minor to forcibly take possession of the crops in the minor's interest. The motive in doing so seems to me very clearly dishonest and in my opinion the five applicants have been correctly convicted of the offence of theft. They dishonestly removed property knowing it belonged to another. I decline to interfere and reject the five applications for revision,

G. R. D. *Applications rejected.*

(1) 28 M. 304; 2 Cr. L. J. 754.
(2) 36 Ind. Cas. 136; 44 C. 66; 20 C. W. N. 1270; 17 Cr. L. J. 456.
(3) 15 B. 344; 8 Ind. Dec. (N. S.) 23.
(4) 2 A. 101; 1 Ind. Dec. (N. S.) 627.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION NO. 95 OF 1923.

October 3, 1923.

Present:—Mr. Neave, A. J. C.

RAM SARUP AND OTHERS—OPPOSITE PARTY—APPLICANTS

versus

EMPEROR THROUGH MOHAMMAD HAIDER—COMPLAINANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIX, r. 1—Suit, dismissal of, for default—Injunction, whether can be granted—Jurisdiction—Criminal Procedure Code (Act V of 1898), s. 107, proceedings under—Attachment of property, whether can be directed.

A Court has no jurisdiction to grant a temporary injunction relating to a suit which has been dismissed for default, but for the restoration of which an application is pending. [p. 240, col. 1)]

No order of attachment of property can be passed in a proceeding under section 107 of the Criminal Procedure Code. [p. 239, col. 1.]

Application against orders of the District Magistrate, Bahraich, dated the 9th July 1923.

Mr. *Ghulam Hasan*, for the Applicants.

Mr. *Mojiz Husain*, for the Opposite Party.

JUDGMENT.—This is an application under section 435, Criminal Procedure Code, for the revision of an order of the Deputy Commissioner of Bahraich.

In order to understand the facts of the case it is necessary to go into its history in some detail.

Mouza Murka in the Bahraich District was sold for Rs. 25,000 by S. Ali Haider, the father of the opposite party, to the father of the present applicants on the 8th May 1919 and possession was given to him on 14th June 1919. He applied for mutation which was finally granted by the Board of Revenue after contest on the 21st September 1920. The purchaser was not allowed to retain possession undisturbed and he instituted proceedings under section 145, Criminal Procedure Code. His right to possession was, however, maintained and an application for revision made by the opposite party was rejected by this Court on the 3rd November 1920 when they were

directed to go to the Civil Court if they wished to establish their rights.

Meanwhile the Police had sent up both the parties to be bound over to keep the peace under section 107, Criminal Procedure Code. The applicants were discharged but the opposite party were bound over on the 3rd February 1920, and on the 28th April 1920 that order was upheld by this Court. The District Magistrate, Mr. Cotton, however, cancelled their bonds under section 125, Criminal Procedure Code. The relations between the parties, however, continued to be so strained that the Police once more asked for action to be taken under section 107, Criminal Procedure Code, and on the 21st November 1920 the District Magistrate, Mr. Cotton, passed the following order:—

"From the report of the Circle Inspector dated 12th November 1920 there is no doubt that the action of Lala Parshotam Das has been highly provocative, at the same time, I am reluctant to bind him over when he has been allowed mutation by the Commissioner and this has been confirmed by the Board. Murka will be taken under Qarq Tahsil at once."

The village was accordingly taken under attachment.

This was clearly an illegal order. What section it is purported to have been passed under, is not shown, but the only proceedings then before the District Magistrate were those under section 107, Criminal Procedure Code, in which no order of attachment of property could be passed. Nor can it be maintained that it was an emergency order under section 146, Criminal Procedure Code, as none of the requirements of section 145 were complied with at the time or later.

From time to time applications were made by Lala Parshotam Das for the release of the village but no orders favourable to him were passed until on 4th November 1921 he was informed that it would be released as soon as the revenue due on it was paid. This condition was complied with by the applicant. But now the opposite party who had in December 1920 filed a civil suit for a declaration, that the deed of transfer should be cancelled, applied to the Subordinate Judge for an order to the District Magistrate directing him not to release the village pending the decision of the civil suit.

It appears that at that moment when this application was made the suit had been dismissed for default but proceedings for its restoration to the file were pending. The Subordinate Judge sent to the District Magistrate a *robkar* in the sense desired. The District Magistrate, however, replied that the Subordinate Judge's order was not warranted by law and could not be carried out. The present applicants now put in a petition to the Subordinate Judge, praying that the order sent to the Deputy Commissioner might be re-called. On this, the Subordinate Judge passed a long order to the effect that he could not re-call an order which had not been obeyed. This was on the 10th February 1923.

The applicants next returned to the District Magistrate and asked to have the village released. On the 9th July he passed the order which this Court is now asked to revise. In this he held that the order passed by Mr. Cotton for the attachment of the property was illegal but that he was now debarred from releasing it by the order issued from the Court of the Subordinate Judge. This he held must be regarded as an injunction under O. XXXIX, r. 1 of Civil Procedure Code. He was fortified in this view by the application which had been made under O. XXXIX, r. 4 by the applicants and rejected on 10th February 1922 by the Subordinate Judge.

The applicants' Pleader argues that the order of the Subordinate Judge ought not to be regarded as under O. XXXIX r. 1, Civil Procedure Code. None of the grounds which would justify the issuing of such an order were even alleged by the persons who asked for it. They merely said that they were apprehensive that the present applicants might get the property released by the District Magistrate. No inquiry was made and no evidence adduced.

On the other hand it is pointed out that O. XXXIX, r. 1 is the only provision of law under which the Subordinate Judge

In re PUNYA SYMALO.

would possibly have acted and the present applicants recognised it as such an order in their own application under r. 4 to have it set aside. It is further pointed out that such an order would not be open to revision under section 115, Civil Procedure Code, and, therefore, whether properly passed or not it cannot be called to question now.

One aspect of the matter which does not appear to have been emphasised or considered is the fact that the Subordinate Judge's order was passed after the suit had once been dismissed and before it had been restored to the file. There was, therefore, no suit pending at the time before the Court and it had no jurisdiction to pass any orders. I am of opinion that the injunction granted by the Subordinate Judge was void *ab Initio* and having been made without jurisdiction it can, therefore, be no bar to the release of the property. The order under which that property was originally attached was an entirely illegal order. I accordingly allow this application and direct that the property be released from attachment in favour of the applicants by the Deputy Commissioner of Bahraich.

Z. K. *Application allowed.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 222 OF 1923.
(CASE REFERRED NO. 42 OF 1923.)
September 19, 1923.
Present:— Mr. Justice Krishnan and
Mr. Justice Odgers.
In re PUNYA SYMALO—ACCUSED.

Madras Local Boards Act (XIV of 1920), s. 221—Money payable under contract of toll lease —"Other sums," meaning of.

The amount due under a contract of the lease of toll does not fall under section 221 of the Local Boards Act. The words "other sums" in that section must be read as *ejusdem generis* with what precedes them.

Case referred for the orders of the High Court under section 438 of Criminal Procedure Code by the Sessions Judge, Ganjam at Berhampore, in his letter Dis. No. 883 of 15th March 1923.

Mr. *V. L. Ethiraj,* for the Public Prosecutor, for the Crown.

ORDER.— We think the reasons stated in the order of the learned Sessions Judge are correct and we accept the same. The amount due under a contract of lease though of the toll cannot be treated as falling within the section 221 of the Local Boards Act. The words "other sums" in the section should be read *ejusdem generis* with what proceedes them. Then again the sum in question, is not payable "under or by virtue of this Act," but is payable by the party under the contract between the parties. Section 106 has no bearing on this question; it merely authorises the leasing out of the tolls but does not make the money payable under the contract of the lease money payable under the Act. We, therefore, set aside the order of the Town Sub-Magistrate of Berhampore, in M. C. No. 44 of 1922 as made without jurisdiction.

V. N. V.
S. D. *Order set aside.*

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION NO. 367 OF 1922.

July 23, 1923.

Present:—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Coyajee.

THE SECRETARY OF STATE FOR INDIA—APPLICANT

versus

NARSIBHAI DADABHAI PATEL AND ANOTHER—OPPONENTS.

Civil Procedure Code (Act V of 1908), s. 115—Bombay Regulation (II of 1827), s. 5—Bombay Civil Courts Act (XIV of 1869), s. 32—Revision—Interlocutory order—Interference by High Court—Suit for declaration that certain nominations of Municipal Councillors are invalid—Secretary of State, whether necessary party—Jurisdiction of Sub-Judge to try suit.

The language of section 115 of the Civil Procedure Code is wide enough to include an interlocutory order. The High Court will not, however, interfere with an interlocutory order in revision, save in cases wherein a defeat of the law and a grave wrong are manifest, and are irremediable by the regular procedure. [p. 242, col. 2.]

Case-law discussed.

The second clause of section 5 of Bombay Regulation II of 1827 confers on the High Court the power to interfere with interlocutory orders. [p. 244, col. 1.]

To a suit for a declaration that the nomination of certain members to a Municipality by the Commissioner is invalid and illegal, the Secretary of State for India is a necessary party. [p. 244, col. 1.]

Section 32 of the Bombay Civil Courts Act, ousts the jurisdiction of a Subordinate Judge to try a suit to which the Secretary of State for India is a party, irrespective of the fact whether he was impleaded as a party at the time when the suit was filed or after the suit had been received and registered by the Court. [p. 244, col. 2.]

Civil Extraordinary Application against an order passed by the Subordinate Judge, Nadiad, in Suit No. 261 of 1922.

Mr. *S. S. Patkar*, Government Pleader, for the Applicant.

Mr. *G. N. Thakor*, (with him Mr. *N. M. Desai*), for the Opponents.

JUDGMENT.

Coyajee, J.—The applicant asks this Court, in the exercise of its revisional jurisdiction to call for the record and proceedings in Suit No. 261 of 1922 of the Court of the First Class Subordinate Judge at Nadiad, and to order that the plaint be returned for presentation to the proper Court, on the ground, *inter alia*, that the former Court has no jurisdiction to try the suit. A Rule was granted on December 1, 1922. It has now come on for argument before us.

The material facts of the case are these. In March 1922, at a general election of Councillors for the Municipality of Nadiad, twenty-five persons were elected to hold office for a period of three years commencing with April 1. In August following seventeen out of that number resigned the office, whereupon a bye-election was held when eight Councillors were elected. As nine vacancies still remained to be filled, and as there was a failure to elect the full number, the Commissioner, Northern Division purporting to act under section 10 (2) of the Bombay District Municipal Act, 1901, nominated the nine persons who figure as the first nine defendants in the plaint.

On October 17, the plaintiffs (now opponents Nos. 1 and 2) claiming to be rate-payers and voters brought the suit which has given rise to this application. By their plaint (paragraph 3) they contended that "the Commissioner Saheb of the Northern Division directly nominated the defendants Nos. 1 to 9. The Commissioner Saheb has got no authority to nominate in this way. And as the appointment of such nominated members is illegal, they have got no right to sit in the Municipality as members and to work therein. In spite of this, we strongly apprehend that they taking shelter of the unlawful orders of the Commissioner Saheb are about to sit in the Municipality as members and to work therein." Then the plaint proceeds: "The cause of action has arisen on the date October 14, 1922, when the nomination of the defendants Nos. 1 to 9 was declared by the Municipality." And relief is sought in these terms: "That it may be declared that the nomination of the defendants Nos 1 to 9 as members of the Nadiad City Municipality made by the Government is illegal, and that they may be restrained by a permanent injunction from attending the meetings of the Municipality and from doing any work on behalf of the Municipality, and that the defendant No. 10 (*i. e.*, the Municipality) may be restrained by a permanent injunction from treating them as members, their nomination being illegal." On the

same day the plaintiffs applied for and obtained a temporary injunction restraining the tenth defendant "from allowing the defendants Nos. 1 to 9 to sit as members of the Municipality, and from dealing with them."

On October 20, the Government Pleader at Kaira applied to the Court praying that on the allegations contained in the plaint the Secretary of State for India in Council should be brought on the record of the case; it was also alleged that plaintiffs had "purposely omitted to make the Secretary of State a necessary party." The learned Subordinate Judge, on October 26, made him a party, as defendant No. 11, as in his opinion the powers of the Commissioner to nominate Councillors would have to be considered when deciding the suit on the merits. But he also said:—

"I allow the application but on condition that if it afterwards appears that the application has been made simply with a view to oust the jurisdiction of this Court and the plaintiffs are prejudiced thereby, it will be open to the plaintiffs then to apply that the name of the appellant as defendant be struck off and the case be tried as if he was not a party. Of course, this does not mean that the plaintiffs' application will be granted as a matter of course. The order only means that the point will then be fully considered and final orders passed then."

Four issues were then framed by the Court, the first two being: (1) Whether Government is a necessary party in the suit? (2) Whether this Court has jurisdiction to hear the suit? These two issues were tried first, probably on the ground that "the case or any part thereof may be disposed of on the issues of law only" (O. XIV, r. 2, Civil Procedure Code). On the first issue the Subordinate Judge held that although the Secretary of State for India in Council was a proper party, he was not a necessary party. On the second he held that notwithstanding the fact that he had made the Secretary of State a party defendant, section 32 of Act XIV of 1869 did not stand in the way of his trying the suit, the reason being that the Secretary of State was brought on the record on his own application and not at the request of the plaintiffs.

On the rule coming on for argument before us, a preliminary objection was raised, on behalf of opponents Nos. 1 and 2, that inasmuch as the trial Judge had not finally decided the suit, but only given his decision on certain issues of law, his order was merely interlocutory, and therefore the present application made under section 115 of the Code of Civil Procedure was not competent. This question has given rise to a diversity of judicial opinion. Arguments on both sides of it have been sufficiently discussed and considered in a large number of decided cases. We are, however, bound to give effect to authoritative pronouncements of this Court. The proper grounds and limits of the extraordinary jurisdiction of this Court "under the Code of Civil Procedure or otherwise" were fully considered by a Full Bench in *Shiva Nathaji* v. *Joma Kashinath* (1). The results of the earlier decisions were summed up thus (page 357): "The High Court will interfere to enforce the exercise of jurisdiction, or to restrain an excess of jurisdiction, in cases apparently calling for such interference, even though there may be a remedy by suit. When there is a remedy by appeal, the cases do not appear to warrant such interference, except under circumstances in which an appeal would manifestly be ineffectual." And the principle, here pertinent, was laid down (page 372) that: "Where an appeal is provided, the Court will not interfere by any peremptory order with the ordinary course of adjudication, save in cases wherein a defeat of the law, and a grave wrong, are manifest, and are irremediable by the regular procedure." There is much to be said in favour of this rule. The language of section 115 confers on the High Court wide powers—sufficiently wide to include an interlocutory order: *Motilal Kashibhai* v. *Nana* (2) and *Bai Atrani* v. *Deepsing Baria* (3). The word "case" is not specifically defined in the Code but it is a word of

(1) 7 B. 341; 7 Ind. Jur. 656; 4 Ind. Dec. (N.S.) 229 (F. B.).
(2) 18 B. 35; 9 Ind. Dec. (N. S.) 532.
(3) 33 Ind. Cas. 358; 40 B. 86; 17 Bom. L. R. 1097.

wide and comprehensive import and "inasmuch as section 115 is merely an empowering section granting certain jurisdiction to the High Court, and as the use or exercise of that jurisdiction will, within the prescribed limits, be regulated by the discretion of the High Court, the section ought to receive rather a liberal than a narrow interpretation:" *Bai Atrani* v. *Deepsing Baria* (3) (page 92*). The Full Bench decision above referred to was approved by another Full Bench of this Court in *Vithal Krishna* v. *Balkrishna Janardan* (4). In *Motilal Kashibhai* v. *Nana* (2), however, the opinion was expressed that the word "case" may be wide enough to include an interlocutory order, but a word of such general import must be controlled by due regard to the purpose with which the section was framed. That purpose was "to enable a party to a suit to get a decision or order of a lower Court rectified by the High Court, when there would otherwise be no remedy" (page 37). No reference was made to the opinions expressed in the two Full Bench decisions above alluded to and it may be respectfully pointed out that the section itself does not make the absence of another remedy a necessary condition of its applicablity. This Court, however, continued to exercise its revisional jurisdiction even in cases where a remedy by way of an appeal from the final decree was open: *cf. Somchand Bhikhabhai* v. *Chhaganlal* (5). In *Irbasappa Mallappa* v. *Basangowda* (6) the appellant asked this Court to revise an order made by the Collector under the Mamlatdars Courts Act. The opponents before us rely on the following observations occurring in the judgment of the learned Chief Justice: "In our opinion the Court should be slow to exercise its powers of revision under section 115 of the Code unless the party applying to the Court has no other remedy. But in a case where the proceedings which are sought to be revised are purely summary proceedings, which did not finally decide the dispute between the parties, then as far as we are concerned we do not think that we should exercise our powers of revision" (page 747*). This view is entirely consistent with the sixth principle laid down in the Full Bench decision in *Shiva Nathaji's case* (1) (page 372).

In support of the preliminary objection reliance is placed on the decision of Macleod, C. J. and Heaton, J., in *Bai Rami* v. *Jaga Dullabh* (7). There are, no doubt, observations in the judgments which, if not read in their context, might favour the opponents, contention. But in order to be able to correctly appreciate those observations, it is essential to know the facts of that case. The applicant before the High Court was one of six defendants in the suit; although served with a summons to appear on October 18, 1918, she failed to appear; an order was then passed directing the suit to proceed *ex parte* against her; on December 8 and 12 the case was heard and adjourned till July 12; on that day she appeared and applied for leave to defend the suit; the Trial Judge rejected this application and declned to set aside his order of October 1. It was in these circumstances that the applicant invoked the revisional jurisdiction of this Court, under section 115. In his judgment the learned Chief Justice fully sets out the above facts and then makes the following observations on which the opponents now rely: "We have no power to call for the record of any case which is under trial by a Court subordinate to the High Court. It seems necessary to point out that an application like this made during the course of a trial asking the Court to exercise its powers under section 115 in the matter of interlocutory orders cannot be countenanced. If such applications are made in future they should not be admitted" (page 802*). And Heaton J., "If there is one kind of case which section 115 most emphatically points to as not falling within its terms, it is a case like the present, where there is an interlo-

(4) 10 B. 610; 5 Ind. Dec. (N. S.) 795 (F. B.).
(5) 10 Ind. Cas. 803: 13 Bom. L. R. 207; 35 B. 243.
(6) 57 Ind. Cas. 432; 22 Bom. L. R. 746; 44 B. 595.
(7) 57 Ind. Cas. 556; 22 Bom. L. R. 801; 44 B. 619.

*Page of 40. B.—[*Ed.*]
*Pages of 22 Bom. L. R.—[*Ed.*]

cutory order on an incidental matter which does not prevent the further progress of the suit" (page 802*). The remarks, it is true, are not confined to the particular case then before the Court for they were obviously meant to apply to a class of cases. But the class intended was one, of which that particular case was but a type. The judgments contain no reference to the earlier Full Bench decisions of this Court, and it is impossible to say that their Lordships were dissenting from those authoritative pronouncements.

I, therefore, hold that this application is competent under section 115 of the Code of Civil Procedure. In any event, our powers derived from section 5 of Bombay Regulation II of 1827 are very wide. The powers thereby conferred on the Sudder Dewany Adawlat were transferred to this Court by section 9 of the High Courts Act, 1861, and they continue still in force by virtue of section 106 of the Government of India Act.

The question then is whether the application before us discloses a fit case for the exercise of our extraordinary jurisdiction. In my opinion it does.

The main question in the suit relates to the legality and validity of the nomination of nine Municipal Councillors, whose ordinary life is three years. The plaint was filed in October 1922. If we do not interfere now, but allow the litigation to run its full course through the Trial Court and the Court of Appeal, the applicant's ultimate success can yield no practical results, beyond a mere waste of time, energy and money. Moreover, delay in a matter of this nature must necessarily prejudicially affect public interests.

On the first issue, there can be no doubt on the case as made in the plaint that the Commissioner ought to have been joined as a party defendant. The lower Court concedes that he is a proper party. I hold that he is also a necessary party. The sole aim and purpose of the suit is to avoid the nominations made by him, in the exercise of statutory powers. Those powers are conferred on him by the Statute in the interests of the public. It is necessary to hear him before it could be decided that the nominations made by him were illegal. For what is the relief which the plaintiffs claim; The plaint says: "It may be declared that the nomination of the defendants Nos. 1 to 9 as the members of the Nadiad City Municipality made by the Government is illegal." It is obvious, then, that Government is a necessary party.

On the second issue, the finding of the Subordinate Judge is manifestly wrong. He has already added the Secretary of State for India in Council as a party to the suit; he is a necessary party. Section 32 of Act XIV of 1869 comes in the way of his trying the suit. The learned Judge does not attempt to ascertain the meaning of the section itself. He says: "There are very few reported cases" on that section. He therefore proceeds to consider some decided cases bearing on section 80 of the Code of Civil Procedure and concludes that 'the Court has jurisdiction to hear the suit when the Secretary of State has been made a party by the Court at his own request and no suit has been instituted against him by the plaintiffs." It is not easy to follow his process of reasoning. Section 32 is in these terms:—

"No Subordinate Judge or Court of Small Causes shall receive or register a suit in which the Government or any officer of Government in his official capacity is a party, but in every such case such Judge or Court shall refer the plaintiff to the District Judge, in whose Court alone (subject to the provisions of section 19) such suit shall be instituted."

It was urged before us that that section merely prohibits a Subordinate Judge from receiving or registering a suit of the nature therein described, but that it does not prevent him from trying it. I am unable to accept this desperate construction of the enactment. A Subordinate Judge is not a ministerial officer appointed for the purpose of receiving or registering suits. When he receives and registers a suit he does it for the purpose of trying it. There can be no

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object in preventing him from receiving and registering a suit, if it was intended to leave him free to try it. The section confers the exclusive jurisdiction of trying suits of a specified description on the District Judge. The other construction would leave the enactment at the mercy of a litigant; he could avoid these provisions of the Act by contrivances which are easy to imagine and not necessary to describe.

For these reasons I would make the Rule absolute and direct that the lower Court should return the plaint to the plaintiffs to be presented to the proper Court. Plaintiffs to pay costs of this application; and also costs of the defendants in the lower Court—one set.

Shah, Ag. C.J.—I am of opinion that this Court has jurisdiction to interfere in a case of this kind, and that under the circumstances of this case we should interfere in the exercise of that jurisdiction.

The preliminary objection as to the jurisdiction of this Court to call for the records of this case under section 115 of the Code of Civil Procedure has been elaborately argued. But I am not prepared to accept the contention that at no interlocutory stage of a suit this Court can interfere under that section. Various decisions have been cited at the bar on both sides as to the meaning of this expression "any case which has been decided by any Court subordinate to the High Court, and in which no appeal lies thereto." I do not think that it can serve any useful purpose to attempt to lay down any definition of "a case which has been decided." Where the question of jurisdiction such as arises in this case is involved, and where the subordinate Court has decided that question, the case cannot be held to be outside the scope of the expression. The interlocutory stage of the proceedings will evidently be a point to be considered in deciding whether it is a fit case for interference. On a question of jurisdiction arising at an interlocutory stage under circumstances which in essential particulars bearing on the preliminary point are similar to the circumstances in the present case, this Court interfered in *Somchand Bhikhabhai* v. *Chhaganlal* (5). Among the decisions which have been cited I have not been able to find any case, where it is held by this Court that the High Court has no jurisdiction to call for the record of a case, in which the question of jurisdiction is involved at an interlocutory stage under section 115 of the Code of Civil Procedure. The real safeguard against undue or improper interference at interlocutory stage is not to put a restricted meaning upon an expression which is comprehensive enough to include a case like the present but to exercise it with due regard to the circumstances of the case, and the nature of the question of jurisdiction. As pointed out in *Shiva Nathaji* v. *Jema Kashinath* (1) "the Court cannot impose on itself limitations without regard to circumstances." Even assuming that the case is not covered by section 115, I think it would clearly be covered by the words of the second clause of section 5 of Bombay Regulation II of 1827. Though the Regulation on this point is repealed, this Court still retains the power under the Statutes, which the Sudder Dewany Adawlat had under the said repealed clause.

As regards the second question, on the cause of action, as disclosed in the plaint and the nature of the relief claimed, I think that the Commissioner or the Secretary of State for India in Council is a necessary party. The distinction between a necessary party and a proper party is real; and it is not always easy to draw that distinction. The learned Subordinate Judge was of opinion that he was only a proper party and not a necessary party. It is true that the relief by way of injunction is directed against the other defendants and it may be said that the relief by way of declaration is not absolutely essential. But it is clear that the principal, if not the only, question of real importance involved in the suit relates to the validity of the Commissioner's order; and on the whole I think that the presence of the officer concerned or the Government before the Court is necessary in order to enable the Court to effectually and completely adjudicate upon the question involved in the suit. This suit cannot be justly tried

and decided and the declaration sought cannot be made in the absence of the officer of the Government. I, therefore, consider the applicant a necessary party. The judgment of the lower Court proceeds upon the basis that he is not a necessary party. It is not essential for the purposes of this case to decide the question whether section 32 of the Bombay Civil Courts Act will necessarily oust the jurisdiction of a Subordinate Judge in a case where the Government or the public officer is not a necessary party but is kept on the record merely because the case between the private parties may be more effectually dealt with. It is conceivable that an order such as was made by this Court in *Narayan Venku* v. *Sakharam Nagu* (8) may imply that the jurisdiction was not necessarily ousted. I reserve my opinion on this point. But where the Government or any officer of Government in his official capacity is a necessary party, as in this case, it is clear that section 32 of the Bombay Civil Courts Act must apply. It makes no difference in its application that the public officer or the Government has not been joined by the plaintiff as a defendant from the beginning before the suit is received or registered. The argument, advanced by the learned Counsel for the opponents, that if the suit is once received or registered and if the Government or the public officer is made a party afterwards, the bar created by section 32 against the jurisdiction of a Subordinate Judge cannot apply, does not deserve any serious treatment. I reject that argument.

It is clear to my mind that it would be futile to allow this suit to go on in the Court of a Subordinate Judge. It is a case in which we ought to prevent further proceedings in the Court, which according to law cannot entertain them. In the view which we take as to the Secretary of State for India in Council being a necessary party it would be a case of illegal assumption of jurisdiction, if that Court were to try the suit.

I, therefore, concur in the order proposed by my learned brother.

Z. K. *Rule made absolute.*

(8) 11 B. 519 at p. 523; 6 Ind. Dec. (N. S.) 342.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1734 OF 1918.

May 25, 1921.

Present.—Mr. Justice Broadway and Mr. Justice Abdul Qadir,

GURDIT SINGH—PLAINTIFF—APPELLANT

versus

KARAM DAD—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s. 101—Suit on unregistered bond—Execution admitted—Full consideration denied—Burden of proof—Question of fact or law—Second appeal.

In a suit on an unregistered bond, the defendant admitted execution. The receipt of consideration was not denied but it was not admitted in full and it was pleaded finally that whatever debt had been incurred had been repaid. The Trial Court placed the onus of proving absence of consideration on the defendant but the Appellate Court took a contrary view. On second appeal:

Held, (1) that the onus of proving absence of consideration lay on the defendant; [p. 247, col. 1.]

(2) that under the circumstances of the case, the question of the burden of proof was a question of law and could be agitated in second appeal. [p. 247, col. 1.]

Second appeal from a decree of the District Judge, Jhelum, dated the 2nd March 1918, reversing that of the Subordinate Judge, First Class, Jhelum, dated the 12th November 1917.

Sardar *Sewa Ram Singh*, for the Appellant.

Mr. *Devi Dyal*, for the Respondent.

JUDGMENT.—One Gurdit Singh instituted a suit against Karam Dad for the recovery of Rs. 1,400-being the principal and interest due on a bond executed by Karam Dad on the 13th of June 1910 for Rs. 600. The defendant admitted execution of the bond in suit but alleged that the bond had been executed as the final one of a series of other bonds and that the amount consisted mainly of interest and compound interest and for that reason the defendant was unable to admit consideration in full. It was also pleaded that whatever debt had been incurred had been repaid.

The execution of the bond having been admitted and a plea of repayment having been raised the Trial Court placed the onus of proving want of consideration on

the defendant and after recording such evidence as the parties cared to produce a decree was passed in favour of the plaintiff for Rs 1,200. Against this decree Keram Dad preferred an appeal to the learned District Judge. This appeal was accepted and the plaintiff's suit dismissed, the learned District Judge being of opinion that the onus of proving consideration should have been placed on the plaintiff and that this onus had not been discharged. Against this decision Gurdit Singh has come up to this Court on appeal through Mr. Sewa Ram Singh while the respondent has been represented by Mr Devi Dial.

In our opinion the view taken by the learned District Judge is erroneous. No doubt, the bond was an unregistered one but on the pleadings we are unable to hold that the onus of proving consideration was on the plaintiff. The execution of the bond had been admitted. The receipt of consideration was not denied it merely being alleged that full consideration could not be admitted. Finally, repayment of the debt was definitely alleged. In these circumstances the Trial Court rightly placed the onus on the defendant to show that the bond was without consideration. In any event having regard to the frame of the issue as to consideration, the appellant would have been entitled to a remand in order to be given an opportunity of proving consideration, a fact which the learned District Judge has lost sight of. Mr Devi Dial contended that the proper allocation of the *onus probandi* was a question of fact which could not be examined in second appeal and in support he referred us to a decision by Johnstone, C. J. reported as *Kaura* v. *Kalu Ram* (1). That decision, however, is really against Mr. Devi Dyal, for there it was held that there was no general rule that "the question of imposition of *onus probandi* is not a question of law for the purposes of second appeal." In the present case we have no hesitation in holding that the question involved is one of law and in our view as above expressed, the learned District Judge was wrong.

(1) 40 Ind. Cas; 1003; 36 P. W. R; 1917;

We accordingly accept this appeal with costs throughout and setting aside the order of the learned District Judge restore the decree passed by the Trial Court.

N. H. *Appeal accepted.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT NO. 2405 OF 1923.

July 17, 1923.

Present:—Mr. Justice Mulla.

SUBHADRABAI—PLAINTIFF

versus

MAHOMEDBHAI I. M. ROWJI—DEFENDANT.

Vendor and purchaser—Interest on unpaid purchase-money, agreement as to—Liability of purchaser—Wilful default of vendor—Default of both parties, effect of.

Where a contract of sale of immoveable property provides that if from any cause whatever the purchase-money is not paid by the date fixed the purchaser shall pay interest on the unpaid purchase-money at a certain rate, the vendor cannot claim interest if delay in payment of the purchase-money occurs owing to his wilful default, as he cannot take advantage of his own wrong. [p. 249, col. 2.]

Williams v. *Glenton*, (1866) 1 Ch. App. 200 at p. 206; 35 L. J. Ch. 284; 12 Jur. (N. S) 175; 13 L. T. 727; 14 W. R. 294 and *In re Woods and Lewis' Contract*, (1898) 2 Ch. 211 at p. 213; 67 L. J. Ch. 475; 78 L. T. 665; 46 W. R. 643; 14 T. L. R. 457 affirming (1898) 1 Ch. 433; 78 L. T. 250; 46 W. R. 373, relied on.

Lapse of time occasioned merely by the defect of the vendor's title not known to him at the date of the contract, especially where immediate steps are taken by the vendor to remedy the defect will not, however, exempt the purchaser from paying interest on the unpaid purchase-money under such a clause as the above. [p. 250, col. 1.]

In re Woods and Lewis' Contract, (1898) 2 Ch. 211 at p. 213; 67 L. J. Ch. 475; 78 L. T. 665; 46 W. R. 643; 14 T. L. R. 457 affirming (1898) 1 Ch. 433; 78 L. T. 250; 46 W. R. 373, *In re Young and Harston's Contract*, (1885) 31 Ch. D. 168; 54 L. J. Ch. 1144; 53 L. T. 875; 34 W. R. 84; 50 J. P. 245; *In re Hetling and Merton's Contract*, (1893) 3 Ch. 269; 62 L. J. Ch. 283; 2 R. 543; 69 L. T. 266; 42 W. R. 19; *In re Mayor of London and Tubbs' Contract*, (1894) 2 Ch. 524 at pp. 539, 540; 63 L. J. Ch. 580; 70 L. T. 719 and *Bennet* v. *Stone*, (1903) 1 Ch. 509; 72 L. J. Ch. 240; 88 L. T. 35; 51 W. R. 338, referred to.

Where delay in the payment of the purchase-money is occasioned by the default of both parties the purchaser is still liable to pay interest under the clause, as it cannot be said that the delay was caused exclusively on the part of the

vendor, which alone entitles the purchaser to exemption from liability to pay interest under the clause. [p. 251, col. 1.]

Mr. *M. C. Setalvad*, for the Plaintiff and Defendant No. 2.

Mr. *Kanga*, Advocate-General, for Defendant No. 1.

JUDGMENT.—This is an originating summons taken out by the plaintiff and the second defendant (purchasers) for the determination of the question whether the first defendant (vendor) is entitled to interest on the balance of the purchase-money from February 18, 1923, as claimed by him.

On January 18, 1923, the plaintiff and the second defendant purchased certain immoveable property at an auction-sale held by the first defendant as mortgagee of the property for Rs. 1,19,500 subject to certain conditions of which a print is Exhibit A herein. On the same day the purchasers paid Rs. 30,000 as earnest. The sale was to be completed on February 18, 1923. After the date of the agreement for sale, the purchasers' attorneys took search of the register of assurances when they discovered that the property was subject to a mortgage dated August 11, 1873, but there was no re-conveyance. The amount of the mortgage was Rs. 2,000, the parties to the mortgage were Hindus; and, having regard to the rule of *damdupat* the mortgagee would not be entitled to more than Rs. 2,000 for interest.

The above facts were brought to the notice of the vendor's attorneys, on February 17, 1923. On February 27 the vendor's attorneys wrote to the purchasers complaining that the purchasers had not completed the purchase and that the vendor would claim interest as provided by condition No. 6. To this the purchasers' attorney replied on March 1, stating that as the said mortgage was still subsisting the title was not marketable, and they enquired what the vender proposed to do to make the title marketable. To this there was no reply.

The purchasers then took out an originating summons for the determination of the question whether they were entitled to retain Rs. 4,000 to meet the mortgagee's claim. The summons was argued before me on April 13, and I delivered judgment on April 17, declaring that the vendor was bound to complete the sale on payment of the balance of the purchase-money less Rs. 4,000 for principal and interest and Rs. 150 for the costs of the re-conveyance, and I directed the purchasers to deposit Rs. 4,150 in Court to meet the mortgagee's claim. No arguments were addressed to me on the question of the costs of the summons, and, believing that the costs of the sale were to be equally divided between the parties, I directed that the costs of the summons should be costs in the sale. This order was made under a misapprehension, for under condition No. 18 all costs of the sale were to be borne by the purchasers. The matter was mentioned to me on June 12, and on June 14, I modified the order and directed in effect that each party should bear his own costs of the summons.

In the meanwhile, on April 17, the purchasers' attorneys wrote to the vendor's attorneys that the order for costs was made under a misapprehension. The vendor's attorneys replied on April 18, stating that the order was usual order made on summonses of this kind, and they required the purchasers to complete the matter. To this letter the purchasers' attorneys replied on the same day reiterating that the order as to costs was made under a misapprehension and they claimed to retain Rs. 1,000 with them until the question of costs was finally determined by me. The vendor's attorneys replied on April 25, denying the purchasers right to retain Rs. 1,000 or any other sum. The vendor also claimed interest from February 18, being the date fixed for completing the sale. Further correspondence passed between the parties, and on May 2, the vendor's attorneys made what I think was a very fair proposal to the purchasers' attorneys, namely, that the purchasers should pay the balance of the purchase-money and complete the purchase without prejudice to the contentions of the parties on the question of interest. As to costs they wrote that they would retain Rs. 1,000 with them and not part with the money until the question of costs was determined by the Court. The purchasers did not accept the offer and

by their letter of May 2, they insisted on retaining Rs. 1,000 with their attorneys. On May 4, the vendor's atterneys wrote to the purchasers' attorneys as follows:—

"With reference to the 2nd paragraph of your letter, in view of your attitude regarding the sum of Rs. 1,000, we are instructed to state that our client insists upon interest also being paid or the amount thereof being deposited either with your firm or with our firm before completion. Of course your clients must take steps as regards the question of costs and also as regards the question of interest on or before June 15 next, failing which the amount of interest will become payable to our client."

The purchasers did not reply to the above letter. On June 11, the purchasers' attorneys applied to me to reconsider the question of costs, and on the same day they wrote to the vendor's attorneys enquiring whether he was prepared to complete *without claiming any interest*. They knew full well that the vendor insisted upon his claim for interest, and I do not see any reason why they made the above inquiry. Then on June 14, I made the order directing each party to bear his own costs of the summons.

The present summons was taken out by the purchasers on June 22, 1923. The question to be determined on the summons depends on the true construction of condition No. 6. That condition is as follows:—

"The purchaser of the property shall pay the balance of his purchase-money to the said mortgagee within one calendar month from the day of sale and if the same from any cause whatever be not so paid the purchaser shall pay interest on his unpaid purchase-money at the rate of 10½ per cent. per annum from the end of one calendar month from the date of sale to the day on which the same is actually paid. The purchaser shall not, however, be entitled to claim any rents or income that might be earned out of the said property before payment of the entire balance of the purchase-money. This stipulation is without prejudice to the rights reserved to the mortgagee under other conditions."

It was contended for the purchasers that the delay in the completion of the purchase was caused by the wilful default of the vendor in refusing to complete unless the whole balance of the price was paid, though the mortgage of 1873 was still subsisting, and that the purchasers were not liable to pay any interest. On the other hand, it was argued for the vendor that the refusal did not amount to wilful default, and that the purchasers were bound to pay interest at the rate of 10½ per cent. per annum from February 18, 1923, being the date fixed for completion until the sale was completed.

The words used in condition No. 6 are "from any cause whatever," but it has long since been settled that the generality of these words do not allow a vendor to claim interest where delay occurs by his "wilful default." The Courts have so construed those words as to prevent a vendor from taking advantage of his own wrong: See *Williams* v. *Glenton* (1) and *In re Woods and Lewis' Contract* (2). In *Williams* v. *Glenton* (1) the vendor contracted to sell a moiety of an estate to Glenton, the purchase to be completed on June 24, 1854, and if "from any cause whatever," the purchase should not be completed on that day, the purchaser was to pay interest. After the agreement for sale the other part-owner set up a claim to the entirety, and refused to produce the deeds. The vendor filed a bill for partition and a decree for partition was made in July 1862. The purchaser applied at distant intervals to know whether the vendor would complete, and never expressed a wish to rescind. After the decree was obtained, the purchaser insisted that he was entitled to complete without paying interest on the purchase-money. It was held by the Court of Appeal that the circumstances were not such as to exempt the purchaser from payment of interest according to the contract. In the course

(1) (1866) 1 Ch. App. 200 at p. 206; 35 L.J. Ch. 284; 12 Jur. (N. S.) 175, 13 L. T. 727; 14 W. R. 294.

(2) (1898) 2 Ch. 211 at p. 213; 67 L. J. Ch. 475; 78 L. T. 665; 46 W.R. 643; 14 T. L. R. 457; Affirming (1898) 1 Ch. 433; 78 L. T. 250; 46 W. R. 373.

of his judgment, Sir J. L. Knight-Bruce, L. J. said(p. 206) :—

"The vendor may be, in a sense, wrong in not having his title ready at the time specified; but I repeat it has notoriously been long settled that the mere existence of difficulties as to the title, justifying the purchaser in refusing to complete until they are removed, does not exempt him from that clause relating to interest.....There must be something more than that kind of default which I have mentioned: there must be, I might almost say, some serious misconduct on the part of the vendor to exempt the purchaser from liability to interest. Here there is nothing of the sort. The purchaser might possibly have exempted himself from interest by investing the purchase-money; he might, and possibly with success, have refused to be bound by the contract; but he did neither."

The above case is an authority for the proposition that lapse of time occasioned merely by the defect of the vendor's title not known to him at the date of the contract, especially where immediate steps are taken by the vendor to remedy the defect, as was done in *In re Woods and Lews' Contract* (2), does not exempt the purchaser from paying interest.

In *In re Young and Harston's Contract* (3), the clause as to interest contained the words, "if from any cause whatever other than wilful default on the part of the purchaser." In dealing with the expression "wilful default," Bowen, L. J. said (page 174) —

"The term 'wilful default'....is not a term of art.....Default is a purely relative term, just like negligence. It means nothing more, nothing less, than not doing what is reasonable under the circumstances—not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction. The other word which it is sought to define is 'wilful'. That is a word of familiar use in every branch of law, and although in some branches of the law, it may have a special meaning, it generally, as used in Courts of Law, implies nothing blamable, but merely that the person of whose action or default the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent."

The observations of Bowen, L. J., were cited with approval in *In re Hetling and Merton's Contract* (4) in *In re Mayor of London and Tubb's Contract* (5) and in *Bennett* v. *Stone* (6).

I now pass to consider whether the delay in the present case was occasioned by the wilful default of the vendor. Applying the above observations to the facts of the present case, I think that the delay was caused by what I may call in the words of Knight-Bruce, L. J., "serious misconduct on the part of the vendor." Immediately the purchasers' attorneys discovered the defect in the title, they brought it to the notice of the vendor by their letter of February 17. The mortgage of 1873 being still subsisting, the vendor was not entitled to payment of the whole of the purchase-money as if the mortgage did not exist. He insisted, however, on payment of the whole of the purchase-money, which obviously he was not entitled to do. The purchasers had no alternative but to take out an originating summons which they did on March 28, 1923. In the language of Bowen, L. J., he did not do what he ought to have done. He ought, I think, to have accepted the price less the amount of the mortgage claim, but he refused to do so. The refusal was unreasonable: it was arbitrary and unjustifiable. What, then, is the period for which the purchasers should be exempted from payment of interest? The mortgage was discovered by their attorneys on or about February 17. But the originating summons was not taken out

(3) (1885) 31 Ch. D. 168; 54 L. J. Ch. 1144; 53 L. T. 875; 34 W. R. 84; 50 J. P. 245.

(4) (1893) 3 Ch. 269; 62 L. J. Ch. 783; 2 R. 543; 69 L. T. 266; 42 W. R. 19.

(5) (1894) 2 Ch. 524 at pp. 539, 540; 63 L. J. Ch. 580; 74 L. T. 719.

(6) (1903) 1 Ch. 509; 72 L. J. Ch. 240; 88 L. T. 355; 51 W. R. 338.

until March 28, 1923, and this delay has not been explained. Further, the purchasers were wrong in insisting upon retaining Rs 1,000 for costs. I think they would have been well advised if they had accepted the offer made by the vendor's attorneys by their letter of May 2. Had the offer been accepted, the purchase could have been completed by May 8. If no such offer had been made, I should have held that both parties were in the wrong, the vendor in refusing to complete unless interest was paid for the full period of the delay, and the purchasers in refusing to complete unless they were allowed to retain Rs. 1,000 for costs. Both parties being in the wrong, it could not be said that the delay was caused exclusively by default on the part of the vendor, which alone entitles the purchaser to exemption from liability to interest under the interest clause : See *In re Mayor of London and Tubbs' Contract* (5). Again, there was no reason why the question of interest should not have been raised by the first summons. The vendor had set up that claim by his attorneys' letter of February 27. Having regard to all the facts of the case and the conduct of the parties, I think that the purchasers should pay interest from February 19, 1923, up to July 9, 1923, being the date on which the purchase was completed, except from March 28, 1923, the date of the first originating summons (No. 1208 of 1923) to May 8 when the sale ought to have been completed, to which ought to be added a further period of ten days, being the period necessary for preparing papers for the originating summons after the date of the discovery of the mortgage. The total period of exclusion will thus be fifty-two days. Each party to bear his own costs of the summons. First defendant to be at liberty to add his costs to his mortgage claim. Counsel certified.

Z. K.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1454 OF 1917.

May 18, 1921.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Harrison.

KANSHI RAM AND OTHERS—DEFENDANTS —APPELLANTS

versus

Musammat HARO—PLAINTIFF —RESPONDENT.

Evidence Act (I of 1872), s. 101—Construction of document—Agreement by surety—Security deposit, confiscation of—Justification—Burden of proof.

The plaintiff deposited security money with the defendants, a partnership firm, on behalf of one of the members thereof, the agreement being that if the business suffered any loss, the other partners would be entitled to deduct the share of the loss of that member from the security money. After the partnership came to an end the plaintiff sued to recover his deposit. The defendants contended that in order to succeed the plaintiff was bound to prove that there had been no loss in the business:

Held, that upon a correct interpretation of the agreement the burden of proof was on the defendants to show that the business had suffered any loss and in the absence of such proof, the plaintiff was entitled to a decree. [p. 252, col. 1.]

Second appeal from a decree of the District Judge, Amritsar, dated the 23rd April 1917, confirming that of the Sub-Judge First Class Amritsar, dated the 12th December 1916.

Mr. *Manohar Lal*, for the Appellants.

Dr. *G. C. Narang*, for the Respondent.

JUDGMENT.—The facts of this case are few and simple On the 10th of April 1906 Pala Mal and Kanshi Ram entered into a partnership business with one Mohan Lal. Mohan Lal was to be the managing partner, and was to keep the accounts. Pala Mal and Kanshi Ram had to find funds. On the 30th of July 1906, *Musammat* Haro, the plaintiff in this case, stood surety for Mohan Lal and executed a security-bond under which she mortgaged a house for Rs. 1,000, and deposited Rs 1,000 in cash. The partnership was entered into for a period of two years. The plaintiff brought this suit for the recovery of Rs. 1,000 which were deposited in cash on the allegation that the partnership business had come to an end, and that no loss had been incurred. She also claimed interest. The suit was

at first dismissed upon a technical ground by the Trial Court. On appeal it was remanded under O. XLI, r. 23, Civil Procedur Code. An appeal against the order of remand to the Chief Court having failed the case went down to the Trial Court for decision. The chief question for decision on the pleadings was the question of burden of proof. The defendants Nos. 1 and 2 contended that the plaintiff in order to succeed was bound to prove that there had been no loss in the business. The plaintiff, on the other hand, argued that it lay upon the defendants to prove that the business had suffered loss, and that they were entitled to detain the money due to her. On the case coming back to the Trial Court the second time, Mohan Lal, for whom the plaintiff had stood surety, was also impleaded as a defendant to the suit. Both the Courts below found that the defendants Nos. 1 and 2 had a right to call upon the defendant No. 3 to give accounts, and that they were not entitled to detain the money belonging to the plaintiff without showing that the business had resulted in loss. The suit was accordingly decreed by the Trial Court and the decree was upheld by the lower Appellate Court.

The defendants have come up in second appeal to this Court, and it has been contended on their behalf by Mr. Manohar Lal that the decision of the two Courts below on the question of burden of proof was wrong. We are clearly of opinion that the two Courts below have taken the right view of the question of the burden of proof. A reference to the hypothecaton bond itself clearly shows what the contract between the parties was. One of the clauses in the document is that in case the business suffered any loss and Mohan Lal refused to pay his share of such loss on demand being made, Pala Mal and Kanshi Ram would be entitled to deduct from the security money, the share due to them on account of the loss.

Upon a correct interpretation of the words of this deed there is no doubt that the burden of proof lay upon defendants Nos. 1 and 2 to show that the business had suffered any loss, and that they had called upon Mohan Lal to pay his share of the loss. This they have failed to show, and the Courts below were right in decreeing the suit. We accordingly dismiss this appeal with costs.

Appeal dismissed.

N. H.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 594 OF 1920.

March 21, 1922.

Present:—Mr. Justice Ross.

Munshi GOBIND PRASAD—PLAINTIFF—APPELLANT

versus

Lala JAGDEEP SAHAI—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 54—Transfer of land—Deed of relinquishment—Title to property, whether passes.

A deed of relinquishment does not confer a title and title to land cannot pass by admission when the Statute requires a deed of conveyance. [p. 253, col. 1.]

Mr. *Rai T. N. Sahai*, for the Appellant.

Mr. *Janak Kishore*, for the Respondent.

JUDGMENT.—This is an appeal by the plaintiff who brought a suit alleging that he had purchased 2 *bighas* 18 *kanals* 10 *dhurs* of land in 1900 in the *farzi* name of the defendant and that on the 7th May 1918 the defendant executed a deed of release in his favour but refused to deliver it.

The plaintiff claims declaration that the defendant was a *benamidar* purchaser in 1900 and prays for a decree ordering the defendant to deliver the deed of release to the plaintiff. In his written statement the defendant denied that he was the *farzidar* of the plaintiff or that the plaintiff had purchased the property.

He further alleged that the deed of release was intended to be a coveyance but the consideration had not been paid.

The learned Munsif thought the deed to be a genuine deed of release and gave a decree. The District Judge, however, first considered the question whether the

plaintiff or the defendant was the beneficial owner of the property.

On this question he finds that the defendant was the beneficial owner. He then went into the question of the *Ladavi* deed and held that if there was no consideration the defendant was not bound by the deed but that in fact the defendant had proved that he executed this document because the plaintiff promised to pay him Rs. 250 which had not been paid. He, therefore, modified the decree of the Munsif by ordering the plaintiff to pay Rs. 250 and the defendant to deliver the sale-deed on receipt of this amount. The contention in second appeal is that under section 92 of the Evidence Act no evidence was admissible to show any contemporaneous agreement for the payment of Rs. 250 and that as the execution of the deed is admitted, the plaintiff is entitled to a decree for delivery thereof unconditionally. Now the learned District Judge has found as a fact that the defendant was the beneficial owner of this property.

The prayer in the plaint, therefore, must be refused and the only question is whether the plaintiff is entitled to the delivery of this deed. Now it has been held repeatedly that the deed of relinquishment does not confer a title and that title to land cannot pass by admission when the Statute requires a deed.

Jadu Nath Poddar v. *Rup Lal Poddar* (1) and *Dharam Chand Boid* v. *Mouji Sahu* (2). Here the parties have been trying to effect by release what could only be effected by conveyance. This document is of no effect whatsoever in transfering the title from the defendant to the plaintiff.

The appeal is dismissed with costs.

N. H. *Appeal dismissed*

(1) 33 C. 967; 4 C. L. J. 22; 10 C. W. N. 650.
(2) 16 Ind. Cas. 440; 16 C. L. J. 436.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2771 OF 1920.

July 20, 1922.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Chotzner.

KUNJA MOHAN CHAKRAVARTY AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MANINDRA CHANDRA ROY CHAUDHURY AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 16 (4), 20, 21, O. XXI, r. 3—Bengal Tenancy Act (VIII of 1885), s. 144—Rent suit—Cause of action—Place of suing—Execution of decree—Sale of immoveable property outside jurisdiction, validity of—Jurisdiction, want of, effect of.

Section 144 of the Bengal Tenancy Act merely lays down where the cause of action in suits between landlord and tenant shall, for the purposes of the Code of Civil Procedure, be deemed to have arisen; it does not say in which Court the suit is to be instituted. To ascertain this recourse must be had to the provisions of section 20 of the Code. [p. 254, col. 2.]

Where the landlord only wants a money-decree the suit may be instituted in the Court within the local limits of whose jurisdiction the tenant resides; where, however, the landlord seeks a decree for rent or ejectment, the suit must be treated as one for recovery of immoveable property within the meaning of section 16 (4) of the Civil Procedure Code and must be instituted in the Court within the local limits of whose jurisdiction the property is situate. [p. 259, col. 2.]

Case-law discussed.

The only case in which a Court is entitled to sell immoveable property beyond the local limits of its jurisdiction is that provided in O. XXI, r. 3 of the Civil Procedure Code. A sale of such property in any other case is without jurisdiction and a nullity. If a Court has no jurisdiction over the subject-matter, its judgments and orders are mere nullities, and may not only be set aside at any time by the Court in which they are rendered, but be declared void by every Court in which they are presented. If a Court has no jurisdiction, its judgment is not merely voidable but void and it is wholly unimportant how precise, certain and technically correct its proceedings and decisions may have been; if it has no power to hear and determine the cause, its authority is wholly usurped and its judgments and orders are the exercise of arbitrary power under the forms, but without the sanction, of the law. These principles apply, not only to original Courts but also to Courts of Appeal. Accordingly where an Appellate Court does not possess jurisdiction to review the action of the Court below, jurisdiction cannot be conferred upon it by consent of the parties, and any waiver on their part cannot make up for the lack or defect of jurisdiction. [p. 256, col. 1.]

Ledgard v. *Bull*, 9 A. 191; 13 I. A. 134; 4 Sar. P. C. J. 741; 5 Ind. Dec. (N. S.) 561 (P. C.), *Minakshi Naidu* v. *Subramanya Sastri*, 11 M. 26; 14 I. A. 160; 5 Sar. P. C. J. 54; 11 Ind. Jur. 393; 4 Ind. Dec. (N. S.) 18 (P. C.), and *Gurdeo Singh* v. *Chandrika Singh*, 1 Ind. Cas. 913; 36 C. 193; 5 C. L. J. 611, referred to.

The provision contained in section 21 of the Civil Procedure Code is an exception to the well established rule that where the Court has no inherent jurisdiction over the subject-matter of suit, its decree is a nullity, even though the parties may have consented to the jurisdiction of the Court, and cannot be so interpreted as to have a wider application than what is justified by its terms. [p. 256, col. 2.]

Section 21 of the Civil Procedure Code does not bar a defendant from questioning the validity of an execution sale held without jurisdiction which is the root of the plaintiff's title. [p. 256, col. 2; p. 257, col. 1.]

Appeal against a decree of the District Judge, Rangpur, dated the 20th July 1920, reversing the decree of the Munsif, First Court, at Kurigram, dated the 2nd June 1919.

Babus *Surendra Chandra Sen* and *Dwijendra Krishna Dutt*, for the Appellants.

Babu *Mohini Mohan Chakravarty*, for the Respondents.

JUDGMENT.—This is an appeal by the defendants in a suit for recovery of possession or, in the alternative, for assessment of rent. The disputed tenure was held by the defendants under the plaintiffs and fell into arrears. The plaintiffs thereupon instituted a suit for arresrs of rent and obtained a decree. In execution of that decree the tenure was sold on the 8th January 1907 and was purchased by the landlord decree-holders for the sum of Re. 1. On the 29th April 1918 the plaintiffs landlords instituted the present suit for ejectment on the allegation that the defendants were in unlawful occupation, notwithstanding the sale of their tenure. The defendants urged that the decree had been made and the sale had been held without jurisdiction. So that their interest in the tenure had not been affected thereby. The Trial Court accepted this contention as well founded and dismissed the claim for ejectment. The Court, however, made a decree for arrears of rent. Upon appeal the District Judge has reversed that decision and made a decree in ejectment with mesne profits. On the present appeal the view taken by the District Judge has been assailed as contrary to law.

It is not disputed that the tenure is situated within the jurisdiction of the Court of the Munsif at Kurigram within the district of Rangpur. The suit for rent however, was instituted in the Court of the Munsif at the head-quarters of that district. The defendants did not appear, with the result that the suit was decreed *ex parte*. The decree was then executed at the instance of the plaintiffs and the tenure was brought to sale in the Court where the decree had been passed. On these facts, the defendants contend that the decree was made and the sale was held without jurisdiction.

In support of the contention that the decree was made without jurisdiction, reliance has been placed upon sub-section (1) of section 144, Bengal Tenancy Act, which is in these terms:—"The cause of action in all suits between landlord and tenant as such shall, for the purposes of the Code of Civil Procedure, be deemed to have arisen within the local limits of the jurisdiction of the Civil Court which would have jurisdiction to entertain a suit for the possession of the tenure or holding in connection with which the suit is brought." This provision, it will be observed, does not specify the Court where the suit is to be instituted. It merely defines the expression 'cause of action' as applied to suits between landlord and tenant for the purposes of the Code of Civil Procedure. That this is the true scope of the section is clear from the decision in *Fazlur Rahim Abu Ahmed* v. *Dwarka Nath Chowdhry* (1). In that case, it was ruled that section 144, Bengal Tenancy Act, was controlled by sections 15 and 17 of the Civil Procedure Code of 1882, and that consequently a suit for rent was required to be instituted, subject to pecuniary limitations, in the Court of the lowest grade competent to try it. Sir Francis Maclean, C. J., pointed out that section 144 merely lays down where the cause of action in suits between landlord and tenant shall, for the purpose of the Code of Civil Procedure, be deemed to have arisen: it does not

(1) 30 C. 453; 7 C. W. N. 402.

say in which Court the suit is to be instituted. To ascertain this, we must go to section 17 of the Code of Civil Procedure, 1882, which provides that all other suits, that is, other than those mentioned in section 16, shall be instituted in a Court within the local limits of whose jurisdiction the cause of action arises. This, in the case of suits between landlord and tenant, is controlled by section 144, Bengal Tenancy Act which tells us where, in such suits, the cause of action shall be deemed to have arisen : *i. e.*, within the local limits of the jurisdiction of the Civil Court which would have jurisdiction to entertain a suit for the possession of the holding or tenure in connection with which the suit is brought. We must consequently turn to the provisions of section 20 of the Code of 1908 which replaces section 17 of the Code of 1882. Now section 20, provides that subject to the limitation aforesaid, that is the limitations set out in the preceding sections, every suit shall be instituted in a Court within the local limits of whose jurisdiction (*a*) the defendant or each of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or (*b*) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides or carries on business or personally works for gain, provided that in such case, either the leave of the Court is given, or the defendants who do not reside, or carry on business or personally work for gain as aforesaid, acquiesce in such institution, or (*c*) the cause of action wholly or in part, arises. Consequently under section 20 (*c*) of the Code of 1908 read with sub-section (1) of section 144, Bengal Tenancy Act, a suit for rent may be instituted in the Court within the local limits of the jurisdiction of which lies the property in respect of which a suit for possession may have been brought. This, however, does not exhaust all the provisions of section 20. Clauses (*a*) and (*b*) of section 20 allow a landlord to institute a suit for rent where the tenant resides. This must obviously be limited to cases where the landlord seeks a decree for money. Where however, the landlord seeks a decree for rent as also ejectment under section 66, Bengal Tenancy Act, the suit must be treated as one for recovery of immoveable property within the meaning of clause (4) of section 16 and can consequently be instituted in the Court within the local limits of whose jurisdiction the property is situate. In the case before us, there is evidence to show that at the time the suit for rent was instituted, the defendants resided within the local limits of the Court of the Munsif at the headquarters of the District of Rangpur. The suit was consequently brought in a Court which had jurisdiction and the decree cannot successfully be impeached on that ground. The view we take is supported by the decision in *Chintaman Narayan* v. *Madhavrav Venkatesh* (2) where it was ruled that a suit to recover the rents of land situated in District T. may be brought in District S., where the defendant is residing, although in such suit the plaintiff's title to the land in respect of which the rent is sought to be recovered may incidentally come in question.

We have next to consider whether the sale was held with jurisdiction. As we have already stated the sale was held by the Court which had made the decree. That Court had jurisdiction over the person of the defendants but not over the disputed property. In these circumstances, it is plain that the Court was not competent to bring the property to sale. The only case in which a Court a is entitled to sell immoveable property beyond the local limits of its jurisdiction is that provided in O. XXI r. 3 of the Code of 1908 which provides as follows:—"Where immoveable property forms one estate or tenure situate within the local limits of the jurisdiction of two or more Courts any one of such Courts may attach and sell the entire estate or tenure." This provision was inserted for the first time in the Code of 1908 and gave effect to the decision of this Court in *Ram Lall Moitra* v. *Bama Sundari Dabia* (3). We must hold

(2) 6 B. H. C. R. A. C. J. 29.
(3) 12 C. 307; 6 Ind. Dec. (N. S.) 209.

accordingly that the sale was held without jurisdiction.

This brings us to the question of the effect of such sale. In our opinion, there is no room for controversy, that the sale was a nullity. In support of this conclusion reference may be made to the decision in *Rajlakshmi Dasee* v. *Katyayani Dasee* (4). It is an elementary principle of law that if a Court has no jurisdiction over the subject-matter, its judgments and orders are mere nullities, and may not only be set aside at any time by the Court in which they are rendered, but be declared void by every Court in which they are presented. If a Court has no jurisdiction its judgment is not merely voidable but void and it is wholly unimportant how precise, certain and technically correct its proceedings and decisions may have been; if it has no power to hear and determine the cause, its authority is wholly usurped and its judgments and orders are the exercise of arbitrary power under the forms, but without the sanction of the law. These principles apply, not only to Original Courts but also to Courts of appeal. Accordingly where an Appellate Court does not possess jurisdiction to review the action of the Court below, jurisdiction cannot be conferred upon it by consent of the parties; and any waiver on their part cannot make up for the lack or defect or jurisdiction. This view has been recognised by the Judicial Committee in *Legdard* v. *Bull* (5) and *Minakshi Naidu* v. *Subramanya Sastri* (6). Reference may also be made to the decision of this Court in *Gurdeo Singh* v. *Chandrika Singh* (7) where the authorities on the subject are reviewed.

It was contended, however, on behalf of the respondents that although the sale was held without jurisdiction, and although the proceedings could not be validated on the ground of acquiescence, still the proceedings might be deemed as those of an arbitrator chosen by the parties. In support of this proposition reliance was placed upon a passage from the judgment of the Judicial Committee in *Legdard* v. *Bull* (5) where Lord Watson observed that when, in proceedings pending before the Court, the parties agree to accept the Judge's decision as final even though the Court may not have jurisdiction, they thereby constitute the Judge a quasi-arbitrator. The effect of such agreement is that the decision of the Judge is not appealable and cannot be questioned in any way. But though the Judge may be considered as an arbitrator, his decision is not, and does not, in any way resemble, an award; *Burgess* v. *Morton* (8). This principle, however, has no application to the circumstances of the present litigation. The decree was made *ex parte*; the sale was held *ex parte*; and consequently it cannot be assumed that the parties, that is, the decree-holder and the judgment-debtor, agreed to constitute the Judge as their arbitrator and to abide by the sale held by him.

Finally, reference has been made, in the course of the argument, to section 21 of the Civil Procedure Code, which forms the basis of the view taken by the District Judge. That section provides that no objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless, such objection was taken in the Court of first instance at the earliest possible opportunity, and in all cases where issues are settled, at or before such settlement; and unless there has been a consequent failure of justice. That provisions was inserted for the first time in the Code of 1908 and is framed on the analogy of section 11 of the Suits Valuation Act of 1884. The provision is an exception to the well-established rule that where the Court has no inherent jurisdiction over the subject-matter of the suit, its decree is a nullity even though the parties may have consented to the jurisdiction of the Court. This exception cannot obviously be so interpreted as to have a wider application than what is justified by its terms. It is possible for us to hold that section 21 debars the defendants from questioning

(4) 12 Ind. Cas. 464; 38 C. 639 at p. 668.
(5) 9 A. 191; 13 I. A. 134; 4 Sar. P. C. J. 741; 5 Ind. Dec. (N. S.) 561 (P. C.).
(6) 11 M. 26; 14 I. A. 160; 5 Sar. P. C. J. 54; 11 Ind. Jur 393; 4 Ind. Dec. (N. S.) 18 (P. C.).
(7) 1 Ind. Cas. 913; 36 C. 193; 5 C. L. J. 611,
(8) (1896) A. C. 136; 65 L. J. Q. B. 321; 73 L. T. 713.

the validity of the execution sale which is the root of the title of the plaintiff's. When the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbitrator and be bound by his decision on the merits when these are submitted to him. This, however, can be accomplished, only when the parties have expressly consented to such a procedure.

The result is that this appeal is allowed, the decree of the District Judge is set aside and that of the Court of first instance restored, with costs both here and in the lower Appellate Court.

Appeal allowed.

Z. K.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1210 OF 1921.

November 11, 1921.

Present:—Mr. Justice Broadway.

HASHAM ALI—DEFENDANT—APPELLANT

versus

UMAR HAYAT—PLAINTIFF, *Musammat* MULAIMI AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Succession—Several heirs—Possession of one heir—Adverse possession—Finding of fact.

In each case where several co-heirs succeed to the property of a deceased Muhammadan it has to be found whether an entry by one co-heir is an entry on behalf of himself alone or on behalf of all the heirs and the finding is one of fact. [p. 258, col. 1.]

Khadersa Hajee v. *Puthen Veettil*, 6 Ind. Cas. 50; 34 M. 511; 20 M. L. J. 288; 8 M. L. T. 4; (1910) M. W. N. 447. *Nasr-ud-din* v. *Lal Bibi*, 89 P. R. 1888, *Lachman Singh* v. *Sohan Singh*, 97 P. R. 1890, referred to.

Second appeal from a decree of the Subordinate Judge, First Class, Sialkot, dated the 21st March 1921, affirming that of the Munsif, First Class, Sialkot, dated the 22nd December 1920.

Lala *Amar Nath Bhatia* for Sheikh *Gulab-ud-Din*, for the Appellant.

Dr. *Nand Lal*, for the Respondent.

JUDGMENT.—One Umar Hayat sued for possession by partition of certain immoveable property. The principal contesting defendant was Hasham Ali. The Trial Court having granted Umar Hayat a decree, Hasham Ali appealed to the Sub-Judge urging that the suit was barred by limitation. His appeal having been dismissed he has come up to this Court in second appeal and I have heard Mr. Amar Nath Bhatia on his behalf. The property in suit originally belonged to Samand and Sakandar who died 50 years or so ago, and for the appellant it was contended that he and his ancestors had been in possession as sole owners during this period for which reason it was incumbent on Umar Hayat to show that he had been in possession within the last twelve years; for Umar Hayat it was apparently urged that when the estate fell in, all the persons entitled to share took possession or that at any rate whoever took possession did so on behalf of all the persons entitled to share.

The lower Appellate Court in reliance on *Khadersa Hajee* v. *Puthen Veettil* (1), and *Lachman Singh* v. *Sohan Singh* (2), held the suit to be within time. It has however gone further and has held that the property in suit is joint at the present time, as deposed to by even the defendant's own witnesses.

In *Khadersa Hajee* v. *Puthen Veettil* (1), it was held that when a Muhammadan died intestate his estate *at once* vested in his heirs as tenants-in-common and there was no one charged by law with its distribution. It was also held that to a suit brought by one of the heirs to recover his share Art. 144 of the Limitation Act applied so far as immoveables were concerned. Mr. Bhatia contended that as the Muhammadan Law did not recognise a joint family such as is recognised by Hindu Law no tenancy-in-common comes into existence on the death of a Muhammadan and limitation commences to run against each individual heir from the date of the death. In support of this

(1) 6 Ind. Cas. 50; 34 M. 511; 20 M. L. J. 288; 8 M. L. T. 4; (1910) M. W. N. 447.

(2) 97 P. R. 1890.

contention he referred to *Nasir-ud-din* v. *Lal Bibi* (3) an authority which certainly is in point.

The decision *Lachman Singh* v. *Sohan Singh* (2) referred to by the lower Appellate Court and relied on by Dr. Nand Lal for the respondent is a little difficult to apply to the present case.

At page 290 Plowden, J., says: "I do not doubt that when an estate devolves in its entirety upon several persons jointly and one of them enters upon or takes possession of the estate that entry may be an entry on behalf of all, and that the consequent possession of a co-heir, who has thus entered on behalf of all, is the possession of all the co-heirs. Whether the entry is an entry on behalf of all the co-heirs or on behalf of the entering co-heir alone is a question of fact; and in the absence of any evidence it may be presumed and often would be presumed as a presumption of fact, and not of law, to be an entry on behalf of all the co-heirs."

At page 292, however, Benton, J., does not accept this proposition; as to the nature of the presumption, he says "Generally speaking in this country one of several sharers who enters on an inheritance should I think be regarded as acting on his own behalf only unless there be circumstances which point to a different intention."

That case deals with Sikhs or Hindus and the above remarks, even if not so conflicting, can scarcely be held to be of general application.

In each case it has to be found whether an entry by one sharer was an entry on behalf of himself alone or on behalf of all and the finding is one of fact. In the present case the lower Appellate Court seems to have held that the entry was one on behalf of all as a matter of law.

Even if this be erroneous however there is the finding that the property sought to be partitioned is actually joint. It would seem to be immaterial therefore what the nature of the original entry may have been. The plaintiff comes into Court asking for the partition of joint property and the Courts have found *on the evidence* that as a fact the property is joint. On this finding of fact the suit is within time and I accordingly dismiss this appeal with costs.

Z. K.

Appeal dismissed.

(3) 89 P. R. 1888.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECNDO CIVIL APPEAL NO. 536 OF 1921.

May 22, 1922.

Present:—Mr. MacColl, A. J. C.

MAUNG CHIT U—APPELLANT

versus

MAUNG THA KU AND ANOTHER —RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 15—Execution of decree—Record destroyed—Proof of decree—Secondary evidence.

When a decree-holder wishes to obtain execution of a decree the record of which he alleges has been destroyed, he must prove the contents of that decree, and this can only be done by means of secondary evidence. For this purpose statements of persons who merely heard the judgment pronounced are not admissible in evidence. What is required is an oral account of the contents of the judgment or decree by someone who had read the one or the other. [p. 259, col. 2.]

Mr. *N. M. Mukerjee*, for the Appellant.

Mr. *D. Dutt*, for the Respondents.

JUDGMENT.—In 1919 the respondents sued the Appellant for ejectment from a piece of land.

The suit was contested and it is said to have been decided on the 1st November 1919. The Court House was burnt on the 13th November 1919 and with it the record. No appeal was filed and no steps were taken by either side until the 26th January 1921 when the respondent Maung Tha Ku alone applied for execution saying that a decree had been passed in his favour. He prayed that the Appellant might be ejected from the land and that he might be arrested and imprisoned for failure to pay costs, which he said amounted to Rs. 26. The appellant contended that as in other cases in which the record had been burnt fresh suits were instituted that course should also be taken in this

case. The Township Judge beldan enquiry with a view to finding out what the decision in the suit had been and then without coming to any exact finding on the point directed Maung Tha Ku to be put in possession of the land and later had the appellant arrested and imprisoned for failure to pay costs, though there was no evidence what the costs amounted to and not a single witness had stated that the appellant had been directed to pay them. The appellant appealed unsuccessfully and has now come up on second appeal. It is urged that the decree must be proved by secondary evidence and that there is no such evidence on the record. For the respondent Maung Tha Ku it is urged that on the authority of *Nuzur Banoo* v. *Hosseln Ali Khan* (1) cited on page 94 of Messrs. Woodroffe and Ameer Ali's Civil Procedure Code, 2nd Edition, a fresh suit for possession of the land would be barred and that if the provisions of section 91, Evidence Act, have not been strictly complied with a fresh decree can be prepared from the materials on the record and executed. There is another ruling cited on the same page of the same book *viz.*, *Ranee Emamun* v. *Hurdyal Singh* (2) in which it was held that in such circumstances a fresh suit would lie. Both these cases are said to be reported in the Weekly Reporter of 1864 but unfortunately there seems to have been a misprint because I have been unable to trace these cases.

The appellant does not admit that it was decided that he should give possession of the land to Maung Tha Ku or that he should pay costs. If it be impossible to prove what the decision was, I am not sure that a fresh suit would not lie. It could only be barred under section 11, Civil Procedure Code, and for that section to act as a bar I think it might reasonably be held that there must have been an effective decision and that what was an effective decision would depend upon circumstances Suppose for instance that at the time a Judge pronounced judgment no one was present and immediately afterwards the Court House and record was burnt and the Judge perished in the fire. In such a case no one could know what the decision had been and the decision would be ineffective. The point, however, does not arise in this case as a fresh suit has not been brought. It is clear that if the respondent Maung Tha Ku wishes to obtain execution of the decree which he says he has obtained he must prove the contents of that decree and he can only do so by means of secondary evidence and there is no secondary evidence of the decree on the record. None of the witnesses professes to have seen the decree. There is in fact no evidence that a decree was ever drawn up and seeing that the record was burnt twelve days after the day on which judgment is said to have been pronounced it is not at all unlikely that no decree ever was drawn up. The Township Judge has mistaken the nature of the evidence required. Statements of persons who merely heard judgment pronounced were not admissible in evidence and as a matter of fact none of the witnesses stated that they had heard the judgment read out. What was required was an oral account of the contents of the judgment or decree by some one who had read the one or the other. If any credible witness who read the judgment or the part of the judgment which contained the decision can depose to what he read, a decree can be drawn up now. There is nothing in the Civil Procedure Code to prevent that. A decree must agree with the judgment and if a decree be drawn up which does not agree with the judgment it can be amended. As I have said there is no evidence that a decree was drawn up. If such a reconstruction of the judgment or decree, if there was one, be now attempted great care will have to be exercised to see that there is no defect as regards the description of the land.

There is another aspect of the case that may require consideration. * * * * * It may be that either party has a right to require the Court to draw up a decree as there is no evidence that a decree has ever been drawn up. In that case the Court might have to treat the suit as still pending. I express no opinion on the point. The respondent Maung Tha Ku applied for execution of a decree, which

(1) W. R. (1864) 378.
(2) W. R. (1864) 301.

he alleged entitled him to certain relief. He further alleged that one Maung Kya Bwin was a joint decree-holder with him but Maung Kya Bwin did not sign the application for execution nor has he joined with Maung Tha Ku in contesting this appeal. The Courts below altogether overlooked the provisions of O. XXI, r. 15, which made it more than ever necessary to prove the exact contents of the decree, which is alleged to have been passed, before ordering execution. I do not think, therefore, that a remand should be ordered.

If Maung Tha Ku or he and Maung Kya Bwin jointly are able to prove what is required, there is nothing to prevent him or them from making a fresh application for execution. If they are unable to prove the contents of the decree or judgment they must be left to take what remedy may be open to them and on that point I refrain from expressing any definite opinion. If they suffer they have only themselves to blame for not having taken immediate steps when they heard of the burning of the Court House.

Maung Tha Ku failed to prove that he was entitled to the relief which he claimed and the orders of the Courts below are accordingly set aside and his application for execution is dismissed with costs in all three Courts.

Z. K. *Application dismissed.*

PATNA HIGH COURT.

CIVIL REVISION NO. 87 OF 1923.

June 6, 1923.

Present:—Mr. Justice Foster.

THE EAST INDIAN RAILWAY COMPANY—PETITIONERS

versus

THE NADIA COAL COMPANY—OPPOSITE PARTY.

Contract Act (IX of 1872), ss 51, 52—Performance of contract—Reciprocal promise, breach of—Liability of party in default—Railway agreeing to give delivery after weighment—Failure to weigh, effect of.

Plaintiff consigned a certain quantity of coal to the defendant Company for carriage to a certain station. On arrival at destination the consignee suspected that there was a considerable shortage in the quantity of coal consigned and he refused to take delivery without weighment. The defendant Company agreed to do this, but failed to carry out the agreement. The consignee refused to take delivery, and the plaintiff thereupon sued the defendant Company for the price of the coal:

Held, that although the defendant Company was not ordinarily bound to give delivery after weighment, they had agreed to do so in this case and having failed to carry out their agreement they were liable to the plaintiff irrespective of the terms of any Risk Note that the plaintiff may have signed. **[p. 261, col. 1.]**

Revision from an order of the Small Cause Court Judge, Dhanbad, dated the 18th January 1923.

Messrs. *N. C. Sinha, B. B. Ghosh* and *N. C. Ghosh*, for the Petitioners.

Mr. *S. C. Mazumdar*, for the Opposite Party.

JUDGMENT.—The plaintiff received an order from one Raj Mohan Saha of Raiganj, district Dinajpur, to send him a certain amount of coal. The plaintiff Company not having that coal engaged the assistance of a firm Matroo Mal whose colliery is adjacent to that of the plaintiff. Matroo Mal apparently as agent of the plaintiff loaded the waggon and consigned it and the plaintiff's manager had before this signed the Risk Note in Form H. The consignment arrived at a station Waria where the axle of a wheel of the truck became hot and the coal had to be taken out snd put into another truck. For a considerable time the consignment was lost sight of and at last in about five months after the date of consinging it reached Raiganj. Raj Mohan Saha suspected that the weight of the coal was only about half of what had been consigned and it is his evidence that he agreed to take delivery if the Railway Company on their behalf would weigh or measure the amount of coal so delivered. He got a letter from the East Indian Railway Company stating that the Eastern Bengal State Railway was being asked to have the coal re-weighed by measurement, the standard being 63 cubic feet to a ton. The Eastern Bengal State Railway refused to do this and the

consignee Raj Mohan on his part refused to take delivery. The plaintiff now has sued for compensation for this non-delivery alleging that the consignee has not paid him the price of the coal. The suit has been decreed against the defendant No. 1, East Indian Railway Company and dismissed against defendant No. 2, the Eastern Bengal State Railway.

It is urged that the plaintiff has no cause of action and cannot sue as plaintiff. As it appears to me, the plaintiff was in fact the consigner and Matroo Mal was the plaintiff's agent. It is also urged that the plaintiff cannot sue unless and until the consignee took delivery. I fail to appreciate this contention, for reasons which I shall give presently.

The third point that is argued is that the Risk Note exonerates the Railway from all claims based upon short delivery. It seems to me that the plaintiff can claim that there has been no delivery of the consignment. The plaintiff has shown that he offered to take delivery on re-weighment and the East Indian Railway Company, the present applicants, agreed to this; so the performance of the contract was based upon reciprocal promises, of which obviously the prior in order of sequence was the promise to weigh or measure. When the Company failed to perform its promise to weigh or measure the consignee was at liberty to protect his own interest by refusing to take delivery. The matter is quite outside the question whether there was a Risk Note or not and it depends on the ordinary law as to the performance of contracts to be found in sections 51 and 52 of the Contract Act. Reading the judgment of the Subordinate Judge it seems to me that he must have this in his mind in the last paragraph of his judgment. It is no answer to this argument to quote the well-known rule that the Railway has no obligation to weigh goods before delivery; for it is obvious that if the Railway makes the special contract to weigh, the individual with whom the contract is made can take advantage of the contract. The defendant Company has not disclosed the amount of loss, nor in fact asserted a loss: so the amount of damages could not be other than that decreed. I see nothing that is against the law in the decision arrived at by the learned Subordinate Judge. The application is rejected with costs. Hearing fee three gold *mohurs*.

Z. K. *Application rejected.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 69 OF 1920.

May 17, 1923.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Cuming.

Rani HEMANTA KUMARI DEBI —APPELLANT

versus

THE MIDNAPUR ZEMINDARI CO., LTD.—RESPONDENT

Bengal Tenancy Act (VIII of 1885), s. 5 (5)—Tenant, status of—Tenure-holder—Area of holding—Presumption—Mode of user, evidence of, whether admissible—Transfer of tenure—Settlement by Government—Agreement between Government and settlement holder, whether can be taken advantage of by tenant.

Defendants were entered in the revenue papers as "tenure-holders" of an area exceeding fourteen hundred *bighas*, and had from the very inception of their tenancy cultivated the land through tenants:

Held, that the defendants must be held to be the tenure-holders of the land. [p. 263, col. 1.]

Bilhudendra v. *Debendra Nath*, 27 Ind. Cas. 432; 20 C. L. J. 140 and *Debendra Nath Das* v. *Bibudhendra Mansingh Bhramarbar Roy*, 45 Ind. Cas. 411; 27 C. L. J. 543: 5 P. L. W. 1; 22 C. W. N. 674; 16 A. L. J. 522; 23 M. L. T. 384; (1918) M. W. N. 379; 20 Bom. L. R. 743: 35 M. L. J. 214; 45 I. A. 67; 45 C. 805 (P. C.), followed.

Where a tenure is treated as transferable in the hands of the original tenure-holder it must be treated as transferable in the hands of the transferee also. [p. 263, col. 2.]

An engagement between the Government and a settlement holder that the latter would respect the rights of the tenants as recorded in the settlement papers, may be invoked by a tenant for his own benefit and protection even though he may not be himself a party thereto. [p. 263, col. 2.]

Chandramoni Mohanti v. *Manmatha Nath Miller*, 5 Ind. Cas. 301; 11 C. L. J. 68; *Jahandar Baksh Mullick* v. *Ram Lal Hazra*, 5 Ind. Cas. 565; 37 C. 449; 11 C. L. J. 364; 14 C. W. N. 470 and *Manmath Nath Roy* v. *Ameer Khan*, 46 Ind. Cas. 98 3 P. L. J. 394, relied on.

In considering the status of a tenant a reference to the mode of user of the land is legitimate when the terms of the original grant are ambiguous or cannot be proved by direct evidence. [p. 263, col. 1.]

Bamapada Roy v. *The Midnapur Zemindary Co.*, 16 Ind. Cas. 376; 16 C. L. J. 322 and *Secretary of State* v *Digambar Nanda*, 45 Ind. Cas. 43; 27 C. L. J. 334, followed.

Appeal against a decree of the Subordinate Judge, Berhampore, dated the 17th December 1919.

Babu *Braja Lal Chakrabarti* (with him Babus *Debendra Nath Bagchi* and *Bansari Lal Sarkar*), for the Appellant.

Babus *Dwarka Nath Chuckerbutty* and *Kshitis Chandra Chuckerbutty*, for the Respondent.

JUDGMENT.—The subject-matter of the litigation, which has culminated in this appeal, is a large tract of alluvial land formed by the recession of the river Padma and recorded as an estate on the revenue roll of the Collector of Rajshahi. The land became fit for cultivation more than a quarter of a century ago and was occupied by Robert Watson & Co. There is no evidence to show that the Watsons entered into an engagement with the Collector before they took possession; but, as is not unusual, they occupied the land and were accepted as tenants; *Nityanund Ghose* v. *Kissen Kishore* (1), *Kali Prosanna Das* v. *Bhagaban Mali* (2), *Birendra Kisore* v. *Gagan Chandra* (3), *Gagan Chandra Chuckerbutty* v. *Birendra Kisore Manikya* (4). The land was assessed and the dues were periodically paid by them direct to the Collector. In 1901, the revenue authorities made a five-year *mallkana* settlement of the lands with the plaintiff who was one of the proprietors of an adjoining estate. There can be no doubt that the Revenue Authorities were competent to create such an intermediate interest between the Crown and the Watsons; *Jokar Mull Bhutra* v. *Bhupendra Nath Basu* (5). On the expiry of the five year term, the settlement with the plaintiff was renewed for another term of five years On the expiration of this second term, the settlement was renewed for shorter periods from time to time, and at the date of the commencement of this litigation, the plaintiff held under a settlement for one year only.

Meanwhile, on the 23rd December 1902; the Watsons had transferred their interest to Ronaldson Gordon Macdonell, and on the 3rd December 1906, the latter transferred his interest to the defendant Midnapore Zemindary Co. On the 3rd December 1918, the plaintiff instituted this suit for ejectment of the defendant Company as trespassers on the allegation that the interest of the Watsons was non-transferable. The Subordinate Judge has negatived this contention and dismissed the suit. The plaintiff has appealed to this Court and reiterated the chief points urged on her behalf in the Court below. From the arguments addressed to us two substantial questions emerge for consideration, namely, first, what was the status of the Watsons as tenants under the Government; and, secondly, was the tenancy transferable?

As regards the question of the status of the Watsons as tenants under the Government, the Subordinate Judge has given weighty reasons in support of his conclusion that they were tenure-holders The statutory presumption formulated in sub-section (5) of section 5 of the Bengal Tenancy Act, namely, that where the area held by a tenant exceeds one hundred standard *bighas*, the tenant shall be presumed to be a tenure-holder, until the contrary has been shown, favours this view. The area of the tenancy in the present case exceeds fourteen hundred *bighas*; we consequently start with the rebuttable presumption that the tenancy of the Watsons was a tenure; *Bibhudendra* v. *Debendra Nath* (6), *Debendra Nath Das* v. *Bibudhendra Mansingh Biramabar Roy* (7). This presumption has not been rebutted. On the other hand, we have two facts of fundamental importance, which confirm the presumption. In the first place, from the very inception of the tenancy the lands have been cultivated by tenants under the Watsons and their successors-in-interest; such reference to

(1) W. R. 1864, Act X, Rul. 82.
(2) 17 Ind. Cas. 587; 17 C. L. J. 431; 17 C. W. N. 348.
(3) 30 Ind. Cas. 902; 22 C. L. J. 132.
(4) 30 Ind. Cas. 931; 22 C. L. J. 135.
(5) 67 Ind. Cas. 108; 34 C. L. J. 79; 49 C. 495; (1922) A. I. R. (C.) 412.
(6) 27 Ind. Cas. 432; 20 C. L. J. 140.
(7) 45 Ind. Cas. 411; 2 C. L. J. 543; 5 P. L. W. 1; 22 C. W. N. 674 16 A. L. J. 522; 23 M. L. T. 384; (1918) M. W. N. 3, 9; 20 Bom. L. R. 743; 35 M. L. J. 214; 45 I. A. 67; 45 C. 805 (P. C.).

the mode of user of the land is legitimate when the terms of the original grant are ambiguous or cannot be proved by dircet evidence: *Bamapada* v. *The Midnapur Zemindary Co.* 8), *Secretary of State* v. *Digambar Nanda* (9). In the second place, the Watsons, as also their transferee Macdonell were recorded by the Revenue Authorities as tenure-holders. Indeed, when Macdonell objected on the 8th August 1905 to be recorded as a tenure-holder, he was peremptorily informed that if he insisted upon the status of an occupancy *raiyat*, he must forthwith vacate the land. The result was that Macdonell withdrew his objection and was recorded as a tenure-holder. We are of opinion that there can be no reasonable doubt that the Watsons were tenure-holders under the Government.

As regards the question whether the Watsons had a transferable tenancy the Subordinate Judge has answered in favour of the defendant Compary. We have already stated that the Watsons held possession as tenants under the Government for several years before the plaintiff obtained a five-year *mallkana* settlement in 1901. There is no room for controversy that the title acquired by the plaintiff was subject to such interest as the Watsons then possessed. During the subsistence of her settlement, the Watsons, on the 23rd December 1902, transferred their interest to Macdonell. On the 20th August 1904, the Revenue Authorities commenced the usual proceedings with a view to re-settlement. We find it recorded on the 1st July 1905, in the order-sheet of the Settlement Officer that Macdonell had his name registered in place of the Watsons, and this was approved by the Collector on the 26th July 1905 Macdonell, as already indicated, made an infructuous attempt to be treated, not as a tenure-holder but as an occupancy *raiyat*. He ultimately signed the rent-roll as a tenure-holder on the 6th December 1906. The order-sheet makes it abundantly clear that the plaintiff herself was a party to the re-settlement proceedings, as she was an applicant for renewal of the superior interest. On the 21st December, 1906, she filed a petition and accepted the settlement which was confirmed by the Collector on the 6th February 1907. The settlement with her was thus renewed for a term of five years with effect from the 1st April, 1905, when the previous settlement had expired.

Two points are thus beyond dispute on the face of these proceedings, namely, first, that the tenancy of the Watsons was treated by the Government as transferable and the rights of Macdonell as transferee were recognised by the Settlement Authorities; secondly, that the plaintiff, on re-settlement with her, took the property subject to the interest of Macdonell as the holder of a transferable tenure. We are fortified in this conclusion by the fact that the standard form of *kabuliyat* executed by temporary settlement holders in Government *Khas Mahals* shows that they expressly undertake to "respect the rights recorded in the settlement papers as possessed by tenants of all grades" (Survey and Settlement Manual, 1917, p. 198). The balance of modern authorities is in favour of the view that such engagement between the Government and the settlement-holder may be invoked by the tenant for his own benefit and protection, even though he may not be himself a party thereto; see *Chandramoni Mohanti* v. *Manmatha Nath Mitter* (10), *Jahandar Baksh Mullick* v. *Ram Lal Hazra* (11), *Manmath Nath Roy* v. *Ameer Khan* (12). The reference to a Full Bench in *Manmatha Nath Mutter* v. *Rai Kishore Mahanti* (13), enumerates the earlier authorities which proceeded on the narrow view that a stranger to a contract can in no circumstances claim a benefit thereunder; this position can no longer be maintained as a universal rule in the face of the decision in *Khwaja Muhammad Khan* v. *Nawab Husaini Begum* (14), which

(8) 16 Ind. Cas. 376; 16 C. L. J. 322.
(9) 45 Ind. Cas. 43; 27 C. L. J. 334.
(10) 5 Ind. Cas. 301; 11 C. L. J. 68.
(11) 5 Ind. Cas. 565; 37 C. 449; 11 C. L. J. 364; 14 C. W. N. 470.
(12) 46 Ind. Cas. 98; 3 P. L. J. 394.
(13) 17 C. L. J. 70*n*.
(14) 7 Ind. Cas. 237; 37 I. A. 152; 32 A. 410; 12 C. L. J. 205; 14 C. W. N. 365; 7 A. L. J. 871; (1910) M. W. N. 313; 8 M. L. T. 147; 12 Bom. L. R. 638; 20 M. L. J. 614 (P. C.).

was explained in *Deb Narain Dutt* v. *Ram Sadhan Mandal*(15), and *Har Shyam* v. *Shyam Lal* (16). We hold accordingly that the tenure of the Watsons, which was treated as transferable when Macdonell was recorded as a tenure-holder by the Revenue Authorities before the renewal of the *malikana* settlement with the plaintiff, must be treated as a transferable tenure also in the hands of Macdonell, who was thus competent to create a valid title in the Midnapur Zemindari Co. This conclusion receives support from the significant fact that the plaintiff received rent successively from the Watsons, from Macdonell and from the defendant, her officers granting them receipts in their respective names.

The inference follows that the plaintiff is not entitled to eject the defendant Company as trespassers and her suit has been rightly dismissed. The appeal consequently fails and must be dismissed with costs.

No costs will, however, be allowed to the respondents in respect of the paper-book beyond the first twenty-four pages.

Z. R. *Appeal dismissed.*

(15) 20 Ind. Cas. 630; 41 C. 137; 18 C. L. J. 603; 17 C. W. N. 1143.

(16) 31 Ind. Cas. 22; 20 C. W. N. 601; 43 C. 69; 22 C. L. J. 227.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 267 OF 1921.

July 18, 1923.

Present:—Mr. Justice Odgers and Mr. Jutice Hughes.

AISAMMA—DEFENDANT NO. 2—APPELLANT

versus

MOIDIR KUNHI BEARI AND ANOTHER—PLAINTIFFS AND DEFENDANT NO. 1—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 63—Execution of decree—Claim proceedings—Order dismissing claim, effect of—Adverse possession.

On a claim petition the following order was passed :—

"There is no time to investigate into this claim. Petition is dismissed without investigation on the ground of delay. I may add that the sale will not affect the rights, if any, of the petitioner;"

Held, that the order which expressed no final judgment on the rights put forward was nevertheless an order against the claimant, notwithstanding the erroneous statement that the petitioner's rights would not be affected, and was subject to the provisions of O. XXI, r. 63 of the Civil Procedure Code. [p. 266, col. 1.]

Machi Raju Venkataratnam v. *Vadrevu Ranganayakamma*, 48 Ind. Cas. 270; 41 M. 985 at p. 992; 35 M. L. J. 335; 24 M. L. T. 197; (1918) M. W. N. 599; 8 L. W. 292 (F. B.), followed.

Parambil Saharabi v. *Ali*, 72 Ind. Cas. 857; 44 M. L. J. 141; 17 L. W. 182; (1923) A. I. R. (M.) 295 and *Lakshmi Ammal* v. *Kadiresan Chettiar*, 63 Ind. Cas. 431; 41 M. L. J. 198; 14 L. W. 12; (1921) M. W. N. 495, distinguished.

The rejection of a claim, if not contested by suit within a year from the date of the order, will estop the claimant from pleading adverse possession at the date of the order in a suit to eject him, where possession since the date of the order is insufficient to establish title. [p. 266, col. 1.]

Velayuthan v. *Laksmana*, 8 M. 506; 3 Ind. Dec. (N. S.) 346, followed.

Second appeal against a decree of the District Court, South Kanara, in A. S. No. 148 of 1920, preferred against a decree of the Court of the District Munsif, Mangalore, in O. S. No. 399 of 1918.

Mr. *B. Sitarama Rao*, for the Appellant:—The point for decision is whether the order on the claim petition is one under O. XXI, r. 63 rejecting my claim so as to compel me to institute a suit within a year. The matter is not covered by the Full Bench judgment in *Machi Raju Venkataratnam* v. *Vadrevu Ranganayakamma* (1). The order does not negative my right, on the other hand it is reserved and kept in tact. I was not aggrieved and am not bound to sue.

See *Lakshmi Ammal* v. *Kadiresan Chettiar* (2) and *Parambil Saharabi* v. *Ali* (3).

Again the defendant was in possession for ten years before the date of the claim order. The present suit is brought more than twelve years from the date of my original possession. I have prescribed for

(1) 48 Ind. Cas. 270; 41 M. 985 at p. 992; 35 M. L. J. 335; 24 M. L. T. 197; (1918) M. W. N. 599; 8 L. W. 292 (F. B.).

(2) 63 Ind. Cas. 431; 41 M. L. J. 198; 14 L. W. 12; (1921) M. W. N. 495.

(3) 72 Ind. Cas. 857; 44 M. L. J. 141; 17 L. W. 182; (1923) A. I. R. (M.) 295.

absolute title by twelve years' possession. The order of the Court is at the highest only declaratory and does not purport to decide against me as to my possession. I could not then set up my ten years' possession since on that date my title was not yet perfect. My possession could not be, therefore, held to have been negatived by the order.

Mr. *K. Yegnanarayana Adiga*, for the Respondent:—The case is covered by the Full Bench judgment in *Machi Raju Venkataratnam* v. *Vadrevu Ranganayakamma* (1). So long as an order does not release the properties from attachments, the order whatever may be its language or form or its ground, must be construed as in effect legally negativing the right set up. Observations in Full Bench, especially of Seshagiri Iyer, J.

The order is either in favour of the decree-holder or the claimant. Clearly there is none here in the claimant's favour and indeed the petition is as a fact dismissed. The further observations after the dismissal of the petition merely amount to an expression of opinion which is *obiter* and cannot prevent the legal operation of the preceding order of dismissal.

So far as possession is concerned, O. XXI, r. 63 applies not to claims of title but includes also claims of possession. If possession be with a stranger, under the section the claim petition ought to be allowed. The dismissal operates as an adjudication on possession as well. The prior possession cannot be relied on and is of no legal effect. The decision in *Velayuthan* v. *Laksmana* (4) is one on all fours with the present case.

I may add twelve years have not elapsed since the date of the order on the claim petition. The judgment of the lower Court is correct.

JUDGMENT.

Hughes, J.—The point to be decided now is whether the question of second defendant's title has been concluded against her by reason of the order passed in R. E. A. No. 243 of 1910, in R. E. P. No. 375 of 1910.

The suit property was attached in R. E. P. No. 375 of 1910 and the second defendant filed a claim petition [R. E. A. No. 243 of 1910] claiming right to the property. The order passed on that petition is Ex. E and runs as follows:—"There is no time to investigate into this claim. This petition is dismissed without investigation on the ground of delay. I may add that the sale will not affect the rights, if any, of this petitioner" The plaintiff's contention is that as the second defendant did not file a suit witnin a year from the date of this order her right to the property is barred.

Now if the order had been merely "This petition is dismissed without investigation on the ground of delay," the matter would have been quite simple. It would be covered exactly by the Full Bench case *Machi Raju Venkataratnam* v. *Vadrevu Ranganayakamma* (1) wherein it was held that such an order was an order rejecting the claim, to which the provisions of O XXI, r. 63 will apply. The question is, what is the effect of the added sentence "the sale will not affect the rights, if any, of this petitioner." Can it be said that when the order expressly declared that the sale would not affect the right of the petitioner, the order was one passed against the party? The answer to this is, I think, to be found in the Full Bench case referred to. In that case the order that was under consideration was as follows:—

"As this petition was filed late, this claim is ordered to be notified to the intending bidders." It was held that the order amounted to a rejection of the claim on the ground that it was filed too late. It was pointed out in the judgment of Seshagiri Aiyar, J. that "when a claim is preferred the usual prayer is that the attachment should be raised as the property does not belong to the judgment-debtor but belongs to the claimant. On the presentation of such a petition if the order is not that the property be released from attachment, it must be taken to be an order against the claimant," and further "his right to raise the attachment must be deemed to have been negatived, when the property was ordered to be sold, without releasing it from attachment. Therefore an order on a claim petition which expresses no final judgment upon

(1) 3 M. 506; 3 Ind. Dec. (N. S.) 346.

the right put forward but simply directs the sale after notifying the claim, is an order against the claimant." In the present case the fact that the order wrongly stated that the petitioner's right would not be affected does not help her. She asked for a relief of the property from attachment and she sought to establish her right. She did not succeed. I think, therefore, following the judgment of the Full Bench case as quoted *supra* it must be held that the order was against her and it was her duty to proceed to assert her title by suit within one year.

The case of *Lakshmi Ammal* v. *Kadiresam Chettiar* (2) has been referred to but that is not in point because in that case the attachment had terminated and the District Munsif had no authority to dispose of the petition of claim.

One other case has been quoted, the case of *Parambil Saharabi* v. *Ali* (3) but in that case the claimant's petition had not been dismissed and his claim to an undefined share in the property attached had not been negatived. In the present case the petition was dismissed and though it may be argued that the rider attached to the dismissal, to the effect that the order would not affect the claimant's right, means that that was not negatived, it is plain the right was not established and, in the light of the observations in the Full Bench case, the order was one against the party. I think, therefore, the District Judge was right in the view taken by him of the effect of the order on the claim petition. It has then been urged that the second defendant can still rely upon adverse possession but the case of *Velayuthan* v. *Laksmana* (4) is an authority for the positon that the rejection of a claim, if not contested by suit, will estop the claimant from pleading adverse possession at the date of the order, in a suit brought to eject him. Since the date of the order the possession has been insufficient to establish a title.

The decision of the District Judge is right and the appeal must be dismissed with costs.

Odgers, J.—I agree.

V. N. V. *Appeal dismissed.*

Z. K.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL NO. 2 OF 1923.

June 27, 1923.

Present:—Mr. Justice Fawcett and Mr. Justice Coyajee.

MORARJI PREMJI GOKULDAS—PLAINTIFF—APPELLANT

versus

MULJI RANCHHOD VED & CO.—DEFENDANTS—RESPONDENTS.

Principal and agent—Broker and sub-broker—Scope of sub-broker's authority—Money of third person paid to principal—Principal, whether liable to refund—Knowledge of fraud—Contract Act (IX of 1872), ss. 72, 182, 186, 187, 188, 251.

Sections 186 and 187 of the Contract Act show that the authority of an agent is to be gathered from either "words" or "circumstances" and is not implied in the mere fact that he is an agent. [p. 268, col. 1.]

The word "agent" does not itself imply full authority to bind the principal in the same way that a partner can bind his co-partners under section 251 of the Contract Act. [p. 267, col. 2.]

An agreement opened with the words "*G* will act as our agent in our share-brokerage business" and then followed provisions which showed that *G.* was appointed to carry on business on the usual terms of sub-brokers:

Held, (1) that the general words in the beginning of the agreement did not enlarge the authority of *G.* so as to enable him to bind his principals as if he were a general agent; [p. 268, col. 1.]

(2) that any business brought by *G.* was subject to the acceptance of his principals, this being the usual condition between brokers and sub-brokers. [p. 268, col. 1.]

Where, by any wrongful or unauthorised act of an agent, the money or property of a third person comes to the hands of the principal, or is applied for his benefit, the principal is liable jointly and severally with the agent to restore the amount or value of such money or property. But this rule is subject to the qualification that the principal must have had knowledge or means of knowledge that the money belonged to a third person. [p. 269, col. 2.]

Case-law discussed.

The Contract Act is not exhaustive of all cases in which a person under the English Law would be taken to have a right of action against another as for money paid to his use. [p. 270, col. 1.]

Ranganaikammal v. *Ramanuja Aiyangar*, 11 Ind. Cas. 570; 35 M. 728 at p. 737; 21 M. L. J. 600; 10 M. L. T. 57; (1911) 2 M. W. N. 285, relied upon.

Though a case may not be one of 'coercion' falling under section 72 of the Contract Act, yet that does not prevent the application of the principle that, where the defendant has received money which in justice and equity belongs to the plaintiff, under circumstances which render a receipt of it, a receipt by the defendant to the use of the plaintiff, the plaintiff is entitled to recover it. [p. 270, col. 2; p. 271, col. 1.]

Case-law discussed.

MORARJI PREMJI GOKULDAS *v.* MULJI RANCHHOD VED & CO.

Per *Coyajee, J.*—Under ordinary circumstances a person, be he banker or other, who takes money from his debtor in discharge of a debt is not bound to inquire into the manner in which the person so paying the debt acquired the money with which he pays it. However that money may have been acquired by the person making the payment, the person taking that payment is entitled to retain it in discharge of the debt which is due to him. But if the person receiving the money has reason to believe that the payment is being made in fraud of a third person and that the person making the payment is handing over in discharge of his debt money which he has no right to hand over, then the person taking such payment would not be entitled to retain the money. [p. 272, col. 2; p. 273, col. 1.]

Appeal from the decision of Mr. Justice Shah.

Mr. *M. C. Setalvad*, for the Appellant.

Mr. *Mirza*, for the Respondents.

JUDGMENT.

Fawcett, J.—In this appeal the facts are not in dispute, and are clearly detailed in the judgment of the Court below.

Briefly, the defendants are a firm doing business as share-brokers and employed one Gordhandas Purshottamdas in the course of their business as a sub-broker. There is a question as to the exact extent of his authority, but the word 'sub-broker' appropriately describes the main functions of Gordhandas. There was a transaction on August 10, 1922, between him and the plaintiff, and the result was that the plaintiff had to pay him Rs. 15,000. Gordhandas owed the plaintiff Rs. 1,000 and the plaintiff gave him a crossed bearer cheque of Rs. 14,000 in favour of the defendants. Gordhandas paid this cheque into his own account with a Bank, and on the same day drew two cheques in favour of the defendants for sums amounting in all to Rs. 10,645-10-0, which they duly received. Subsequently Gordhandas absconded without having taken any steps to carry out the plaintiff's contract. The main question is whether the defendants are liable in respect of the transaction. Though the plaintiff did not know of it at the time of the transaction, there was a written agreement between the defendants and Gordhandas (Exhibit A) regarding the terms of the latter's employment. The learned Trial Judge held that under this document Gordhandas was in merely the same position as an ordinary sub-broker, and that it was a reasonable inference that any business transacted through Gordhandas was conditional on acceptance by the defendants. He also held that the transaction was of an unusual character and not within the scope of Gordhandas' authority. He accordingly held that Gordhandas had no authority to bind the defendants in respect of the transaction in question.

In this appeal Mr. Setalvad for the appellant raises two main issues: namely, (1) what was the scope of Gordhandas' authority, and (2) whether the particular transaction was within that scope. His main contention was that the document, Exhibit A, opens with a statement that Gordhandas "will act as an agent of Messrs. M. R. Ved & Co. in the share-brokerage business of Messrs. M. R. Ved and Co."; that this constituted him not only an ordinary sub-broker but an agent with full authority to act for the defendants in all their share-brokerage business; and that in fact Gordhandas had as much authority as any partner in the defendants' firm to bind the latter in any transaction entered into by him for the purpose of carrying on that share-brokerage business. He urged that the words quoted above are perfectly general and that there is nothing in the following words to cut them down; and that the provisions as to the half-commission business to be conducted by Gordhandas were not inconsistent with his acting as defendants' agent in their general share-business as well. Accordingly he contended that defendants were bound to accept all business brought by Gordhandas, who could irrevocably accept it on behalf of the defendants. He further relied upon section 188 of the Indian Contract Act and Illustration (*b*) to that section.

In my opinion this contention attaches an unjustifiable effect to the mere words "agent in the share-brokerage business"; and I agree with the lower Court that, reading Exhibit A as a whole, it does not amount to anything more than this that Gordhandas was expressly assigned the same position as would ordinarily be occupied by a sub-broker.

The word "agent" does not of itself imply full authority to bind the principal, in the same way that a partner can bind his co-partner under section 251 of the Indian Contract Act. The question of the scope of his authority as agent is left entirely open. The definition of 'agent' in section 182 of the Indian Contract Act covers a person employed to do *any* act for another, and the same applies to its use in ordinary parlance. Sections 186 and 187 of the Indian Contract Act show that the authority of an agent is to be gathered from either "words" or "circumstances," and is not implied in the mere fact that he is an agent. The second paragraph of section 188 and Illustration (*b*) thereto only cover the case of an agent appointed "to carry on a business." If for instance Exhibit A had said that Gordhandas was appointed an agent to carry on the defendants' share-brokerage business, or an agent with full authority to represent the defendants in that business, then there would no doubt be substantial ground for Mr. Setalvad's contentions. But in the absence of any such expressions, the words relied on are entirely insufficient to justify the wide construction that is sought to be put upon them. All the subsequent provisions of the agreement deal merely with the case of Gordhandas' acting as a sub-broker in the ordinary way, and it seems to me clear that the general words at the beginning were not intended to go further than appointing him an agent for the particular kind of share business referred to in those subsequent provisions. In my opinion it is a case where the words relied on give no full authority and the authority is to be gathered from the document read as a whole, and not a case where the principle applies that a full authority clearly given in one part of an instrument, is not to be cut down on account of ambiguous and uncertain expressions elsewhere: Halsbury, Volume I, p. 163. Article 354.

Then as regards the question of Gordhandas' authority to bind the defendants, unless they accepted the business brought by him, it seems to me that the words "placed with" favour the inference adopted by the learned Judge in the Court below that there was a condition of acceptance by the principals. Otherwise "obtained for" or similar words would seem more appropriate. The evidence shows that such acceptance is a usual condition in the case of sub-brokers, and in the circumstances I think express words would have been used if it had been intended to dispense with this condition. It is no doubt true that ordinarily defendants would have accepted any legitimate business brought by Gordhandas. But it does not follow that they, therefore, renounced the power to reject it, should they think fit to do so. It is quite conceivable that a case might arise in which they would desire to exercise that power.

The second issue raised by Mr. Setalvad as to this particular transaction being within the scope of Gordhandas' authority is not, in this view of the case, of material importance. For, if the transaction was subject to the condition precedent of acceptance by the defendants, it follows that, as they did not accept it, it does not matter whether the transaction was, or was not, within the scope of Gordhandas' authority. But, supposing the first issue has been decided otherwise, then I think there is substance in Mr. Setalvad's complaint that the finding of the lower Court that the transaction of August 10 was of an unusual character and so was not within the scope of Gordhandas' authority is opposed to the observation of the learned Judge that "it is the nature of the transaction which has to be looked to and not the time when it was entered into." I should not, merely on account of the transaction having been entered into at an unusual time, hold that it was not within the scope of Gordhandas' authority, assuming that he had full authority to represent the defendants in his dealings with third persons.

The third point taken by Mr. Setalvad is that, in any case, in so far as the defendants obtained the benefit of the Rs. 10,645-10-0 paid to them by Gordhandas out of the Rs. 14,000 received by him from the plaintiff, the latter is entitled to recover the first named sum from the defendants. Apparently this contention was not pressed in the lower Court, for the judgment does not discuss the point and refers to an admission by the learned

Counsel for the plaintiff that the fact of the payment of Rs. 10,645 was merely a matter of prejudice. But the point seems sufficiently covered by the second part of issue No. 3 in the lower Court: and in any case (the requisite facts being in evidence and undisputed) it is purely a point of law, which can be raised before us. It was urged that the defendants cannot retain these moneys and at the same time repudiate the transaction; and reliance was placed upon *Sinclair* v. *Brougham* (1). That case is not really in point, for it is not one of "principal and agent" at all; and the main decision following the principle of *In re Hallett's Estate*: *Knatchbull* v. *Hallett* (2) has no application to the present case. *Hallett's case* (2) [as summarised at page 404 in the course of the arguments in *Sinclair* v. *Brougham* (1)] decided that if *A* holds property of *B* in a fiduciary character and pays it together with his own money into his Banking account and draws money out of the account, he must be taken to have drawn out his own money in preference to *B's*. That does not help the plaintiff in this case. But there are no doubt observations in the judgments in *Sinclair* v. *Brougham* (1) which do bear on the present question. I refer, for instance, to the remarks of Lord Haldane on the question of "following money" at pages 418-420 of the report, of Lord Dunedin at pages 431-32, and of Lord Sumner at pages 453-54. Reference is there made to the equitable principle that no one has a right to keep either property, or the proceeds of property which does not belong to him: pages 431, 436; and it is held that it can propely be given effect to on an action "for money had and received" in cases where the law can consistently impute to the defendant the fiction of a of a promise to pay (*cf.* pages 410, 417). But it is also held that such a promise could not be imputed where it would be *ultra vires* to give it (page 417): and that the action for money had and received should not be extended beyond the principles illustrated in decided cases (page 453). Mr. Setalvad did not cite any authorities for applying these principles in a case of the present kind, and (as already remarked) *Hallett's case* (2) does not help the plaintiff here. It is one of the class referred to in Article 111 at page 375 of Bowstead on Agency, 6th Edition. But there is authority which can be cited in support of Mr. Setalvad's contention, *viz.*, Article 103 at page 348 of the same work, which says.—

"Where, by any wrongful or unauthorised act of an agent, the money or property of a third person comes to the hands of the principal, or is applied for his benefit, the principal is liable jointly and severally with the agent to restore the amount or value of such money or property."

The law is similarly summarised in Halsbury, Volume I, Article 432, paragraph 2, at pages 202 and 203 and Volume VII, Article 986, at page 486. Illustrations 2 and 3 at page 349 of Bowstead, which summarize *In re Japanese Curtains and Patent Fabric Co.*, *Ex parte Shoolbred* (3) and *Marsh* v. *Keating* (4) seem in particular to cover the present case. The payment of the Rs. 10,645-10-0 to defendants through the Bank by Gordhandas was virtually a payment made directly from Rs. 14,000 received from plaintiff, for Exhibit B at pages 19, 20 of Part III of the paper-book shows that, on Agust 10, 1922, Gordhandas had a balance of only Rs. 174-10-1 and deducting the other debits of that day (Rs. 62) this balance is reduced to Rs. 112-10-1. In *In re Japanese Curtains and Patent Fabric Co.*, *Ex parte Shoolbred* (3) there was a similar payment into the agent's account and drawing cheques upon it. It can also be contended that the fact of Gordhandas being indebted to the defendants to the extent of about Rs. 27,000 on August 10, 1922, is immaterial: but for this misappropriation of plaintiff's money Gordhandas would presumbly never have made the payment, and the exception mentioned in foot-note (*i*) at page 203 of Halsbury, Volume I, only extends to the case of the *third person* being indebted to

(1) (1914) A. C. 398; 83 L. J. Ch. 465; 111 L. T. 1; 58 S. J. 302; 30 T. L. R. 315.
(2) (1880) 13 Ch. D. 696; 49 L. J. Ch. 415; 42 L. T. 421; 28 W. R. 732.
(3) (1880) 28 W. R. 339.
(4) (1834) 1 Bing, (N. C.) 198; 1 Scott 5; 2 Cl. & F. 250; 8 Bligh (N. S.) 651; 1 Mont. & Ayr. 592; 37 R. R. 75; 131 E. R. 1094.

the principal. But an important question is whether it makes any difference that defendants neither knew, nor had the means of knowing, that the funds from which Gordhandas paid the Rs. 10,645-10-0 had been misappropriated. In *Marsh* v. *Keating* (4) it was expressly held that the defendants had the means of knowledge that the money was the property of the plaintiff; but this does not seem to have been always regarded in later cases as an essential condition. In *Reid* v. *Rigby & Co.* (5) the point was taken in argument, but is not noticed in the Court's judgments; and in *Jacobs* v. *Morris* (6) Vaughan Williams, L. J. at page 830 says: "I am not sure that in *Marsh* v. *Keating* (4) either the House of Lords or the Judges whose opinion was taken meant to decide either that ignorance and want of means of knowledge will exonerate a person, through whose account a sum of money has passed, from responsibility, or that knowledge of the fact is essential to liability. Nothing more seems to me to have been decided than that there the defendants could not rely upon ignorance if they had the means of knowledge."

On the other hand Stirling, L. J., held (at page 833) that it was necessary to establish the principal's knowledge or means of knowledge in such a case. Cozens-Hardy, L. J., appears to have been of the same opinion. But a stronger authority on the point is afforded by the decision of the House of Lords in *Thomson* v. *Clydesdale Bank, Limited* (7). In that case Lord Shand says (page 291):—

"Where questions arise with third parties into whose hands the money can be traced, as in this instance, liability against them for recovery of the sum misapplied arises only where it can be shown directly, or as a reasonable inference from facts proved, that these parties were cognizant that the money was being wrongfully used, in violation of the agent's duty and obligation."

This case is cited by the Privy Council in *Bank of New South Wales* v. *Goulburn Valley Butter Co.* (8) as settling the law that in the absence of notice of fraud or irregularity a banker is bound to honour his customer's cheque: but it is clear from the judgment in *Thomson* v. *Clydesdale Bank, Limited* (7) that the principle is a general one, not based on any peculiarity of banking law. Thus Lord Herschell in his remarks (at page 287) says "a person, be he banker or other", and Lord Shand laid down the general principle I have already quoted.

This is an important qualification of the general rule laid down in Article 103 of Bowstead on Agency, which applies also to the corresponding right of the principal to follow property into the hands of third persons: see Illustration (3) to Article 110, *ibid*, page 374.

If, therefore, this suit had been brought in England, I think there is clear authority for holding that plaintiff is not entitled to recover the Rs. 106,45-10-0 from the defendants. Is there any difference in the law applicable in India?

The case is not expressly provided for in the Indian Contract Act. Thus sections 69 and 70 do not cover the case. But there is good authority for holding that the Indian Contract Act is not exhaustive of all cases in which a person under the English Law would be taken to have a right of action against another as for money paid to his use: see *Ranganatkaammal* v. *Ramanuja Aiyangar* (9) and cases there cited. In *Jugdeo Narain Singh* v. *Rajah Singh* (10) and *Narayanasami Reddi* v. *Osuru Reddi* (11) it has been held that though a case may not be one of 'coercion' falling under section 72 of the Indian Contract Act, yet that does not prevent the application of the principle that, where the defendant has received money which in justice and equity belongs to the plaintiff, under

(5) (1894) 2 Q. B. 40; 63 L. J. Q. B 451; 10 R. 280.
(6) (1902) 1 Ch. 816; 71 L. J. Ch. 363; 86 L. T. 275; 50 W R. 371; 18 T. L. R. 384.
(7) (1893) A. C. 282; 62 L. J. P. C. 91; 1 R. 255; 67 L. T. 156.
(8) (1902) A. C. 543 at p. 550; 71 L. J. P. C. 112; 87 L. T. 88; 51 W. R. 367; 18 T. L. R. 735.
(9) 11 Ind. Cas. 570; 35 M. 728 at p. 737; 21 M L. J. 600; 10 M. L. T. 57; (1911) 2 M W. N. 285
(10) 15 C. 656 at pp. 664, 665; 13 Ind. Jur. 217; 7 Ind. Dec. (N. S.) 1021.
(11) 25 M. 548 at p 552;

circumstances which render a receipt of it, a receipt by the defendant to the use of the plaintiff, the plaintiff is entitled to recover it. These decisions are not in this respect affected by the Privy Council case of *Kanhaya Lal* v. *National Bank of India, Ld.* (12) which places a wider meaning on the word 'coercion' in section 72 of the Indian Contract Act than the Indian Courts were disposed to give it. I can see no sufficient reason for not following the principle laid down in the two cases of *Jugdeo Narain Singh* v. *Rajah Singh* (10) and *Narayanasami Reddi* v. *Osuru Reddi* (11) in view of the fact that the Legislature in Article 62 of Schedule I of the Indian Limitation Act expressly recognizes a suit to recover money received by the defendant for the plaintiff's use, and under section 26 of Bombay Regulation IV of 1827, the principles of law and equity laid down in English decisions are proper guides, in the absence of specific law or usage to the contrary. Section 238 of the Indian Contract Act no doubt says that "misrepresentations made, or frauds committed, by agents, in matters which do not fall within their authority, do not affect their principals." But this is a section which falls under the general heading (above section 226) of "effect of agency on contracts with third persons," and is restricted (as the illustrations and the first part of the section show) to the question of the effect of such misrepresentations or frauds *on agreements made by the agents*. It does not purport to deal with the third person's right to recover from the principal money which the latter has obtained through the agent's fraud or misrepresentation. If, however, the English case-law is applied, it must be applied in full; and I think it is clear that the money received by the defendants in this case cannot, in the absence of knowledge, or means of knowledge, on their part that it was plaintiff's money, which had been misappropriated by Gordhandas, be treated as money received by the defendants for the plaintiff's use. I also think that the Privy Council have painly shown that their view is the same as that taken by the House of Lords in *Thomson* v. *Clydesdale Bank Limited* (7) not only by their reference to it in *Bank of New South Wales* v. *Goulburn Valley Butter Co.* (8), but also by their decision in *Texas Company, Ltd.* v. *Bombay Banking Company* (13). I may cite in particular the remarks in their Lordships' judgment at pages 146, 147.—

"Had Vaidya's account, to which the proceeds of the oil business were paid, been kept with the Bombay Bank under circumstances that could fairly impute to them knowledge that the monies were not Vaidya's, different considerations would apply."

In my opinion, therefore, Mr. Setalvad's contention fails, and I would dismiss the appeal with costs.

Coyajee, J.—The main contentions urged before us in this appeal are:—

1. What was the scope of Gordhandas' authority?

2. Whether the transaction in suit was within that scope?

I have had the advantage of seeing the judgment of my learned colleague. I entirely agree with his conclusions on those issues and with the reasons which he has there set out in support of those conclusions.

At the end of his opening address, appellant's Counsel contended that, at any event, the respondents (defendants) should not be allowed to retain the two sums of Rs. 5,000 and Rs. 5,645-10-0 paid to them by Gordhandas out of the Rs. 14,000 which he had wrongfully obtained from the appellant, and that the appellant was entitled to follow these sums of money and to require the respondents to pay them over to him.

Assuming that this contention is covered by the third issue in the Trial Court, it was certainly not pressed there, for the learned Judge observes in his judgment that "it was admitted by the

(12) 18 Ind. Cas. 949; 40 C. 598; 17 C. W. N. 541; (1913) M. W. N. 406; 13 M. L. T. 406; 11 A. L. J. 413; 17 C. L. J. 478; 15 Bom. L. R. 472; 184 P. L. R. 1913; 25 M. L. J. 104; 40 I. A. 56 (P. C.);

(13) 54 Ind. Cas. 121; 44 B 139; 22 Bom. L R. 429 at p 434; 26 M L. T. 370; 30 C. L. J. 446; (1920) M. W. N. 70; 2 U. P. L. R. (P.C.) 21; 11 L. W. 320; 24 C. W. N. 469; 46 I. A. 250 (P. C.);

learned Counsel for the plaintiff" (now appellant) 'that the fact of the payments by these two cheques was merely a matter of prejudice." In my opinion the admission was made for substantial reasons. I agree with my learned colleague in holding that this contention is untenable, and will briefly give my reasons. The material facts bearing on this contention are these. The agreed price of the fifteen shares, which formed the subject-matter of this transaction, was Rs. 15,000. Plaintiff withheld a sum of Rs. 1,000 in satisfaction of a debt due to him by Gordhandas personally, he then made out a crossed cheque of Rs. 14,000 in favour of "Mulji Ranchod Ved Esq. or bearer" and gave it to Gordhandas. On August 10, Gordhandas paid this cheque into his own account with the Bank of India, Limited. Gordhandas was at that time indebted to the respondents in a sum of about Rs. 27,000. The existence of that debt is not called in question. In part payment of that debt Gordhandas, on August 10, drew two cheques in favour of the respondents for the sums of Rs. 5,000 and Rs. 5,645-10-0 respectively—which amounts they duly received. On the same day (August 10) Gordhandas gave them two more cheques, one of Rs. 1,000 and the other of Rs. 5,000: but we do not know more about these, beyond the fact that they were dishonoured.

The position then is this. Gordhandas had no authority, express or implied, from the respondents to act on their behalf in this particular transaction. He obtained Rs. 14,000 from the appellant on certain representations which he failed to make good. He appropriated this sum of Rs. 14,000 to his own use. A part of it, namely, Rs. 10,645-10-0, he used in discharge *pro tanto* of a debt which he then owed to the respondents. The respondents did not know, nor had they the means of knowing, that the money which they were receiving in discharge (*pro tanto*) of the debt due from him, had been wrongfully obtained from the appellant.

Under these circumstances the appellant, in my opinion, is not entitled to follow this money, and to require its payment to him by the respondents. The principles laid down in *Thomson* v. *Clydesdale Bank, Limited* (7) are applicable to this case. The appellants in that case, who held as trustees certain shares in the Commercial Bank of Scotland, instructed D. B. Thomson, a stock broker in Edinburgh, to sell the shares and to deposit the proceeds in certain Colonial Banks in the names of the appellants. The shares were sold by Thomson in the ordinary course of business, the dealing being between him and another member of the Stock Exchange who knew him only in the transaction, and accordingly gave in payment for the shares in the ordinary way a cheque payable to Thomson or order. This cheque Thomson paid in to his credit with the respondent Bank on the same day on which he received it. At that time Thomson's account with the respondent Bank was overdrawn to an account exceeding the amount so paid. Thomson having become insolvent, the appellants claimed to be entitled to have the amount of the cheque repaid to them by the respondent Bank. The question then arose whether, under those circumstances, the appellants were entitled to follow the money and to require its payment to them by the respondent Bank, or whether the Bank were entitled to retain it in discharge *pro tanto* of the debt which was due from Thomson. Dealing with this question Lord Herschell, L. C., observes (page 287).—

"It cannot, I think, be questioned that under ordinary circumstances a person, be he banker or other, who takes money from his debtor in discharge of a debt is not bound to inquire into the manner in which the person so paying the debt acquired the money with which he pays it. However that money may have been acquired by the person making the payment, the person taking that payment is entitled to retain it in discharge of the debt which is due to him."

Then, commenting on the argument that the bankers took with notice that the sum which they received was a sum of money not belonging to their debtor personally, but which he held or had received for other persons, and that, having had

this knowledge or notice, they were not entitled to retain it in discharge of Thomson's debt, his Lordship says (page 287):

"I cannot assent to the proposition that even if a person receiving money knows that such money has been received by the person paying it to him on account of other persons, that of itself is sufficient to prevent the payment being a good payment and properly discharging the debt due to the person who receives the money. No doubt if the person receiving the money has reason to believe that the payment is being made in fraud of a third person, and that the person making the payment is handing over in discharge of his debt money which he has no right to hand over, then the person taking such payment would not be entitled to retain the money, upon ordinary principles which I need not dwell upon. But in the present case there appears to me to be an absolute absence of any evidence of that kind."

And Lord Watson observes (page 290):

"The broker knew that he was insolvent, and that he was using his customers' money to pay his own debt to the Bank without any reasonable expectation of his being able to replace it. That was an undoubted fraud upon the appellants; but, in my opinion, the broker's fraud is of no relevancy in this case, unless it is coupled with bad faith on the part of the respondents. The *onus* of proving that they acted in *male fide* rests with the appellants."

The decision in *Sundar Lal* v. *Fakir Chand* (14) has a bearing upon this question. There, a *benamidar*, Mahesh Das, realized upon a bond standing in his own name money to which other parties including the plaintiff were beneficially entitled, and paid over the money so obtained, in the course of a transaction apparently *bona fide* and not collusive, to a third party Fakir Chand, who had no knowledge of plaintiff's interest therein; it was held that the plaintiff could not recover against Fakir Chand. The learned Judges observe (page 64):

"We fail to see how it can be successfully contended that he got any portion of this money for the use of the plaintiff, or that, under the circumstances of this case, the money which was in the hands of Mahesh Das can be followed into the hands of Fakir Chand.... There was no fiduciary relation or privity existing between him and the plaintiff, and no collusion whatever between him and Mahesh Das has been suggested....If Fakir Chand had known or had had reason to believe that the money secured by the bond belonged in part to the plaintiff, different considerations would arise.... But it does not appear that he had any such knowledge, and no collusion on his part, as we have said, or fraud, is alleged."

The learned Judges then refer to the case of *Thomson* v. *Clydesdale Bank, Limited* (7). Here, also, the respondents had no reason to believe that Gordhandas, in discharge of his debt, was handing over money which he had wrongfully obtained from the appellants and had, therefore, no right to hand over.

I have found it difficult to understand the basis of the appellant's claim to recover this money from the respondents. The facts of this case do not fall within the principle enunciated by Romer, L. J., in *Bannatyne* v. *M cIver* (15). This is not a case where an agent, having obtained money from a third person wrongfully, has applied it for his principal's benefit, *e. g.*, in discharging his legal debts and obligations. Neither does the case come within the principle of "unjust enrichment." But in justification of this claim, the appellant's Counsel has relied on certain observations of Lord Haldane, L. C., in *Sinclair* v. *Brougham* (1) I have read those observations with respectful attention. The difficulty, however, is how to apply them to the facts of the particular case now before us. On what principle is the appellant entitled to compel the respondents to refund the money? There is no promise to pay, actual or imputed by law. There is no implied promise on the respondents' part

(14) 25 A. 62; A. W. N. (1902), 185.

(15) (1906) 1 K. B. 103; 75 L. J. K. B. 120; 94 L. T. 150; 54 W. R. 293.

to re-pay to the appellant money which Gordhandas gave them in discharge of his debt under the circumstances stated above. The decision in *Sinclair* v. *Brougham* (1) does not proceed on the footing of money had and received. And as observed by Lord Sumner (at page 453 of the report): "The action for money had and reeeived cannot now be extended beyond the principles illustrated in the decided cases." No decided case has been brought to our notice justifying a claim to money received and retained by the respondents under circumstances such as we have here.

For these reasons I agree in holding that this appeal fails.

Appeal dismissed.

Z. K.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2436 OF 1921.

March 8, 1922.

Present:—Justice Sir William Chevis, Kt.

KUNDAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

MAM RAJ—PLAINTIFF—RESPONDENT.

Punjab Limitation (Ancestral Land Alienation) Act (I of 1900), Art. 2—Attestation of mutation—Two sales—Combined mutation—Limitation.

F., a person governed by the Customary Law, sold certain property to *H.* and *M.* in March 1907. The defendants threatened to bring a pre-emption suit and the matter was settled by the village *punchayat* by which the defendants paid off *H.* and *M.* and took over the sale. The mutation in favour of the defendants was duly attested by the Revenue Officer in the presence of *F.*, *H.* and the defendants in February 1908. Plaintiffs, as reversioners of *F.*, brought a suit for possession in January 1920, alleging that the sale by *F.* was without legal necessity and that time began to run from the date of the attestation of the mutation. The defendants contended that there were really two alienations one by *F.* to *H.* and *M.* and a second one by *H.* and *M.* to themselves and that what had been attested was a sale by *F.* in favour of themselves, an alienation which as a matter of fact never really took place:

Held, that the mutation was really a combined one covering both the alienations and therefore there was an attestation of the alienation disputed by the plaintiffs and their suit brought within twelve years of the date was within time: [p. 275, col. 1.]

Fazla v. *Badan Singh*, 11 Ind. Cas. 765; 48 P. R. 1911; 141 P. W. R. 1911; 237 P. L. R. 1911, followed.

Second appeal from an order of the District Judge, Karnal, dated the 28th July 1921, reversing that of the Munsif, First Class, Kaithal, District Karnal, dated the 16th July 1920.

Lala *Gopal Chand*, for the Appellants.

Mr. *Shamair Chand*, for the Respondent.

JUDGMENT.—The plaintiffs in this case are reversioners of Fattu who, on the 26th March 1907, sold the property in suit to the sons of Daya, namely, Hans Raj and Mam Raj, for Rs. 500. The sons of Budh Ram threatened to bring a suit for pre-emption and the matter was settled by the village *panchayat*, the sons of Budh Ram paying off the sons of Daya and taking over the sale. The matter was reported to the village *Patwari* who entered up the mutation and on the 27th of February 1908, the Tehsildar in the presence of Fattu, Mam Raj son of Daya and the sons of Budh Ram attested the mutation in favour of the sons of Budh Ram. The plaintiffs now sue for possession of the land and house covered by the sale, alleging that the sale was without consideration and necessity The First Court dismissed the suit holding that it was time-barred.

The learned District Judge holds that the suit is within time and has remanded the case to the First Court for decision of the other issues on the merits. The defendants have lodged a further appeal to this Court, and on their behalf it is urged that the suit is not within time.

The suit was brought on the 15th of January, 1920. Under Punjab Act I of 1900 the date to be taken for commencement of limitation is the date on which the alienation was attested by the Revenue Officer. The contention on behalf of the defendants is that the alienation was a sale by Fattu to the sons of Daya and that what had actually been attested is an alienation by Fattu to the sons of Budh Ram. It is urged, that there were really two alienations, one by Fattu to the sons of Daya, and a second by the sons of Daya to the

sons of Budh Ram, and that what had really been attested is neither of these alienations but an alienation by Fattu to the sons of Budh Ram, an alienation which, as a matter of fact, never really took place.

I note, however, that one of the sons of Daya was present at the mutation and that the Tehsildar at the time of mutation was fully acquainted with all the facts of the case. The mutation was, in my opinion, really a combined mutation covering both the alienations and I am unable to hold that the attestation is not one of the alienations which is disputed by the plaintiffs in the present case. My ruling is in accordance with *Fazla* v. *Badan Singh* (1).

I note that Counsel for the defendants-appellants has been unable to distinguish this ruling and he simply urges that it is incorrect. It has also been urged before me that the plaintiffs place their suit on an alleged alienation by Fattu in favour of the sons of Budh Ram. This is, however, merely a misinterpretation of what actually took place and does not affect the merits of the case. If it be held that the alienation by Fattu was without necessity and consideration the plaintiffs are entitled to a decree.

The only other point argued before me is that as only one of the two plaintiffs appealed to the learned District Judge the suit should be regarded as having been dismissed so far as the half share of the other plaintiff is concerned. This, however, overlooks the provisions of O. XLI, r. 4, which lays down that if the decree appealed against proceeds on a ground common to all the plaintiffs any one of the plaintiffs may appeal from the whole decree and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs.

This appeal fails, and is dismissed with costs.

N. H. *Appeal dismissed.*

(1) 11 Ind. Cas. 765; 48 P. R. 1911; 141 P. W. R. 1911; 237 P. L. R. 1911.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION
APPEAL NO. 18 OF 1923.
August 10, 1923.

Present:—Mr. Justice Fawcett and Mr. Justice Coyajee.

KARSANDAS KALIDAS GHIA—
DEFENDANT—APPELLANT
versus
CHHOTALAL MOTICHAND—
PLAINTIFF—RESPONDENT.

Specific Relief Act (I of 1877), ss. 12, 22—Civil Procedure Code (Act V of 1908), O. VIII, r. 7, O. XXIII, r. 1—Contract to sell immoveable property—Time of essence of contract—Reasonable time—Repudiation of contract—Breach—Specific performance—Discretion—Appellate Court, interference by—Deposit, when can be recovered—Abandonment of relief—Alternative reliefs—Damages.

Where time is not originally made of the essence of the contract, in a contract, for the sale of immoveable property, it is open to one party, if unnecessary delay is caused by the other, to limit a reasonable time within which the contract should be performed by the other. What is a reasonable time must depend upon the facts of each particular case. The question of reasonableness of notice should be considered with reference to the past attitude of the parties. What remains to be done at the date of the notice is of importance, but it is by no means the only relevant fact. The fact that the purchaser has continually been pressing for completion, or has before given similar notices which he has waived, or that it is specially important to him to obtain early completion, are equally relevant facts. [p. 287, col. 2; p. 288, col. 1.]

Where one party repudiates his obligation under the contract he is debarred from claiming specific performance of the contract by the other party. [p. 280, col. 2; p. 281, col. 1.]

No one has an absolute right to a decree for specific performance, but as laid down in sections 18 and 22 of the Specific Relief Act the grant or refusal of this relief is purely discretionary with the Court. After a suit has been filed for specific performance, the question whether a decree should be granted or refused is one purely for the Court in the exercise of its jurisdiction on judicial principles, and the domain of strict law is superseded by the domain of discretion and equity. [p. 281, cols. 1 & 2.]

Frost v. *Knight*, (1872) 7 Ex. 111; 41 L. J. Ex. 78; 26 L. T. 77; 20 W. R. 471 and *Sabapathi* v. *Vanmahalinga*, 23 Ind. Cas. 581; 38 M. 959; 15 M. L. T. 203; 26 M. L. J. 331; (1914) M. W. N. 256, distinguished.

In exercising a discretion under section 27 of the Specific Relief Act, the Courts are not tied down by the rules laid down by the Contract Act and by those alone. It can take into consideration the plaintiff's abandonment of his claim to specific performance and it can come to the conclusion that in the circumstances the plaintiff's proper and equitable remedy is to get a decree

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for specific performance, and that if he refuses to take this his suit should be dismissed with costs. [p. 282, col. 1.]

Gobinda Chandra Chackravarti v. *Nanda Kumar Das*, 22 Ind. Cas. 910; 18 C. W. N. 689 and *Hipgrave* v. *Case*, (1885) 28 Ch. D. 356; 54 L. J. Ch. 399; 52 L. T. 242, relied on.

The above principle has, however, no application to a case where the plaintiff expressly makes an alternative prayer in the plaint for damages, not only as a substitute for specific performance but also coupled with a prayer in the alternative for rescission of the contract. [p. 282, col. 2.]

Where a Trial Court has decided that in exercise of its discretion it would not grant a decree for specific performance, an Appellate Court should be slow to interfere with the exercise of such a discretion. [p. 282, col. 1.]

Where there is no repudiation of the contract by the purchaser, nor any conduct on his part amounting to repudiation, he is entitled to a return of the deposit, though specific performance is refused. [p. 283, col. 1.]

A plaintiff is *dominus litis*, and the ordinary rule is that if he claims alternative reliefs he can choose at the hearing which he will ask for. [p. 282, col. 2.]

Farrant v. *Olver*, (1922) W. N. 47; 91 L. J. Ch. 758; 127 L. T. 145; 66 S. J. 283, relied on.

Under O. VII, r. 7 of the Civil Procedure Code the Courts in India have a general right to give such relief as they may think just, and are not so tied down as the Courts in England used to be. [p. 282, col. 2.]

Defendant agreed to sell certain immoveable property to the plaintiff and the time fixed for completion was six months. The market, however, improved and the defendant evaded the performance of the contract. After considerable delay the plaintiff served the defendant with notice to complete within seven days. Defendant failed to do so and plaintiff sued him for specific performance of the contract and in the alternative for damages. The market declined considerably during the pendency of the suit and the defendant expressed his willingness to perform the contract, but the plaintiff refused to accept specific performance and pressed his claim for damages:

Held, (1) that although time was not originally of the essence of the contract it was open to the plaintiff, having regard to the conduct of the defendant, to give notice to the latter making time of the essence of the contract; [p. 279, col. 2.]

(2) that under the circumstances of the case the period of seven days fixed by the plaintiff in his notice was reasonable; [p. 279, col. 2.]

(3) that defendant having failed to perform the contract within the time fixed was guilty of breach and the date of breach was the date on which the period fixed in the notice expired; [p. 280, col. 1.]

(4) that it was open to the plaintiff to abandon his claim for specific performance and confine his claim to damages, and that the defendant could not insist that the plaintiff must accept specific performance. [p. 281, col. 2.]

Appeal from the judgment of Mr. Justice Shah.

Mr. *Munshi*, (with him Mr. *Coltman*), for the Appellant.

Mr. *Lalji*, for the Respondent.

JUDGMENT.

Fawcett, J.—The facts in this case are sufficiently detailed in the judgment of the Court below and that of my learned brother. I proceed to consider the contentions urged before us in this appeal.

I first take up the contention of the respondent's Counsel, Mr. Lalji, that in any case the contract could not be enforced for want of mutuality. This is based on the ground that two of the defendant's brothers were minors at the time of the contract and on the ruling of the Privy Council in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (1). In my opinion this plea must be rejected. First of all the objection of want of mutuality has never before been raised by the plaintiff and no issue was framed upon that point. In fact it amounts to an inconsistent plea which would require an amendment of plaint (O. VI, r. 7, Civil Procedure Code). No such amendment has been asked for. Secondly, the plaintiff has by his conduct precluded himself from raising this point, especially in view of his consent to the application to the Court to sanction the sale on behalf of the minors: see Halsbury, Vol. XXVII, Art. 14 (2), p. 12; and Fry on Specific Performance, Art. 468, p. 224. The case, in my opinion, falls under section 115 of the Indian Evidence Act. Thirdly, the case of *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (1) was quite different from the present case. In that case the contract for sale was by, or on behalf of, the minor alone, whereas in the present case it is by a person, who is the manager of a joint Hindu family which included minor brothers. The difficulty about the minors in such a case is in Bombay got over by an appointment of a guardian and sanction to the proposed alienation in accordance with the ruling in *In re Manilal Hargovan* (2).

(1) 13 Ind. Cas. 331; 39 I. A. 1; 14 Bom. L. R. 5; 16 C. W. N. 74; (1912) M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 39 C. 232; 21 M. L. J. 56; 11 M. L. T. 8 (P. C.).

(2) 25 B. 353; 3 Bom. L. R. 411.

The authority given by the Court in such a case is accepted by conveyancers in Bombay as sufficient and no question was raised by the plaintiff's attorneys as to the Court's authority to pass the proposed order, and apparently there was no contest regarding the matter at the trial: cf. the finding of the lower Court on issue No. 10. Mr. Lalji also cited *Baluswami Aiyar* v. *Lakshmana Aiyar* (3), but the applicability of that ruling depends on facts which have not been proved to exist in this case. The remark in the lower Court's judgment in the last line of p. 54, part I, of the Paper-Book, shows that the defendant's power to convey alone was not even discussed before it. And supposing he had no such power, the contract could still have been performed in the manner by which defendant put himself in a position to fulfil it in March 1921.

The two main issues raised by the appellant's Counsel, Mr. Munshi, are (1) whether the defendant committed breach of the contract, and (2) whether the plaintiff kept the contract alive, so that he was bound by the defendant's offer to perform it on April 1, 1921. His main contention is that time was not of the essence of the contract under the original contract, and that though the plaintiff subsequently made time of the essence of the contract by his letter of June 28, 1920, this was waived by his conduct in continuing the negotiations; that the contract being kept open, the other side could take advantage of this to offer to perform it; that the filing of the suit for specific performance implied that the contract was still subsisting at the date of the suit; that the plaintiff by dropping his claim for specific performance refused to perform the contract though defendant was ready and willing to perform his part of the contract; that the result was that he could not maintain his claim to damages and there was also a repudiation of the contract, entitling the defendant to forfeit the deposit; and that accordingly the plaintiff's suit should have been dismissed with costs. He relied mainly upon two cases, namely, *Frost* v. *Knight* (4) and *Hipgrave* v. *Case* (5). But before considering these cases and the other contention put forward, it is desirable to note exactly what it was that the learned Judge decided. He holds (1) there was a breach of the contract on the part of the defendant (pages 57, 59 and 60 of the Paper-Book); (2) the plaintiff did not keep the contract alive, as contended by the defence (pages 57, 60, 61); (3) the plaintiff is entitled to the alternative relief of damages (pages 57, 58, 59); and (4) in any case the Court, in the exercise of its discretion, would not decree specific performance (page 59)

In regard to the first point the judgment has not dealt as fully or definitely as it might have with the question: What was the time for performance and what was the actual date on which the defendant committed a breach of the contract? This is an important question, because it is not sufficient to show that the defendant was not able to perform his part of the contract within the period of seven days mentioned in the letter of June 28, 1923, unless it is also shown that the time for performance of the contract had then expired. The original time fixed for the completion of the conveyance expired in April 1920. But, as time was not of the essence of the contract, it must be taken that no time for the performance was specified within the meaning of section 46 of the Indian Contract Act, that is, the plaintiff's engagement had to be performed within a reasonable time. A subsidiary question arises as to whether the plaintiff was justified in making time the essence of the contract as he did in the letter of June 28, 1920, and whether the time so specified of seven days was a reasonable time to allow. Unfortunately no issues were raised upon this point apparently because of the undesirable practice of raising an issue on every statement of

(3) 63 Ind. Cas. 374; 44 M. 605; 13 L. W. 562; 29 M. L. T. 306; (1921) M. W. N. 316; 41 M. L. J. 129 (F. B.).

(4) (1872) 7 Ex. 111; 41 L. J. Ex. 78; 26 L. T. 77; 20 W. R. 471.

(5) (1885) 28 Ch. D. 356; 54 L. J. Ch. 399; 52 L. T. 242.

the plaint which is contested, without confining the issues to the main question for decision, in accordance with the observations of Scott, C. J. in *West End Watch Company* v. *Berna Watch Company* (6). The point is not, therefore, discussed as a particular issue in the lower Court's judgment. However, at page 60 the learned Judge says:—

"In the first place when the Court refused to sanction the sale in June 1920 the defendant was unable to perform the contract. There was a breach on his part."

Again at page 61 the learned Judge says:—

"Further it seems to me that in view of what happened in June 1920 it was perfectly open to the plaintiff to make time of the essence of the contract and to give to the defendant a final opportunity to fulfil the contract. When he could not do that the plaintiff was entitled to sue on the footing of a breach by the defendants."

And at page 57 of the Paper-Book the learned Judge says:—

"It is clear from the correspondence between the parties that the plaintiff insisted upon making time of the essence of the contract in June as I think at that stage he was entitled to do and that the defendant treated the contract as at an end:"

I take it, therefore, that the lower Court found that the plaintiff was justified in making time of the essence of the contract, as was done by the letter of June 28 and that the period of seven days fixed for completion of the sale in that letter was a reasonable one, so that on the defendant's failure to perform the contract within that period there was breach on his part. The learned Judge has also apparently held that there was no waiver on the part of the plaintiff, although this point is not discussed in detail. At page 58 he says that the plaintiff did not by his conduct definitely commit himself so as to be precluded from claiming either specific performance or the alternative relief of damages, and at page 61, in connection with the passage already quoted as to the plaintiff being justified in making time of the essence of the contract, no reference is made to any subsequent waiver by the plaintiff of his action.

The first question, then, is whether the lower Court has erred in holding that there was a breach on the part of the defendant in failing to complete his part of the contract by July 5, 1920, when the period of seven days specified in the letter of June 28, 1923, expired? Mr. Munshi's contention on this part of his case was mainly based on the assumption that the defendant could convey a good title as the manager of the joint Hindu family consisting of himself and his brothers, and that his offer to convey the property on that basis, which was made in his attorney's letter of July 6, 1920, was, therefore, a good one. As already remarked, however, the lower Court's judgment shows that no attempt was made at the hearing to justify the position that defendant alone was competent to convey a good title. And, in my opinion, such a position is entirely opposed to condition No. 4 of the contract, under which "the vendor and all other persons whom the purchaser or his attorneys shall consider to be necessary parties" were to execute the conveyance. This leaves it to the plaintiff to say who were necessary parties, and he could properly insist on defendant's adult brothers and a duly constituted guardian of the minor brothers joining in the conveyance. Condition No. 4 was obiously intended to protect the plaintiff from having to accept a title, which, though outwardly good, would render him liable to litigation; and a conveyance by a manager of a joint Hindu family, which contains minor members, is just the sort of transaction which would lead to such litigation. In this particular case defendant's brothers objected to the sale in February 1923 and warned plaintiff that if he proceeded with this purchase he would do so at his own risk (Paper Book, Part I, page 18, Part III, page 28). Plaintiff was, therefore, clearly justified in requiring that all the brothers should join in the conveyance, and this was re-

(6) 10 Ind. Cas. 805; 35 B. 425; 13 Bom. L. R. 242.

cognised by the defendant, who took steps accordingly (cf Paper Book, Part. I, pp. 31, 35, 36).

Though the learned Judge has held on the second issue that it is not proved that there was any collusion between defendant and his adult brother, Narotam, the circumstances of the case strongly suggest this. I also think that there is substantial ground for the allegation in paragraph 9 of the plaint that defendant's petition to the Court was intentionally made in a way that would almost necessarily lead to its rejection, as was at the time pointed out in plaintiff's attorney's letter of April 16, 1920, (Paper-Book, Part I, p. 22), though the learned Judge has on Issue No. 4 held it not proved that the petition was a dishonest one. The correspondence, to my mind, contains conclusive evidence of defendant's desire to delay the completion of the sale owing to the considerable rise in the market value of the property since the date of the contract; and as remarked by the learned Judge (Paper-Book, Part I, p. 55) "the defendant was anxious to sell to some body else if possible." The circumstances, in my opinion, clearly prove that there was deliberate delay on the part of the defendant, who was not really willing to complete. No doubt the rise in the value of the property would make it difficult for him to obtain the Court's sanction to the sale on behalf of his minor brothers, but this was in accordance with defendant's own desires. This position continued up to the date of the suit, and it was only when the market subsequently fell that defendant's wishes and ability to complete the sale again corresponded, but in an opposite direction to the former position. The facts seem to me perfectly clear, and though there is no actual evidence on record as to the market fluctuations of immoveable property in Bombay in 1920-22, it would be absurd for the Court to shut its eyes to what is plain to it from the different positions taken up by the parties at different times and its knowledge of a notorious fact from (*inter alia*) litigation that has come up before this High Court on its Original Side: *cf. Cooper* v. *General Accident, Fire, and Life Assurance Corporation, Limited* (7). I entirely concur with the view taken by the Judge below that "when the Court refused to sanction the sale in June 1920 the defendant was unable to perform the contract" (p. 60). I also concur with his finding (p. 57) that the plaintiff was entitled to make time of the essence of the contract as he did by his letter of June 28, 1920. There had been a previous warning to defendant in his letter of April 6, 1920 (Paper Book, Part III, p. 34), which led to the application to the Court to sanction the sale; and when that application was refused, the inability of defendant to give plaintiff a good title under conditions Nos. 4 and 5 of the contract became definitely ascertained. There was a failure on his part to make out the title contracted for and obtain the concurrence of other parties, as required by condition 4 of the contract. This was a breach going to the root of the contract, and the correspondence and other circumstances clearly show that the defendant up to the date of the suit had no intention of fulfilling his part of the contract.

That being so, I think the period of seven days allowed by the notice of June 28, 1920, was a reasonable one (*cf.* Fry on Specific Performance, Art. 1095. at p. 512). It did not really matter whether seven days, or seventy days, were fixed: the defendant would not have got himself into a position to fulfil his contract (as he did in 1921), even if the period fixed had covered the four months prior to the institution of the suit, or indeed any period before the time when the market turned in his favour. The case is quite different to the ordinary one, where there are difficulties in the way of clearing the title, which require time for their removal, and where the notice gives insufficient time for that purpose. The general rule is that when a substantial defect is ascertained, the purchaser must exercise his right of repudiation or of seeking the aid of the Court for specific performance without undue delay (*cf.* Halsbury, Vol. XXV, Art. 692, at p. 404,

(7) (1922) 39 T. L. R. 113 at p. 115; 2 Ir. R. 214.

and Fry on Specific Performance, Art. 1100, at p. 514). Also, as ruled in *Stickney* v. *Keeble* (8) the prior delay of defendant must be taken into consideration in determining the reasonableness of the time fixed by the notice. The case was, therefore, one in which a short period for completion of the contract might reasonably be fixed. To use the language of section 46 of the Indian Contract Act, defendant by failing to get the Court's sanction by July 5 had failed to perform his engagement within a reasonable time. I hold accordingly that there was a breach of contract by defendant on July 5, 1920.

But it is said that there was waiver by plaintiff of his right to act on such a breach by his continuing in negotiation as to the title. In support of this reliance is placed on the letter of plaintiff's attorneys, dated July 6, 1920 (Paper-Book, Part III, page 41) in which they ask defendant's attorneys to give them inspection of a supposed agreement between defendant and one Lukmanji regarding the assignment of the Improvement Trust lease to defendant, and of the Letters of Administration of his father's estate that had been granted to defendant. It is not clear that these documents were really wanted for the investigation of defendant's title, and as there is no evidence on the point, it is a matter of speculation why their inspection was desired. But assuming that it was for the purpose of such an investigation, it is to be remarked that the request does not appear to have been complied with, and plaintiff's attorney's letters of July 22 and 24, 1920, (Paper-Book, Part III pages 46 and 47) make it quite clear that plaintiff would not accept any other title than one passed by a conveyance in which defendant's brothers joined. Also the plaintiff's attorneys' second letter of July 6, 1920 (Paper-Book, Part III, page 41) implies that plaintiff was not willing to accept the conveyance by defendant alone which was offered in the letter of defendant's attorneys of the same date. A suit had already been threatened, and the defendant's letter of August 3, 1920 (Paper-Book, Part III, page 47) shows that his attorneys were aware that the idea had not been dropped. No other evidence of a desire, or effort, on the part of the plaintiff to continue the negotiations is adduced, except the third para of plaintiff's letter of July 14, 1920, in which he asks if defendant is prepared to comply with his requirement that the brothers should join in the conveyance. That merely amounts to a statement that defendant *could not* comply, for it is coupled with a reference to the Court's refusal to sanction the sale; and it was met by a refusal to discuss the matter, as plaintiff was understood to have filed a suit. In these circumstances, it is, in my opinion, absurd to suggest that there was any *waiver* by plaintiff. There was no "course of conduct inconsistent with the intention of insisting on such an objection" (Fry on Specific Performance, Art. 1120, at page 520). It is quite clear that plaintiff and his advisers were all along determined to sue, for he really wanted at that time to buy the property, probably in order to take advantage of the rising market (cf. the statement in his letter of April 16, 1920, that he had received a good offer for the property, (Paper-Book, Part I, page 22).

I, therefore, hold that there was no waiver on the part of the plaintiff as alleged. It follows that he is entitled to recover the damages allowed by the lower Court (*viz.*, the costs of and incidental to the investigation of title up to the date of suit) unless Mr. Munshi's second contention is correct.

This contention is that in any case plaintiff's abandonment of his claim to specific performance at the hearing entitles the defendant (*a*) to forfeit the plaintiff's deposit and (*b*) to ask the Court to dismiss his suit with costs. Mr. Munshi submitted an elaborate argument on this point, and in regard to the first part of it I concur with him that the plaintiff treated the contract as subsisting up to the date of the suit. It was in fact necessary for him to do so, if he hoped to get a decree for specific performance, for if the plaintiff repudiates his obligation under this contract, this debars him

(8) (1915) A. C. 386; 84 L. J. Ch. 259; 112 L. T. 664.

from claiming specific performance of the contract by the other party : see Halsbury, Vol. XXVII, Art. 101, page 59. But Mr. Munshi relies on the principle laid down in *Frost* v. *Knight* (4) that, if the promisee keeps the contract alive for his own purpose, he also keeps it alive for the benefit of his opponent; "he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it."

I take it that it is in this sense that the lower Court found on Issue No. 8 that the plaintiff did not keep the contract alive down to the date of hearing (see Paper-Book, pages 60, 61), *i. e.*, he did not keep it alive so as to enable the promisor to take advantage of this in the way laid down in that case. As I have already said I do not think it can be held that the plaintiff did not treat the contract as still subsisting, but in my opinion the contention that, therefore, the plaintiff could not abandon the claim to specific performance except under penalty of dismissal of his suit with costs and to forfeiture of his deposit is incorrect for the following reasons.

(1) This contention overlooks the fact that no one has an absolute right to a decree for specific performance, but as laid down in sections 12 and 22 of the Specific Relief Act the grant or refusal of this relief is purely discretionary with the Court. I think that the right held to be kept open under the doctrine of *Frost* v. *Knight* (4) is a purely legal right implied in the "continuance" of the contract, which is referred to in the last sentence of section 39 of the Indian Contract Act. It seems to me doubtful whether such a right exists in a case like this falling under the provisions of section 54 of the Indian Contract Act, which expressly enacts that the promisor cannot, after a breach on his part, "claim the performance of the reciprocal promise" (cf. *Sabapathi Pillay* v. *Vanmahalinga Pillai* (9). But assuming that it does the fact remains that, after a suit has been filed for specific performance, the question whether a decree should be granted or refused is one purely for the Court in the exercise of its jurisdiction on judicial principles, and the domain of strict law is superseded by the domain of discretion and equity. I concur with the view taken in *Gobinda Chandra Chakravarti* v. *Nanda Kumar Das* (10) that in exercising a discretion under section 22 of the Specific Relief Act, the Courts are not tied down by the rules laid down in the Indian Contracts Act and by those alone.

(2) In exercising its discretion, the Court can take into consideration the plaintiff's abandonment of his claim to specific performance, a position he is entitled to take up under O. XXIII r. 1, of the Civil Procedure Code. A somewhat similar point arose in *Bombay Cycle & Motor Agency, Ltd.* v. *Rustomji Dossabhai N. Wadia* (1921) O. C. J. Appeal No. 7 of 1921, decided by Macleod, C. J., and Shah, J., on June 20, 1921 (Unreported). In that case also there was a change of position by the parties. The plaintiff sued for specific performance. Abandoning that, he wanted to fall back upon the alternative relief of damages, if on an inspection of defendant's accounts he found it worth while to do so. The main question decided was one of procedure with which we are not concerned in this case. The remarks which I am going to cite are purely *obiter*, but they deal with the point in consideration and I think they may properly be mentioned. In the Appeal Court's judgment the learned Chief Justice says:—

"It is the Court alone which has to decide whether specific performance ought or ought not to be granted, and unless the parties come to the Court agreed as to what the terms of the decree should be, the Court has to come to a decision on that question, and it is open to the plaintiffs to say

(9) 23 Ind. Cas. 581; 38 M. 959; 15 M. L. T. 203; 26 M. L. J. 331; (1914) M. W. N. 256.

(10) 22 Ind. Cas. 910; 18 C. W. N. 689.

that considering all the facts of the case, the Court ought not to grant the prayer for specific performance in the plaint, but to grant the alternative prayer for damages."

Mr. Justice Shah in his judgment says:

"The plaintiffs' claim has been dismissed, as they were not then prepared to submit to decree for specific performance by consent. They were in no sense bound to consent to such a decree, and just as the defendants changed their position, they were also in my opinion entitled to consider their position with reference to the state of the market as it developed during the pendency of the suit, and to limit their prayer to damages, if so advised."

(3) The Court can no doubt come to the conclusion that in the circumstances the plaintiff's proper and equitable remedy is to get a decree for specific performance, and that if he refuses to take this his suit should be dismissed with costs. But the present is certainly not a case of that kind. As remarked by the learned Judge at page 57, Part I, of the Paper-Book "the controversy between the parties from time to time has changed with the market value of the property and even the form it has taken at the hearing is due largely to the fluctuations in the market value of the property." There can be no doubt, in my opinion, that the defendant's failure to perform the contract prior to the suit and his desire to perform it after the suit is entirely due to such fluctuations. The maxim applies "that he who comes into equity must come with clean hands," and the defendant is really in the same box as the plaintiff in regard to the latter seeking to avod the performance of the contract.

(4) The lower Court has decided that in any case in the exercise of its discretion it would not grant a decree for specific performance (p. 59 of the Paper-Book) and the Appellate Court should be slow to interfere with the exercise of such a discretion. I fully agree with the Judge below that in all the circumstances it would not be equitable to give the defendant, in view of his previous conduct, the advantage he seeks to obtain from the turn of the market. It is true that he does not here seek a decree for specific performance. But the basis on which he claims that the plaintiff's suit should be dismissed with costs is on the basis of his right to specific performance.

(5) *Hipgrave* v. *Case* (5) is, no doubt, a decision which goes to support Mr. Munshi's contention. But it is to be read in the light of the peculiar history of the circumstances under which the alternative remedy of damages came to be allowed first under Lord Cairns' Act and then, under the Judicature Act of 1873. A succinct account of this will be found in the Encyclopoedia of Laws of England, Vol. II, at pp. 670, 671. Also the stricter rules in England as to pleadings and amendment thereof, compared with those of India, have to be taken into consideration, as pointed out in the lower Court's judgment. The case, in my opinion, has no application to one like this where the plaintiff expressly makes an alternative prayer in the plaint for damages, not only as a substitute for specific performance but also coupled with a prayer in the alternative for rescission of the contract. The Courts in India have a general right to give such relief as they may think just, under O. VII, r. 7, Civil Procedure Code, and are not so tied down as the Courts used to be in England: cf. *Callianji Harjivan* v. *Narsi Tricum* (11). There is also no question of defendant's being taken by surprise.

(6) Apart from the considerations like those which weighed with the Court in *Hipgrave* v. *Case* (5) the plaintiff is *dominus litis*, and the ordinary rule is that if he claims alternative reliefs he can choose at the hearing which he will ask for, cf. O. XXIII, r. 1, Civil Procedure Code, and *Farrant* v. *Olver* (12). No doubt the facts in the latter case are different from those here, but that does not affect the above principle.

(7) The defendant's ability to give a good title arose only after the suit; and

(11) 19 B. 764 at p. 770; 10 Ind. Dec. (N.S.) 512.
(12) (1922) W. N. 47; 91 L. J. Ch. 758; 127 L. T. 145; 66 S. J. 283.

it is at least doubtful whether, having failed to obtain the requisite concurrence of his adult brother and the Court's sanction prior to the suit and having thus incapacitated himself from performing his contract, he could recapacitate himself by such subsequent action. Thus it has been held that—"If *A* agrees to convey land to *B* at a future date and before that date conveys the land to a third person, *A* commits an anticipatory breach of his agreement, and *B* can repudiate it. It is immaterial that *B* might, by repurchasing the land before the date fixed, recapacitate himself to perform his contract with *B*." See Ashburner's Principles of Equity, page 549, and the cases there cited.

(8) As regards the defendant's claim to forfeit the deposit I take the law to be that where there is no repudiation of the contract by the purchaser, nor any conduct on his part amounting to repudiation, he is entitled to a return of the deposit, though specific performance is refused; see Pollock and Mulla's Contract and Specific Relief Acts, 4th Edn., page 887 and cases there cited. Here there has been no such repudiation prior to suit, and the claim is based merely on his abandonment at the hearing of the claim to specific performance. In my opinion, he was at liberty to abandon it, and this is not a case which can properly be treated as a repudiation entitling the defendant to forfeit the deposit. Further the right of the purchaser to recover his deposit springs out of breach of contract by the vendor (Halsbury, Vol. XXV, Art. 688, page 401) and on the finding that there has been such a breach by the defendant the plaintiff is clearly entitled to recover his deposit.

(9) Mr. Coltman contended that the sale of the property by the defendant was held up for two years by the suit, and it was only fair in the circumstances that the plaintiff should be deemed to have made a final election when he brought his suit for specific performance; for if he had not treated the contract as subsisting, the defendant could have sold the property to some other party. If the defendant's conduct had been free from blame, there would no doubt be considerable force in this contention. But the balance of equities of the case is not in favour of the defendant, and I do not think that this consideration can be held to outweigh the other considerations that go against him. Substantial justice is, in my opinion, done by the decision of the lower Court.

I would, therefore, dismiss the appeal with costs.

Coyajee, J.—On October 2, 1919, the defendant (now appellant) entered into an agreement in writing, Exhibit B to sell the immoveable property therein described to the plaintiff-respondent for the price of Rs. 1,60,001. A sum of Rs. 25,000 was paid by the purchaser as "earnest money" and it was agreed that "the balance *viz.*, Rupees one lac and thirty-five thousand and one shall be paid on the completion of the purchase. The purchase was to be completed within six months. The vendor agreed to deduce at his own cost "a marketable title free from all reasonable doubts" and to "do all such things and take such actions and proceedings as may be necessary for clearing up any defect in such title," and also to "put the purchaser in vacant possesssion of the second, third and fourth floors of the said hereditaments and by getting the tenants of the remaining portion to attorn to the purchaser (clause 5). It was also agreed that "upon payment of the purchase-money at the time and in manner aforesaid, the vendor and all other persons whom the purchaser or his attorneys shall consider to be necessary parties shall execute a proper assignment of the said premises to the said purchaser or to such other person or persons as the purchaser may nominate" (clause 4).

At the date of the contract the said property admittedly belonged to a joint Hindu family consisting of four brothers, namely, the defendant, Narotam, Nandlal and Manilal—the last two beirg then minors. The purchaser, however, had no knowledge of these facts. The further relevart history of the property is thus stated by the Trial Judge: "The original lease of the property was taken from the Improvement Trust by one Lookmanji Noorbhoy. He agreed to assign

his right..to Karsandas Kalidas and his brother Narotam Kalidas in March 1911 for Rs. 46,500. The lease which was not then executed in favour of Lookmanji was ultimately executed by the Trustees of the Improvement Trust directly in favour of and in the name of Karsandas Kalidas *i. e.* the defendant, only on October 17, 1911."

The main question for determination is, whether, on the facts of this particular case. the purchaser is entitled to the return of the deposit money Rs. 25,000, or whether the vendor should be permitted to retain it?

The evidence bearing on this question is documentary. It consists, with a few exceptions, of letters which have passed between the parties. The correspondence began soon after the contract, and was kept up until this suit was brought (November 12, 1920); and it continued even thereafter. The conclusions to which this evidence leads me are:

(1) Throughout the period intervening between the date of the contract and the date of filing the plaint, the plaintiff had continually been pressing for completion of the sale.

(2) As for the defendant, he apparently entertained the hope of making a still better bargain. He wanted to gain time, and was therefore anxious on the one hand to keep the plaintiff to his promise. On the other hand he did all he could up to the time this suit was brought, to delay from time to time the fulfilment of the contract. The difficulties arising from the fact of his brothers having an interest in the property were held in reserve to serve as an excuse for backing out of the contract in the event of his being able to find a higher price elsewhere.

(3) There was such a protracted default on the part of the vendor as to give the purchaser the right to say that the vendor had refused to perform his part of the contract.

Soon after the contract, the plaintiff applied for and obtained the sanction of the Improvement Trust Board to the proposed assignment of the lease in his favour. By clause 3 of the contract, however, it was the vendor's duty to secure it. Plaintiff sent a draft assignment to the defendant for his approval. It was not returned. On February 4, 1920, Messrs. Mehta, Dalpatram and Lalji, as attorneys of the vendor's brothers, wrote to the plaintiff as follows:

"We undestand that our client's brother Mr. Karsandas Kalidas has contracted to sell the above-mentioned property to your client. This is, therefore, to give your client notice that the said property belongs jointly to the said Karsandas Kalidas and our clients although the lease from the Improvement Trust was taken in the name of Mr. Karsandas Kalidas for the sake of convenience. If your client completes the purchase notwithstanding this notice he will do so at his own risk.

"We have, therefore, to request you to let us know if your client after this intimation desires to complete the purchase in which case we have instructions to take proceedings to restrain the sale."

On the same day plaintiff's attorneys sent a copy of it to defendant's attorney and asked: "please let us know by to-morrow evening what your client has to say in this matter." It is found by the lower Court—and the finding is not challenged here—that until this date the plaintiff had no knowledge of the defendant's brothers' being interested in the property. No reply was given, and plaintiff's attorneys wrote again on February 2:—"By the reason of your client's studied silence, our client is led to believe that your client has put up his brothers to make a false claim with a view to delay the completion of the sale." On February 10, defendant's attorney wrote denying any desire to delay completion, and added: "As regards the claim made by my client's brothers' the fact is that they are all joint with my client and the property was erected out of joint family funds and the lease was taken in my client's name as the eldest member of the family. The attitude taken up by my client's brothers is unreasonable and I have this day written to them to join in the conveyance." On the next day the plaintiff's attorneys called for "the names of all your client's brothers...and if any

of your client's brothers...are minors, we shall thank you to let us know accordingly." This apparently had reference to clause 4 of the contract. Another letter of the same date contains the plaintiff's complaint that "Neither in *kacha* nor in the *pucca* agreement for sale any mention is made of the alleged jointness of your client and his brothers, nor was the fact (if a fact it is) even mentioned or information as to it conveyed to our clients." On February 19, the defendant's attorney wrote: "So far as my client understands his brother is willing to sign the conveyance," and added that the plaintiff knew all along that the defendant was a member of a joint Hindu family. Plaintiff replied on the same day denying this and inquiring whether the minor brothers would be made parties to the conveyance and whether the defendant was prepared to obtain an order from the Court permitting him to convey the minors' interests. On March 8, plaintiffs attorneys wrote: "Your client has been observing a studious silence regarding all our letters in this matter. Please note that unless your client makes out a marketable title and gets all the necessary persons joined in the conveyance by the second proximo our client will proceed in the matter." The second proximo has reference to the termination of the six months' period allowed by the contract. On March 24, the defendant's attorney replied that he had addressed a letter to Messrs. Mehta, Dalpatram and Lalji to obtain the necessary order from the Court as regards the minors' interests. Plaintiff's attorneys wrote on the same day, stating that that could not abate their client's anxiety, for what he really wanted was speedy completion of the matter which was being unnecessarily delayed. The six months' period having expired, plaintiffs attorneys wrote as follows on April 6:—

"Notwithstanding our repeated reminders your client has not answered our client's queries nor has he made out a marketable title as contracted nor have you as yet returned the draft assignment duly approved.

"Our client's moneys are lying idle and please note that our client will charge at 12 per cent. per annum on the balance of the consideration money.

"We also require your client to make out a marketable title and to execute a proper assignment to our client as provided by the agreement for sale on or before the 29th instant. Please note that in default our client will without further intimation file the necessary suit against your client."

On April 15, plaintiff's attorneys called for the papers for obtaining the Court's order for perusal, and added that "this is of course without prejudice to..our letter of the 6th instant." The draft petition being supplied, plaintiffs attorneys wrote on April 16:

"The petition does not comply with any of the material requirements of law nor does it place before the Court the materials on a consideration of which the Court may make an order..It is evident that your client's desire is to get out of the bargain and for that purpose he has all along suppressed the facts from our client, has failed to give the necessary information..and has now hit upon the plan of presenting to the Court a petition disclosing scarcely any material fact so as to make it probable that the Court should not grant the order and then to make an excuse of it for non-completion..Our client has received a good offer for the property and he insists upon completion of the sale."

The petition is Exhibit E: read by the light of the defendant's conduct it is fairly open to this criticism. I agree with my learned brother when he observes that the circumstances of the case strongly suggest a collusion between the defendant and his brother Narotam whose opposition is evidenced by Exhibit F. Thus in June 1920 the defendant was unable, and in my opinion also unwilling, to complete the sale. In these circumstances, on June 22, the plaintiff offered to buy the defendant's own interest on certain terms; but the offer was rejected as "absurd." The plaintiff then adopted the course which I think he was perfectly justified in doing. On June 28 he allowed the defendant one week's

time within which to complete the sale making time of the essence of the contract. The time so allowed expired on July 5 On the 6th, the defendant took up a different attitude he alleged that he was the manager of the joint Hindu family and as such was entitled to sell the property on behalf of all the members and it was unnecessary to obtain the Court's order with regard to the minors' interests. No attempt was made to justify this position either in the lower Court or before us, moreover the position disregards the clear provisions of the fourth clause of the contract. More letters followed. On July 21, the defendant's attorney wrote: "Please let me know if you have accepted the title." The reply was: "It is no use pretending ignorance of our client's contentions as to your client's title to the property. We see no reason why you should be ignoring all the previous correspondence in the connection. Please let us know what your client has done regarding our client's requirements as to his title to the property, before you ask us whether our client has accepted the title." Plaintiff's letter of the 24th is to the same effect and reminds the defendant that he had failed to obtain the Court's sanction to the proposed sale. In the opinion of the learned Trial Judge, with which I agree, the further correspondence shews that the defendant was anxious to sell the property to some other purchaser, but was waiting to see what steps the plaintiff was going to take. On August 30, plaintiff gave a warning to the defendant "against dealing with the property in any manner" and intimated that draft plaint was ready. Some more letters followed. As I understand them, the plaintiff was anxious to make it clear that it was not he who was repudiating the contract but that there was a protracted default on the part of the defendant.

The plaint was filed on November 12, 1920. It was thereby alleged that the defendant had deliberately contrived to recede from the contract by putting up his adult brother to resist its completion and by failing to make a genuine effort to secure the Court's permission to convey the minors' interests. Plaintiff claimed specific performance of the contract. In the alternative he claimed (1) a return of his deposit, (2) costs of investigation of title, and (3) a sum of Rs. 40,000 "as damages for the defendant's wilful default in carrying out the said agreement and consequent breach of the contract." With this third item we are no longer concerned.

About this time, events were happening which were beyond the control of these litigants, but which, by the time the case was set down for hearing in December 1922, induced them to reconsider their respective positions. As the learned Judge observes: "The controversy between the parties from time to time has changed with the market value of the property and even the form it has taken at the hearing is due largely to the fluctuations in the market value of the property."

On March 10, 1921, the defendant applied to the Court to appoint him guardian of the property of one of the said minors (the other having then reached his age of majority) and to authorize him to convey his interest also. A perusal of his petition, Exhibit G, clearly shews a real attempt on his part to secure a favourable order—which indeed was made on March 12. This indeed is the first real endeavour made by the defendant to carry out the contract made on October 2, 1919. But this attempt was made nearly four months after the plaint was filed. The petition, Exhibit G, may be compared—contrasted rather—with the earlier one, Exhibit E. On April 22, defendant's attorney wrote to the plaintiffs: "We fail to understand your client's object in proceeding with this suit as our client is willing to convey the property and has as a matter of fact obtained the necessary Judge's Order authorizing him to complete the sale on behalf of his minor brother." On April 25, plaintiff's attorneys replied: "Before your client would object to our client proceeding with the suit we shall thank you to let us know to which of the reliefs claimed in the plaint your client is willing to submit." And on the

6th May this reply was amplified by making it clear that the plaintiff would insist on claiming compensation.

In his written statement, declared on August 20, 1921, reference is made to the Judge's order obtained on March 12; the defendant declares that he is ready and willing to complete the sale.

The learned Trial Judge has held that at the date of the contract plaintiff had no knowledge that other persons besides this defendant had an interest in the property; that defendant was guilty of a breach of the contract; that in November 1920 when the plaint was filed the plaintiff had a clear cause of action; that plaintiff had not kept the contract alive up to the day of hearing; that in the peculiar circumstances of this case, in the exercise of his judicial discretion, he would not force specific performance on the plaintiff; and that the plaintiff was entitled to the deposit and to costs incidental to the investigation of title.

In my opinion he has reached the right conclusions.

The nature of a deposit is thus explained by Cotton, L. J., in *Howe* v. *Smith* (13):

"The deposit, as I understand it, and using the words of Lord Justice James, is a guarantee that the contract shall be performed. If the sale goes on,....it goes in part payment of the purchase-money for which it is deposited but if on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then....he can have no right to recover the deposit.

"I do not say that in all cases where this Court would refuse specific performance, the vendor ought to be entitled to retain the deposit. It may well be that there may be circumstances which would justify this Court in declining, and which would require the Court, according to its ordinary rules to refuse, to order specific performance, in which it could not be said that the purchaser had repudiated the contract, or that he had entirely put an end to it so as to enable the vendor to retain the deposit. In order to enable the vendor so to act, in my opinion there must be acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract."

In the present case the contract is silent as to what should happen to the deposit money in case the contract goes off. Upon the special facts of this case I do not see any reason for refusing the plaintiff's claim to recover this deposit, and for allowing the defendant to retain it. From first to last, from the date of the contract up to the institution of this suit, the plaintiff had been making a continuous and pressing demand for completion of the sale. The defendant on the other hand was doing all he could to delay and even to defeat it; he was in my opinion clearly guilty of default.

It is true, the parties did not by the terms of their agreement make time of the essence of the contract. But in such a case, if unnecessary delay is created by one party the other has a right to limit a reasonable time within which the contract should be perfected by the other: *Taylor* v. *Brown* (14). Accordingly the plaintiff expressly made time of the essence of the contract by his letter of June 28, 1920. But it is urged that the time so allowed was only one week, and that it was, therefore, too short. What is a reasonable time must depend upon the facts of each particular case. The question of reasonableness of notice should be considered with reference to the past attitude of the parties. Ordinarily, one week's time would be too short; in the circumstances of this case it was not. The contract allowed the parties six months for completion of the sale. Even though time was not of the essence of the contract, it was clearly the duty of the vendor to begin making some progress towards fulfilment of the contract. He had no right to expect the purchaser to wait an indefinite time. The defendant here did nothing beyond causing unnecessary delay; he was

(13) (1884) 27 Ch. D. 89 at p. 958; 53 L. J. Ch. 1055; 50 L. T. 573; 32 W. R. 802; 48 J. P. 773.

(14) (1839) 2 Beav. 180; 9 L. J. (N. S.) Ch. 141; 50 R. R. 152; 48 E. R. 1149.

both unable and unwilling to fulfil the contract, and his inability was of his own making. The first genuine effort he made to fulfil his contract was in March 1921, and that was nearly four months after the plaint was filed In considering the question of sufficiency of time, his past conduct is relevant. As observed by Lord Parker of Waddington in *Stickney* v. *Keeble* (8): "In considering whether the time so limited is a reasonable time the Court will consider all the circumstances of the case. No doubt what remains to be done at the date of the notice is of importance, but it is by no means the only relevant fact. The fact that the purchaser has continually been pressing for completion, or has before given similar notices which he has waived, or that it is specially important to him to obtain early completion, are equally relevant facts." In my opinion, therefore, there was a breach on the part of the defendant, at any rate, on July 5, 1920, if not earlier. On July 6, he, as I have endeavoured to point out, took up a different attitude, which, moreover, he has made no attempt to justify. The further letters which passed between the parties do not, in my opinion, amount to a waiver of objection on the part of the plaintiff. In his letters of July 22 and 24 he was referring to the provisions contained in the fourth clause of the contract, and he warned the defendant not to ignore "all the previous correspondence in this connection," and he reminded the defendant that "he had failed to obtain the Court's sanction to the proposed sale." By his plaint he claimed damages for defendant's "wilful default in carrying out the said agreement and consequent breach of contract. This position he has done nothing to give up. In my opinion, therefore, the learned Judge was right in awarding to the plaintiff by way of damages all costs incurred by him in consequence of the failure on the part of the defendant to perform the contract in time I also hold that he was right in permitting the plaintiff to recover the deposit money.

It was contended on behalf of the defendant that the plaintiff, having at the hearing of the suit abandoned his claim to specific performance, was not entitled to a return of the deposit money The plaintiff, however, had not claimed specific performance alone. The claim to damages and to a return of the deposit was expressly made in the plaint. It was the defendant's non-performance or breach of the contract which gave rise to the suit. The plaint sets out all the necessary facts bearing on both these reliefs. It was competent to him to make those claims. And, as shown in the judgment of my learned brother, it was equally competent to him at the hearing to abandon any part of his claim (O. XXIII, r. 1, Code of Civil Procedure). The interval of time between the date of the contract and the date of hearing was over three years. Plaintiff was in no sense responsible for this delay. Under the stress of circumstances, as explained by the lower Court, the plaintiff abandoned his claim to specific performance. He had done nothing to keep the contract alive in the sense that the defendant who was himself in default became entitled to say that if for any reason the claim to specific performance was either abandoned or disallowed, the plaintiff should not be permitted to recover the deposit. Moreover, the jurisdiction to decree specific performance of a contract is discretionary, and the Court is not bound to grant such relief (section 22, Specific Relief Act). And if, while disallowing specific performance, the Court finds that the plaintiff is entitled to a remedy, it is competent to the Court to award the appropriate remedy. Here the learned Judge observes that in the exercise of his discretion he would not—on the special facts of this case—have forced specific performance on the plaintiff; he would have disallowed it, not because of any fault of the plaintiff but because it would enure to the benefit of the defendant who was definitely unable or unwilling to fulfil the contract before the suit was filed. I agree then that to permit the defendant to retain this deposit or part payment would be to permit him to take advantage of his own default.

The appeal, therefore, fails.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 184-B OF 1923.

November 3, 1923.

Present:—Mr. Prideaux, A. J. C.

PARASHRAM—PARTY No. II—APPLICANT

versus

GOPAL RAMCHANDRA AND OTHERS—PARTY No. I—NON-APPLICANTS.

Criminal Procedure Code (Act V of 1898), s. 147—Jurisdiction—Preliminary order—Addition of applicants—Revision.

Unless there are special circumstances giving rise to an apprehension of the breach of the peace, there is no jurisdiction to make an order under section 147, Criminal Procedure Code. [p. 290, col. 1.]

The bringing of new applicants on record after the preliminary order in proceedings under section 147, Criminal Procedure Code, is passed, is undesirable but it is a mere irregularity which does not vitiate the proceedings. [p. 290, col. 1.]

It is not usual for a High Court to interfere in revision with the discretion of the Magistrate who has passed an order under section 147, Criminal Procedure Code, unless it is made without jurisdiction or if the Magistrate has not followed the procedure which has been laid down. [p. 290, col. 1.]

Revision against an order of the Magistrate, First Class, Akola, in Miscellaneous Criminal Case No. 9 of 1923, dated the 20th April 19 3.

Messrs. *A. V. Khare*, *M. B. Niyogi* and *D. V. Pingle*, for the Applicant.

Mr. *G. G. Hatwalne*, for the Non-Applicants.

ORDER.—A large number of the inhabitants of Akola petitioned the Deputy Commissioner of that District complaining that P. C. Joglekar of that town had stopped the public from taking water from the two wells situated in S. No. 9 of Sukhapur, a part of Akola. The Tahsildar was told to enquire into the matter, and he did so, and found that Joglekar had sold water from the two wells to the Sir Hukumchand Mills and, therefore, stopped the public from taking water from those wells, and came to the conclusion that the wells were public property, and suggested that under section 133 of the Criminal Procedure Code, action be taken. The report passed to the Deputy Commissioner as District Magistrate, who eventually sent to the Sub-Divisional Magistrate for proceedings to be initiated under sections 133 or 147 of the Criminal Procedure Code. The Magistrate took the statements of five of the signatories to the application as one statement, and they spoke to Joglekar preventing the persons who signed the application from using the wells, and to the likelihood of the breach of the peace if any of them went to take water there. Upon this on 5th July 1922 a preliminary order was passed, and other persons were joined as applicants on 17th August 1922, but no new written statements were taken from them, and eventually the case resulted in an order under section 147 of the Criminal Procedure Code in which it was stated that party No. 1, *i. e.*, the signatories to the application had a right of using the wells for a very long period and that such right was being exercised by them within three months of the institution of these proceedings, and further that there exists a dispute concerning the use of the wells which is likely to occasion breach of the peace. It was further directed that party No. 1 be restored to their right of using the two wells and Joglekar was forbidden from obstructing them in the use of the wells. The order was to remain in force until and unless some other competent Court held otherwise. Against that order the present application in revision has been filed.

It is contended here that there was no likelihood of a breach of the peace and that the order under section 147 was, therefore, wrong. It seems to me that if the public have from a very long series of years used and have been allowed to use the water of certain wells, whether the wells be public or private, and have been allowed to make use of them as a matter of right, and then if certain person claims ownership forbids the use of the wells, there is every probability of a breach of the peace. I am referred to *Dhanput Singh* v. *Chhatterput Singh* (1), *Kali Kissen Tagore* v. *Anund Chunder Roy* (2), *Anesh Mollah* v. *Ejaharuddi Mollah* (3) and

(1) 20 C. 513; 10 Ind. Dec. (N. S.) 348.
(2) 23 C. 557; 12 Ind. Dec. (N. S.) 370.
(3) 28 C. 446; 5 C. W. N. 428.

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Tularam Sao v. *Bheoram* (4). It can be accepted as correct that unless there are special circumstances giving rise to an apprehension of the breach of the peace, there is no jurisdiction to make an order under section 147, Criminal Procedure Code. But it seems to me that the special circumstances which justify the apprehension of the Magistrate exist in the present case. In this connection it is also stated that the public cannot acquire ownership of immoveable property by prescription: see *Ussan Kasim Sait* v. *Secretary of State for India in Council* (5). What can be proved in these cases is actual grant, or dedication, if direct evidence of one is available, or to be presumed, in cases where such evidence is not available; and in the latter case evidence of enjoyment is relevent and goes far towards supporting the inference that a grant or dedication, which is lost, at some time was made.

An objection is taken to the bringing of new applicants on record on the 17th August 1922. Of course it is undesirable, but still at the most it is merely an irregularity which does not vitiate the proceedings. There seems to me no doubt, taking the evidence of both sides together, that the case is a proper one for enquiry under section 147, and the evidence does support the finding that the wells had been used within three months of the institution of the proceedings. The conditions precedent to the application of the section exist, and it is not usual for a High Court to interfere with the discretion of the Magistrate in these cases unless the order is made without jurisdiction, or if the Magistrate has not followed the procedure laid down. Under the circumstances of the present case, the Magistrate is right in taking the action he did.

It is contended for the applicant that it would be impossible for him to sue in a Civil Court a number of the Akola public for a declaration that each of such persons has no right to use the water from the wells; but there is no necessity for him to do so. A suit brought against the signatories of the petition that started these proceedings would suffice. Whether the wells are public or private, there seems to be no reasonable doubt that the public living in their vicinity have for a large number of years used these wells, and I think the applicant has been rightly referred to Civil Court to establish the fact of his alleged sole enjoyment.

With these remarks I dismiss this application.

Application dismissed.

G. R. D.

(4) 12 C. P. L. R. 2 Cr.

(5) 74 Ind. Cas. 25; 44 M. L. J. 638; 17 L. W. 610; (1923) M. W. N. 315; (1923) A. I. R. (M.) 624.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 508 OF 1923.

(CRIMINAL REVISION PETITION NO. 400 OF 1922).

December 13, 1923.

Present:—Mr. Justice Odgers.

In re P.C. PERUMAL *alias* CHELLAPERUMAL—ACCUSED—PETITIONER.

Criminal Procedure Code (Act V of 1898), s. 540—Court-witness—Discretion—Power of Court.

It is not improper for a Court to call a Court-witness under section 540, Criminal Procedure Code, after the case for prosecution and defence has been closed.

Although a Court has to exercise proper discretion in calling Court-witnesses, the terms of section 540 are extremely wide and the Court may at any stage of any inquiry, trial or other proceedings summon any person as a Court-witness if his evidence appears to it essential to the just decision of the case. [p. 292, col. 1.]

Empress of India v. *Kaliprosonno Doss*, 14 C. 245; 7 Ind. Dec. (N. S.) 163 and *Natabar Ghose* v. *Adya Nath Biswas*, 75 Ind. Cas. 541; 37 C. L. J. 415; 27 C. W. N. 675; (1923) A. I. R. (C.) 690; 24 Cr. L. J. 957, distinguished.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate, Trichinopoly, in Criminal Appeal No. 1 of 1923 preferred against the

P. C. PERUMAL. *In re.*

judgment of the Court of the Town Second Class Magistrate, Trichinopoly, in C. C. No. 668 of 1922.

Messrs. *S. Subramania Iyar* and *A. S. Srinivasa Aiyar*, for the Petitioner.

Mr. *V. L. Ethiraj*, for Public Prosecutor, for the Crown.

ORDER.— In this case the accused was charged under sections 342, 323 and 379, Indian Penal Code, in that at about 5 o'clock on the evening of the 18th November 1922, he bound the complainant to a tree, snatched away his loin cloth and the towel he had on the upper part of his body and the two rupees that he had in the folds of his loin cloth. He was acquitted under section 379 but convicted under sections 342 and 323. The conviction was upheld by the Sub-Divisional Magistrate. Mr. S. Subramania Aiyar for the accused presents three points for consideration. He says, first, that there is good and sufficient *alibi* evidence that the accused who was employed as a Building Sub-Inspector in the Loco Scheme, Golden Rock S. I. Ry., Trichinopoly was at work there on that day and not at the place where the offence is said to have been committed which is agreed to be about seven miles distant. The second point is that the Court improperly called a Court-witness after the case of each side had been closed; and the third point is that the Court had no jurisdiction to try the case at all as the offence really amounted to roboery and, therefore was only cognisable by a First Class Magistrate.

With regard to the first point the First Court disbelieved the *alibi* evidence and the lower Appellate Court says:

"The lower Court also disbelieved the *alibi* evidence of defence witnesses Nos. 1, 2 and 4 as the appellant did not mention a word about it in his long statement" and proceeds to confirm the conviction. I have allowed the learned Vakil, as I thought it was a case which needs some examination, to take me through the evidence of the *alibi* witnesses. The first *alibi* witness D. W. No. 1 says that the accused was at the work spot in the office until 5 P. M. on the date in question. He and the accused apparently left the work together and went to Trichinopoly Junction by train together. He is a fellow workman with the accused. He and the accused work in one and the same section under the Sub-Divisional Officer, and the Head Draftsman in the witness's office is the maternal uncle of the accused. Further the witness states from memory and not from any official record that the accused worked with him until 5 P. M., on the 18th November. I am not prepared to say that this witness can be trusted to establish the *alibi* of the accused. To begin with he is indirectly interested and again he only relies on his memory. With regard to D. W. No. 2 he first stated that he did not know where the accused was working on the 18th November. However, he speaks to his having met the accused on the Golden Rock platform at 5-30 that evening. This man is a draftsman. Although his office does not work on the Penultimate Saturday, he says he specially worked on the 18th November, though there is no record to show that he did. I cannot believe this man in any way. D. W. No. 3 was not relied on by Mr. Subramania Iyar because he says that no such occurrence as is charged occured at all. I am not prepared to believe that D. W. No. 4 produces a diary of the accused. He is a clerk in the Railway Executive Engineer's Office. The diary was made up on the 22nd November and the complaint was made on the 18th. The diary is made up by the accused himself, and I must say I am unable to rely on that in any shape or form. I am of opinion that the *alibi* evidence was sufficiently considered by the lower Court, and having considered it myself, I find it does not establish an *alibi* in favour of the accused.

With regard to the second point, the Court-witness was called under section 540, Criminal Procedure Code, when both the prosecution and the defence evidence had been closed. But neither the prosecution nor the defence had called Kambarasampettai Perimana Muthirian who is mentioned as second witness in the complaint of Nachiar Ammal, who is the boy's (complainant's) mother. It is true that this witness is not mentioned in the list put in by the Police in the charge-sheet which contains the names of seven witnesses of whom five were called. The Magistrate, acting under section 540, the terms of

which are extremely wide, called him as a Court-witness and apparently relied on his evidence. Two cases are quoted for the defence to show that this witness ought not to have been called. The first is *Empress of India* v. *Kaliprosonno Doss* (1) where a Single Judge of the Calcutta High Court refused to exercise his powers under section 540 on the ground that there was no matter necessitating enquiry or question to be cleared up and the witness proposed to be called was not one on whose testimony the Court could place confidence. Here the Magistrate apparently thought there was a matter to be cleared up as it appeared that this witness could corroborate the prosecution witness as to the occurrence on the 18th November. The other case quoted, I may state that no Madras case has been quoted, was *Natabar Ghose* v. *Adya Nath Biswas* (2). That was a protracted hearing by the Special Deputy Magistrate lasting for a out ten months and after the case had been posted for judgment two witnesses were examined before the Magistrate under section 540. I consider that that was an exceptional case, and although it is true that proper discretion has to be exercised under section 540, still the terms of the section are extremely wide and any Court may at any stage of any enquiry, trial, or other proceedings, summon any person as a witness if his evidence appears to it essential to the just decision of the case. There is no ground for assuming here that the Magistrate did not think that the evidence of this man might be of importance one way or the other, either to support the prosecution or to destroy the prosecution theory.

The third point is that there was no theft but robbery. I am quite unable to accede to this proposition. The Magistrate has found that the reason why the boy was tied up was to punish him for having thrown stones in the street. It is quite unreasonable to suppose that the accused meant to rob the boy of his cloth and two rupees. It is quite unnecessary that a man should have to tie up a small boy in order to take his cloth from him; so that the object of tying up the boy was not theft at all. Therefore, the offence of robbery was not committed. The boy was tied up to punish him and then the cloth was taken away from him to put him to shame and two rupees were found in the cloth. It has been found that the accused did not take the two rupees. In fact the accused was not guilty of theft at all. I find these three points against the petitioner and dismiss the criminal revision case.

V. N. V. *Rivision case dismissed.*

(1) 14 C. 245; 7 Ind. Dec. (N. S.) 163.
(2) 75 Ind. Cas. 541; 37 C. L. J. 415; 27 C. W. N. 675; (1923) A. I. R. (C.) 690; 24 Cr. L. J. 957.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL NO. 70-B OF 1923.

October 29, 1923

Present:—Mr. Kinkhede, A. J.C.

GANPAT—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XL V of 1860), s. 302—Culpable homicide—Intention or knowledge—Statement of witness in Police investigation—Statement retracted before Committing Magistrate and Sessions Judge—Evidential value.

It is not saf to rely upon a statement made by a witness before the Police during the investigation but retracted before the Committing Magistrate and the Sessions Judge. [p. 293, col. 2.]

Dal Singh v. *Emperor*, 39 Ind. Cas. 311; 13 N. L. R. 100; 15 A. L. J. 475; 1 P. L. W. 661; 19 Bom. L. R. 510; 21 C. W. N. 818; 26 C. L. J. 13; 6 L. W. 71; 22 M. L. T. 31; (1917) M. W. N. 522; 18 Cr. L. J. 471; 86 L. J. P. 140; 33 M. L. J. 555; 44 C. 876; 11 Bur. L. T. 54; 44 I. A. 137 (P. C.), relied upon.

The offence of culpable homicide presupposes an intention or knowledge of likelihood of causing death. The intention must be directed either deliberately to putting an end to human life or to some act which to the knowledge of the accused is likely to eventuate in the putting an end to human life. The knowledge must have reference to the particular circumstances in which the accused is placed and the intention demanded by the section must stand in some relation to the person who is alive. [p. 295, col. 2.]

GANPAT *v.* EMPEROR.

Appeal against the decision of the Sessions Judge, East Berar, Amraoti, in Sessions Trial No. 9 of 1923, dated the 13th July 1923.

Mr. *N. G. Sarkar*, R. B., for the Appellant.

Mr. *G. P. Dick*, for the Crown.

JUDGMENT.—The accused Ganpat is the father of the deceased Rangu, a girl of 2½ years of age, who was born to him from his first wife, Gangu, who was divorced by him on 24th March 1923, by a registered deed of that date on receipt of Rs. 500 cash. By the term of the agreement he was to have the custody of the girl. In fact he insisted on having the girl and refused the temptation of receiving Rs. 200 to part with the girl's custody (P. W. No. 13). Accordingly he brought her over to his place of residence and she lived with him and his pet wife Soni. Owing to her tender age she occasionally remembered her absent mother and used to cry and the accused is said to have beaten her cruelly on that account several times. His neighbours (P. W. No. 12, P. W. No. 13 and P. W. No. 14) say that they saw the accused beating the girl on other occasions and heard the girl screaming aloud in consequence of the beating. The last such occasion was on 8th May 1923.

2. In the evening of that day the girl is said to have been very severely beaten and dashed away by the accused in consequence of which she died at night. The dead body was early next morning buried in a grave dug by P. W. No. 8, Bhurusha. It was afterwards exhumed from the grave and examined by the Sub-Assistant Surgeon, Morsi (P. W. No. 13) on 11th May 1923. His opinion as embodied in Exhibit P-4 and P-8 was that the death was caused by fracture of the skull. The exact location of the fracture will be seen from the diagram slip attached to Exhibit P-8.

The accused was consequently arrested on the 12th early morning. After some further investigation and seizure of certain articles of evidence the accused was put on his trial before a Sub-Divisional Magistrate who committed him to the Sessions under section 302, Indian Penal Code, on the 6th of June 1923.

3. The Sessions Judge held the trial with the help of Assessors and came to the conclusion that the accused was guilty of having committed an offence of culpable homicide not amounting to murder by causing the death of his daughter and he thought that the act done was such as the accused knew was likely to cause death but that as he had no intention to cause death, he sentenced him to five years' rigorous imprisonment.

The Assessors although unanimous in their opinion that the accused was not guilty differed as to the cause of death; while according to one, it was due to accidental fall, the other thought that the girl was dashed by the accused in a fit of anger but that the accused had no intention to cause death of the girl. The Sessions Judge, however, did not see his way to acquit the accused. Therefore the accused has now presented this appeal against the conviction urging that he was not guilty but that the death was caused by an attack of the cow in the evening. According to him the witnesses have given evidence out of animosity against him. He urged that it was very unlikely that he would kill his own daughter.

4. A perusal of the record shows that the prosecution have based their story upon a statement made by *Musammat* Soni (P. W. No. 11), in the course of the Police investigation, to the effect that the girl was beaten and dashed to the ground by the accused and that she died subsequently.

In the course of his argument, Mr. Dick, Bar-at-Law who appeared for the Crown conceded, and I think very rightly, that as Soni did not stick before the Committing Magistrate and in the Sessions Court to her former statement to the Police and said that she made the statement under Police threat, it was not safe to rely on such retracted statement of this witness. He very frankly admitted that there was no other evidence on record to show that any of the witnesses saw the accused dashing the girl on the ground.

GANPAT v. EMPEROR.

The position, therefore, is that if Soni's evidence is excluded from consideration as I think it ought to be, [See *Dal Singh* v. *Emperor* (1)] there is no direct evidence to prove that the accused dashed the girl on the ground and thereby caused her death. There is also no evidence to show that the accused beat the girl on the head. It is, therefore, contended on behalf of the accused that as the Sessions Judge was principally influenced by the evidence of Soni, the whole judgment is vitiated and the conviction is, therefore, not sustainable. It was also pointed out that the other evidence, even if believed, when scrutinised, reduces itself to evidence of corporal chastisement of the girl by her father, which as some of the prosecution witnesses themselves characterise is not unusual. At any rate it does not appear that it was so very harsh as to lead to the necessary conclusion that the accused knew, when he beat her last on 8th May 1923 that death would ensue instantaneously or after some hours, from that beating. The subsequent conduct of the accused of burying the dead body with the help of Manha and Bharusha early morning, did not, it was urged, bring the guilt home to him either. There was nothing unusual in that, because it is common experience that in the case of death of infants you do not send for neighbours and friends to accompany you to the burial ground. The accused's contradictory versions, (1) to the Police that some days before her death the girl climbed upon a heap of wood and had a fall therefrom and she died of some injuries received on the temples and the head in consequence of the fall and (2) to the villagers who questioned him that the girl died of illness, whether true of false, were, it is argued, not necessarily inconsistent with the last statement that his cow struck the girl while she was standing in a door and that she fell on some stones lying there. That this is likely to have caused the fracture of the skull is clear from the evidence of the Sub-Assistant Surgeon (see his deposition as P. W. No. 13 before Committing Magistrate). Every one of these causes may have contributed towards the untimely end of the girl's life. My attention is also drawn to the fact that the accused as also his pet wife, Soni, entertained affection for her, and, therefore, the act complained of could not be said to be an act done with the intention to cause death or with the knowledge that he was likely by such an act to cause death. The accused has stated in his memorandum of appeal that several people saw the cow striking her head against the head of the girl but not a single witness has been examined by the accused on this point. His next complaint is that his evidence was not taken. This also is not attempted to be supported by the learned Pleader who appeared for him before me. In the absence of any evidence on the side of the accused I am not prepared to accept any of the three theories advanced as having been the direct cause of the girl's death. But with that I am not concerned. What I have to see is whether the prosecution has been successful in establishing the story set up by it.

5. P. W. No. 4 says he and one Sheikh Gulab and Dhonda while passing in the evening along the public road that runs by the accused's house, saw the accused beating the child with his fists and that he had also a small stick in his hand. He was actually beating the child near the door of his house. He says he and his companions remonstrated with the accused and asked him why he was beating the child. The accused paid no attention to him and so they all went away. He says in cross-examination that the accused struck the girl with his fist, that the girl was standing and was crying and that the girl remained standing even after the blow. He admits every one beats his children. The stick in the hand of the accused was a thin bamboo stick. He

(1) 39 Ind. Cas. 311; 13 N. L. R. 100; 15 A. L. J. 475; 1 P. L. W. 661; 19 Bom. L. R. 510; 21 C. W. N. 818; 26 C. L. J. 13; 6 L. W. 71; 22 M. L. T. 31; (1917) M. W. N. 522; 18 Cr. L. J. 471; 86 L. J. P. 140; 33 M. L. J. 555; 44 C. 876; 11 Bur. L. T. 54; 44 I. A. 137 (P. C.).

did not konw whether the girl was ill when the accused was beating her or not. There is no corroboration to this witness's testimony. Pandurang, witness No. 12 for the prosecution, says accused used to beat his daughter often. While he was sleeping in the *angan* about 10 P. M. he heard the accused's daughter crying and the sound of the beating. The girl began to scream and the accused told her to keep quiet. After a time the crying stopped. He did not think it was anything unusual as this happened often. The next morning he heard that the girl had died. He had seen the girl playing in the compound, that afternoon about 4 P. M. He heard two sounds of blows. He says the time was night and not evening. Here again we find a very material discrepancy which detracts from the truth of the version given by the prosecution. P. W. No. 10, Mukaji barber, is another witness who says the accused went to his house to request him to come to his house at night, that he asked him why he called him and where he wanted him to go and he says he was told by the accused that his daughter was dead. On being asked how she died he replied he had beaten her and "she happened to die" This evidence is attempted to be given to prove an admission of guilt by the accused that the beating was the immediate cause of death. The witness is a barber; it was not necessary for the accused to seek his help. He deposes that the wife objected to the dead body being buried in the compound and it appears the accusad could not bury the dead body in the night. This evidence does not seem to be quite convincing. This is all the evidence of beating or admission about beating. It does not to my mind prove clearly that the girl's death resulted from the beating. At the same time I cannot ignore the fact that there is no evidence to show that the accused had actually struck the girl on any vital parts; much less on the head. The Sessions Judge while recording evidence of witnesses who spoke of the blows by fists and of the beating by stick ought to have located particular part or parts of the body where the blows were given or the stick fell in their presence.

6. Under these circumstances I differ from the Sessions Judge in thinking that the act of the beating, if any, was not (?) done by the accused with intention to cause, or with knowledge that it will cause death either instantaneously or within a few hours. The offence of culpable homicide presupposes an intention or knowledge of likelihood of causing death. The intention must be directed either deliberately to putting an end to human life or to some act which to the knowledge of the accused is likely to eventuate in the putting an end to human life. The knowledge must have reference to the particular circumstances in which the accused is placed and the intention demanded by the section must stand in some relation to the person who is alive. Ratanlal's Law of Crimes, 9th Edition, page 614.

7. I am not, therefore, prepared to uphold the conviction or the sentence pronounced by the Sessions Judge. Even if the witnesses be believed when they speak of the accused having beaten the girl, I do not think that in view of the witnesses' own version about the beating being nothing more than usual chastisement of a child by his parents, the accused can be considered to have committed any offence; technically it would not amount to anything more than simple hurt. The accused has already been in Jail for all this time and I think that is quite sufficient. I, therefore, order that he be at once set at liberty.

G. R. D. *Conviction set aside.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION NO. 100 OF 1923.

October 9, 1923.

Present:—Mr. Wazir Hasan, A. J. C.

BINDRA—ACCUSED—APPLICANT

versus

Musammat BHAGWANTA—COMPLAINANT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss:

BINDRA *v.* BHAGWANTA.

247, 435, 436—*Dismissal of summons case for default—Acquittal—Second complaint on same facts—Jurisdiction.*

Where a complaint under section 447, Penal Code, is dismissed for default of appearance of the complainant, the order must be taken to have been passed under section 247, Criminal Procedure Code, though the latter section is neither mentioned nor is the order in terms of that section.

Such an order as the above is tantamount to an acquittal and the District Magistrate has no jurisdiction either under section 435, or under any other section of the Code to set it aside.

The powers of a District Magistrate directing further enquiry into any complaint are limited to the cases mentioned under section 436 of the Code and an order passed under section 247 of the Code does not fall within the purview of that section.

Application against an order of the District Magistrate, Gonda, dated the 16th June 1923, reversing that of the Honorary Bench Magistrate, Second Class, Gonda, dated the 19th April 1923.

Mr. *P. C. Gupta*, for the Applicant.

JUDGMENT.—One *Musammat* Bhagwanta filed a complaint on the 20th August 1922 before a Bench of Honorary Magistrates, exercising jurisdiction in the town of Gonda, against six persons including the present applicant, Bindra. In this complaint the accused were primarily charged with an offence under section 447 of the Indian Penal Code alleged to have been committed by them on the 26th August 1922. The Magistrates took cognizance of this complaint and issued summons to Bindra according to the provisions of the law. On the 28th December 1922 the case was taken up for hearing by the learned Magistrates. The complainant was absent but Bindra was present on that date. In consequence of this the complaint was dismissed for default in prosecution and consigned to records. On the same date *Musammat* Bhagwanta again filed a complaint against five persons including Bindra, the applicant, before the same Magistrates. This complaint was substantially founded on the same facts which were the basis of the previous complaint. On the 19th April 1923 the Magistrate decided that the second complaint was not maintainable in view of the order passed in respect of the first complaint so long as that order subsisted and was not set aside on revision. They, therefore, dismissed the second complaint. *Musammat* Bhagwanta was aggrieved with this order of the Magistrates. She filed an application to the District Magistrate of Gonda under section 435 of the Code of Criminal Procedure, praying that the order of the Magistrates be set aside and an order directing further inquiry be passed. The learned District Magistrate has accepted that application and directed that the complaint may be inquired into. The application before me impugnes the legality of the order of the learned Magistrate.

I am of opinion that the application must be allowed. The original complaint of *Musammat* Bhagwanta disclosed a summons case and the order of the Bench of the Honorary Magistrates, dismissing the complaint for default in prosecution, must be taken to have been passed under section 247 of the Code of Criminal Procedure. Unfortunately that order neither mentions section 247 of the Code, as one under which it was passed, nor it is in terms of that section. This, however, cannot stop the application of that section to the facts of the case. The order of dismissal for default was, therefore, tantamount to an order of acquittal as one contemplated by the provisions of that section. The learned District Magistrate seems to have acted under section 435 of the Code of Criminal Procedure. That section gave him jurisdiction merely to call for and examine the record of the case for the purpose of satisfying himself as to the correctness, legality or propriety of the finding or order passed therein. He had no jurisdiction either under that section or under any other section of the Code to set aside an order of acquittal passed by a Court of competent jurisdiction under section 247 of the same Code. His powers of directing further inquiry into any complaint are limited to the cases mentioned in section 436 of the Code. An order passed under section 247 of the Code does not fall within the purview of section 436.

I, therefore, accept the application and set aside the order of the learned

District Magistrate dated the 16th June 1923.

G. H. *Application accepted.*

MADRAS HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION NO. 374 OF 1923.

December 3, 1923.

Present:—Mr. Justice Odgers and Mr. Justice Wallace.

NATARAJA PILLAI—PETITIONER

versus

RANGASWAMY PILLAI AND OTHERS—COUNTER-PETITIONERS—RESPONDENTS.

Criminal Procedure Code (Act XVIII of 1923), s. 195—Criminal Procedure Code (Act V of 1898), s. 195 (6)—Sanction to prosecute—Sanction proceedings under amending Act—Petition to set aside order revoking sanction—Appeal under old Act—Interpretation of Statutes—Procedure Law, alteration of—Retrospective effect—Appeal, right of, if affected.

A High Court cannot entertain sanction proceedings under the Criminal Procedure Code, as amended by Act XVIII of 1923. Therefore, a petition to set aside an order (passed under the old Act of 1898) revoking an order for sanction to prosecute does not lie to a High Court. [p. 298, col. 1.]

Section 195 (6) of the Criminal Procedure Code, 1898, did not give a right of appeal. [p. 298, col. 1.]

The amendment of section 195 of the Criminal Procedure Code, 1898, by Act XVIII of 1923, has effected only an alteration in procedure. [p. 297, col. 2.]

Per *Odgers, J.*—A new procedure affects bygone transactions and alterations in procedure are always retrospective. [p. 297, col. 2.]

Gardner v. *Lucas*, (1878) 3 A. C. 582 at p. 603, relied upon.

Where the right of appeal is given by law a suitor cannot be deprived of that right, in a pending action, by an alteration of the law. [p. 298, col. 1.]

Colonial Sugar Refining Co. v. *Irving*, (1905) A. C. 369; 74 L. J. P. C. 77; 92 L. T. 738; 21 T. L. R. 513, relied upon.

Petition praying that in the circumstances stated therein the High Court will be pleased to set aside the order, dated the 24th April 1923, of the Court of the Additional District Magistrate, Tanjore, in Criminal Miscellaneous Petition No. 17 of 1923, revoking the sanction accorded for the prosecution of the respondents herein by the order of the Court of the Sub-Divisional Magistrate, Tanjore, in M. C. No. 48 of 1921.

Mr. *K. S. Jayarama Aiyar*, for the Petitioner.

Mr. *V. L. Ethiraj*, for Public Prosecutor, for the Crown.

Mr. *A. V. Viswanatha Sastri*, for Respondents Nos. 1 to 3.

ORDER.

Odgers, J.—This is an application to set aside the order of the Additional District Magistrate of Tanjore wherein he revoked the sanction to prosecute the respondents granted by the Sub-Divisional Magistrate of Tanjore. The application is under section 195 of the Criminal Procedure Code which has been amended by Act XVIII of 1923. The old section allowed applications to be made by a private party. This has now been abolished by the amended section and no Court can take cognizance of any offence punishable under sections 172 to 188 of the Indian Penal Code, except on the complaint in writing of the public servant concerned, etc., or of the Court when such offence is alleged to have been committed in, or in relation to any proceeding in that Court. Mr. A. V. Viswanatha Sastriar, who appears for the respondents, takes more than one preliminary objection. We have only heard him so far on one, and that is the question whether sanction proceedings can now be entertained under the Criminal Procedure Code as amended. Mr. Viswanatha Sastriar maintains that this is not an appeal under section 195, Criminal Procedure Code, and that the amendment of that section has effected an alteration in procedure. Now it is settled law that new procedure affects bygone transactions and alterations in procedure are always retrospective [*Gardner* v. *Lucas* (1).] It is conceded by Mr. K. S. Jayarama Aiyar for the petitioner that if this is a matter of procedure, the contention of the other side is correct. Mr. Jayarama Aiyar, how-

(1) (1878) 3 A. C. 582 at p. 603.

ever, contends that there is a right of appeal given under section 195, Criminal Procedure Code, itself and this section is self-contained and independent of, or additional to, any other right of appeal given by the Code. If this is an appeal than the right of appeal inhered in the parties at the time the original application for sanction was made, which was on or before the 8th December 1921, for it is clear law that you cannot deprive a suitor of a right in a pending action of an appeal to a superior Tribunal which belonged to him as of right [*Colonial Sugar Refining Co.* v. *Irving* (2)] so that, if this is an appeal, we can hear the notice; if this is not an appeal, but a mere matter of procedure, then alterations in procedure being retrospective, we are not at liberty to entertain it. That this is not an appeal under the ordinary appellate chapters of the Code Chapters XXXI and XXXII is clear from the ruling in *Bapu* v. *Bapu* (3). That was a decision of the Full Bench where the Court said they were not prepared to dissent from the conclusion arrived at by the Full Bench in *Muthuswami Mudali* v. *Veeni Chetti* (4). They added "we think, however, the power conferred upon this Court by section 195 (6), Criminal Procedure Code, is not a part of the appellate and revisional jurisdiction of this Court conferred by Chapters XXXI and XXXII of the Code of Criminal Procedure. It is a special power conferred by section 195 (6), Criminal Procedure Code. They decided that when the Judges are equally divided on a question under section 195 the matter is governed by section 36 of the Letters Patent and not by section 429 or 439 of the Criminal Procedure Code. The bearing of this case on the case in *Muthuswami Mudali* v. *Veeni Chetti* (4) will be considered in a moment. Meantime it is instructive to refer to the opinions of the Referring Judges because, in the first instance there were differing judgments and also an order of reference to the Full Bench, in all of which the matter was considered in some detail. Sundara Aiyar, J., in his first opinion held that clauses 6 and 7 of section 195, Criminal Procedure Code, do not provide in terms that an appeal lies from an order granting or refusing sanction, nor does Chapter XXXI, relating to appeals, provide that an appeal shall lie from such an order, that the power of the superior Court under these clauses is similar to what it possesses in appeals and that the same may be said of the powers of the High Court in proceedings in revision. As to the language of section 429, Criminal Procedure Code, the learned Judge was of opinion that the language referring to the powers of a Court of Appeal under section 195, Criminal Procedure Code, was employed "only because it is the Court to which an appeal lies from the decisions of the Court granting the sanction that has got power to revoke a sanction or to give a sanction refused by an inferior Court." Spencer, J., also held that there was no rule of law which subjects applications made under the special provisions of section 195, Criminal Procedure Code, to the periods of limitation contained in the Limitation Act. The learned Judges, therefore, in their first judgment both concurred that an application under section 195 (6), Criminal Procedure Code, cannot strictly be regarded as an appeal. To come to the Full Bench decision in *Muthuswami Mudali* v. *Veeni Chetti* (4) that case decided that the right of appeal conferred by section 195, (6), Criminal Procedure Code as read with sub-clause 7 is not restricted to a right of appeal to the Appellate Court to which the Court of first instace is immediately subordinate. It also decided that a revocation of a sanction is a refusal of a sanction in the same way as an order confirming a grant of a sanction is a giving of a sanction for the purposes of the section. *Muthuswami Mudali* v. *Veeni Chetti* (4) followed *Palaniappa Chetti* v. *Annamalai Chetti* (5) where it was held that "under sub-section (6) a petition by way of

(2) (1905) A. C. 369; 74 L. J P C 77; 92 L. T. 738; 21 T. L. R. 513.

(3) 14 Ind Cas 305; 39 M 750; 11 M L. T. 367; (1912) M W. N 499; 22 M. L. J 419; 13 Cr. L. J. 209

(4) 30 M. 382; 2 M L. T. 239; 17 M. L. J 266; 6 Cr. L J. 102.

(5) 27 M 223; 14 M L J 74; 1 Cr L J 321; 2 Weir 208 & 577.

appeal lies to the High Court in every case in which a Civil or a Criminal Court subordinate to it within the meaning of sub-section 7 (*a*) gives or refuses a sanction whether in respect of an offence committed before it or in respect of one committed before a Court subordinate to it, and in the latter case, whether it gives a sanction refused by the Subordinate Court or revokes a sanction accorded by such Court. In all these three cases it is to be noted that the main question before the Court was, put shortly, whether there was one right of appeal or more than one, and what *Palaniappa Chetti* v. *Annamalai Chetti* (5) and *Muthuswami Mudali* v. *Veeni Chetti* (4) decided is that in such a case there is more than one right of appeal. This is the point on which *Bapu* v. *Bapu* (3) confirmed *Muthuswami Mudali* v. *Veeni Chetti* (4). As stated above *Bapu* v. *Bapu* (3) went further and held that the power conferred by section 195 (6), Criminal Procedure Code, is not part of the appellate and revisional jurisdiction conferred by Chapters XXXI and XXXII, Criminal Procedure Code. Section 404, Criminal Procedure Code says that: "No appeal shall lie from any judgment or order ....except as provided for by this Code." It is, therefore, necessary in my opinion to find a distinct and definite right of appeal given by section 195, Criminal Procedure Code, itself before it can be assumed that any such right of appeal exists. Now, sub-section 6 says that "any sanction....may be *revoked* or *granted* by any authority to which the authority giving or refusing it is subordinate etc." The wording itself seems to point to an original refusal or an original grant by the High Court as a superior authority itself. Sadasiva Aiyar, J., in *In re Gaddam Penchulu Reddi* (6) says that the power given by section 195 (6) of the Criminal Procedure Code to the superior "authority" is a specific statutory power. Though it is usual to call the application to the superior authority a petition of appeal, the learned Judge doubted whether it could be called an appeal, and in *In re Subbasari* (7) the same learned Judge was inclined to hold that the application to the Appellate Court to revoke or grant a sanction granted or refused is not an appeal, but an original application. In *Public Prosecutor* v. *Raier Unithri* (8) it was said that a confirmation of sanction by the Appellate Court is equivalent to a fresh grant of sanction by that Court. No doubt, section 439, Criminal Procedure Code, in speaking of the High Court's powers of revision, confers on the Court any of the powers conferred on a Court of Appeal by sections 195 etc. But, I am of opinion, which I think is supported by authority quoted above, that the "Court of Appeal" referred to is only a designation of the superior authority to which application for revocation or grant is to be made. Further, it will be noted that section 429, Criminal Procedure Code, which provides for a difference of opinion between Judges composing the Court of Appeal is not confined to appeals under Chapter XXXI, whereas section 428 (1), Criminal Procedure Code deals with appeals under "this Chapter." This distinction is important in relation to the decision in *Bapu* v. *Bapu* (3) which held that clause 36 of the Letters Patent applied and not section 429, Criminal Procedure Code, on a difference of opinion between the Judges composing the superior Court to which application is made under section 195 (6), Criminal Procedure Code. Further I am of opinion that the alterations made by the amendments to the Code are merely alterations of procedure. Prosecutions for various offences committed in relation to proceedings before public servants or Courts are still punishable but those proceedings are to be initiated on complaints either of the public servants or the Courts concerned themselves and not on the application for sanction to prosecute by a private

(6) 48 Ind Cas. 890; 42 M. 96 at p 100; 35 M. L. J. 686; 20 Cr. L. J. 90; (1918) M. W. N. 68; 9 L. W. 237.

(7) 61 Ind Cas 228; 44 M 47; 12 L. W. 605; 22 Cr. L. J 372.

(8) 24 Ind. Cas 145; 26 M. L J. 511; 15 M. L. T. 403; 15 Cr. L. J. 409.

party. The public servant or Court will still generally be set in motion by the party aggrieved though of course it will be open to either to take proceedings *suo motu*.

For these reasons I am of opinion that no appeal is provided for in the Code under section 195, Criminal Procedure Code and further that the amendments made affect only procedure. We have, therefore, since the amendment no power to entertain this petition, which must be dismissed.

Wallace, J.—This is a petition to set aside an order of the Additional District Magistrate, Tanjore, revoking the sanction granted by the Sub-Divisional Magistrate, Tanjore, for the prosecution of the respondents for an offence under section 188, Indian Penal Code.

A preliminary legal point is raised by the respondents, namely that, since the new amended Criminal Procedure Code has abolished such sanctions and since that is now the law in force in this case, this petition does not lie. The petitioner rejoins that the right to move this Court for sanction is of the nature of a substantive right, such as a right of appeal which cannot be taken away by any alteration of the processual law. I think the respondents' contention must be upheld for two reasons; first that there is no substantive right now taken away; and the right conferred by the old section 195 (6) of the Criminal Procedure Code is not a right in the nature of a right of appeal; and secondly, to comply with the petitioner's request and grant a sanction now, would be a futile proceeding since no Court can now take cognizance of complaints under any such sanction.

To take the first point the substantive right which the petitioner possesses is the right of setting up a criminal prosecution in train against a party who has committed a breach of an order under section 144, Criminal Procedure Code. The necessary preliminary under the old section 195 (1) to such a prosecution was the obtaining by the party of a sanction or the presentation of a complaint by a public servant named therein. Now the method of proceeding by first obtaining a sanction has been abolished. Clearly the change is a change in the processual law and does not deprive petitioner of his substantive right to set the Criminal Law in motion. The petitioner still has a method under the new procedure for setting the law in motion, since he may apply to the public servant, or any authority to whom that public servant is subordinate to present a complaint.

Such an application as is now before us is not defined anywhere in the old Criminal Procedure Code as an appeal; nor do any provisions of Chapter XXXI extend to it. The petitioner points out that under section 439, old Criminal Procedure Code, it was laid down that the High Court may in proceeding under that section exercise any of the rights conferred on "a Court of Appeal" by sections 195 etc., which seems to imply that section 195 confers some powers of the nature of appellate powers on a superior Court and the omission of section 195 in the new section 439 emphasises the fact that the phrase "Court of Appeal" as hitherto used had reference to the powers conferred on Courts in the matter of sanctions now abolished. However the question whether in taking proceedings under the old section 195 (6), this Court is a Court of Appeal has been fully discussed in the Full Bench case of this Court reported as *Bapu* v. *Bapu* (3) which lays down that the power exercised under the old section 195 (6) is neither an appellate nor a revisional power but a special power. The previous rulings of this Court which used the words "appeal" and "Appellate Court" with reference to these powers, for example, *In re Paree Kunhammad* (9); *In re Muthukudam Pillai* (10); *Palaniappa Chetty* v. *Annamalai Chetti* (5), *Muthuswami Mudali* v. *Veeni Chetti* (4), *Jamna Das* v. *Sabapathy Chetti* (11) must, therefore, be taken to have been using these words loosely and not with strict technical accuracy. Section 439 also indicates plainly enough

(9) 26 M. 116; 2 Weir 189
(10) 26 M. 190; 2 Weir 200.
(11) 12 Ind. Cas. 521; 36 M. 138; 10 M. L. T. 278; (1911) 2 M. W. N. 259; 21 M. L. J. 1074; 12 Cr. L. J. 545.

that the powers of this Court as a Court of Appeal under the old section 195 (6) are to be found in that section alone and are limited to the terms of that section. It is significant that there was no other section which laid down that the powers of the High Court under the old section 195 (6), Criminal Procedure Code, consisted of any of the powers which were under the old sections 423, 426, 427 and 428, the other sections quoted in section 439 conferred on it. Another significant fact is that nowhere was any period of limitation fixed for petitions under section 195 (6) whereas a regular right of appeal has always a defined period fixed within which it must be exercised. Old section 195 (6) to my mind indicates that in a case like the present, the power of the Court as a "Court of Appeal", to adopt the phraseology of old section 439, is limited to granting a sanction refused by the lower Appellate Court, which sanction is a fresh sanction and is not a revival or resuscitation of the original sanction granted by the original Court which had been revoked by the lower Appellate Court. No reportable case controverting this view has been quoted to us. There is no reported case in this Presidency, so far as I know, which *e. g.*, lays down that when a sanction has been granted and revoked and again granted, the six months are to date from the date of the original grant as if that had been resuscitated. The case reported as *In re Muthukudam Pillai* (10) is not in point as there the original sanction had never been interfered with.

The same result will be obtained by considering the matter from another point of view. Assuming, without deciding, petitioner's contention that for the purposes of a petition under old section 195 (6) the District Magistrate as a public servant is within the meaning of section 195 (1) subordinate to this Court, it is clear that petitioner might have applied in the first instance in this Court for the sanction he now seeks. It follows that his right to move this Court does not depend on there being in existence an order against him against which he can "appeal." Such right as was given him by the section was a right to apply to this Court for a sanction, irrespective of what had happened to similar application in any Court subordinate to this Court.

For the above reasons I hold that petitioner's right to apply for a sanction is purely a matter of processual law and not a right of the nature of a right of appeal.

As to the second point, it rests on petitioner's contention that the grant of sanction by this Court will restore the sanction of the Original Court so as to enable the prosecution already instituted on that sanction to continue from where it left off when the sanction was revoked; that is, in his view, the revocation of sanction has not destroyed the sanction but merely holds it in abeyance if and while an appeal is pending. The petitioner goes further and contends that, since the Criminal Procedure Code does not contamplate a case once begun ending merely because a requisite sanction had not been obtained or because the sanction on which it was instituted has been revoked, no subsequent discovery of absence of sanction or revocation of sanction can interfere with its jurisdiction. Such a position, I must hold to be untenable, since it would imply that the right to have a sanction revoked would be quite futile, if a complaint based on a sanction had already been put in, since on this theory any subsequent revocation would not affect the jurisdiction of the Court to proceed with the trial of the complaint already filed. The petitioner appeals to section 537 of the Criminal Procedure Code for his position; but it does not really help him since that section has no application to cases *under trial* when it is discovered that no sanction exists or that the sanction given has been revoked. Obviously the Court has power to discharge or acquit an accused person of a charge which requires previous sanction if, in the course of the trial and before judgment is pronounced, it is brought to its notice that no sanction has been obtained, and I can see no difference between such a case and a case where the sanction on which the trial is proceeding has been

set aside during the trial. Revocation of a sanction must have some legal effect and can only imply, to my mind, that the prosecution started under the sanction can proceed no further and has come to an end.

For reasons, already given, I have held that the petitioner can now ask and is now asking this Court only to grant a fresh sanction and that this is not a petition of appeal against, or a petition to revise, any order of the lower Court, and for reasons now given I hold that the original sanction given has by the revocation been swept away for ever and cannot be revived by any order on this petition.

The new Criminal Procedure Code has abolished the right to present such a petition and this petition must be heard under the existing processual law. That law now forbids any prosecution being instituted merely upon a sanction granted to a private party. It follows then that even if this Court does grant the petitioner the sanction that he seeks, such a sanction would be of no avail for instituting any prosecution; and this is an additional reason for refusing to grant the petitioner the sanction which he seeks, since to grant it would be a merely empty formal proceeding of no use whatever to the potitioner.

As I have already pointed out the petitioner is not left without a remedy since it is still open to him to move the authority to whom the Additional District Magistrate is subordinate within the meaning of section 195 (1) to present a complaint on which the respondents may be prosecuted for their disobedience of the order passed by the original public servant.

I, therefore, agree that the petitioner's petition is not maintainable and must be dismissed.

V. N. V.

S. D. *Petition dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 97 OF 1923.

November 6, 1923.

Present:—Mr. Wazir Hasan, A. J. C.

SITAL DIN AND OTHERS—ACCUSED—APPLICANTS

versus

EMPEROR—COMPLAINANT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 110—Substantive offence not proved—Proceedings under s. 110, whether proper.

Where a man has been arrested on a substantive charge (*e.g.*, of dacoity) but released for the reason that that charge cannot be sustained, the prosecution under section 110 of the Code of Criminal Procedure on the same evidence on which the charge for the substantive offence was founded or on evidence which arises as a natural sequal to the charge of the substantive offence, is not desirable. [p. 303, col. 1.]

Application against an order of the District Magistrate, Rai Bareli, dated the 21st July 1923, confirming that of the Magistrate, First Class, Rai Bareli, dated the 25th June 1923.

Mr. *H. K. Ghose*, for the Applicants.

The Government Pleader, for the Crown.

JUDGMENT.—This is an application in revision. These applicants have been convicted under section 110 of the Code of Criminal Procedure and each has been ordered to furnish two sureties in Rs. 100 each and execute a personal bond in Rs. 200 as security for their good behavior for a period of one year. The judgment of the Court of first instance is so full of details that we are all agreed here that the case could be decided with reference to that judgment. The whole of the evidence produced on behalf of the prosecution has been summarised in that judgment. Equally well that evidence has been set forth which was produced on behalf of the accused. I have gone through this judgment carefully and considered the resume of evidence stated as against the name of each of the witnesses. I find that there is a great mixture of admissible and inadmissible evidence. Some of this evidence, which was inadmissible, has been carefully eliminated by the learned Magistrate,

CHINNIAH, *In re.*

There still remains evidence of the same character, on which, to a certain extent, the judgment of the learned Magistrate is based, though not wholly, for instance reference to the fact that as against two of the accused there exist history sheets. Be that, as it may, there still remains ample evidence on the record which is admissible in law and is enough to support the order passed against these applicants under section 110 of the Code of Criminal Procedure.

The law on the subject as to what is evidence of general repute has so repeatedly been considered and stated in several rulings of this Court that it will serve no useful purpose to repeat once more the substance of those decisions. The conviction, therefore, cannot be set aside on the ground that it is based on purely inadmissible evidence.

It appears, that these applicants were arrested on a charge of dacoity, but were released under section 169 of the Code of Criminal Procedure and soon after their release, they were arrested to stand their trial under section 110 of the Code. Now there are decisions of this Court expressing the opinion, that where a man has been arrested on a substantive charge but released for the reason that that charge could not be sustained, a prosecution under section 110 of the Code of Criminal Procedure on the same evidence on which the charge for the substantive offence was founded or on evidence which arose as a natural sequel to the charge of the substantive offence was not desirable. I respectfully say that I agree with that opinion. In this case, however, the evidence in support of the charge under section 110 is not only antecedent to the charge for the dacoity as against these applicants but is wholly independent of it.

It was also urged, that there was a large number of defence witnesses, who have been accepted by the Court of first instance as furnishing unimpeachable testimony in respect of the good character of the accused. Surely the mere fact that the witnesses on the side of the defence are more in number than on the side of the prosecution can be no ground for rejecting the latter in favour of the former. It must be the quality of the evidence on which the judgment of the Court should be founded. The evidence of the defence witnesses, though in some respects unimpeachable was not accepted by the Magistrate as sufficient to demolish the evidence produced on the side of the prosecution and I, sitting here as a Court of revision, decline to question the opinion of the Court of first instance in respect of sufficiency or insufficiency of evidence. The application fails and is dismissed.

Application dismissed.

S. D.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 382 OF 1923.
(CRIMINAL REVISION PETITION NO. 286 OF 1923.)

November 23, 1923.

Present:—Mr. Justice Venkatasubba Rao.

In re CHINNIAH *alias* KRISHNASWAMI NAIDU—ACCUSED NO. 1—PETITIONER.

Madras Towns Nuisances Act (III of 1889), s. 6—"Common gaming house," what is.

A common gaming house is one in which a large number of persons are invited habitually to congregate for the purpose of gaming and it makes no difference that the use of the house and the gaming therein was limited to the subscribers and members of the club and that it was not open to all persons who might be desirous of using the same. [p. 304, col. 1.]

In re Srinivasa Chary, 1 Weir 917; *Jenks* v. *Turpin*, (1884) 13 Q. B. D. 505; 53 L. J. M. C. 161; 50 L. T. 808; 15 Cox C. C. 486; 49 J. P. 20 and 15 Halbsbury 217, followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the First Class, Magistrate, Chittoor Town, in Bench Case No. 69 of 1923.

Mr. *V. Viswanatha Sastriar*, for the Petitioner.

Mr. *K. N. Ganapathi*, for Public Prosecutor, for the Crown.

ORDER.—The offence with which the accused is charged is that of keeping a common gaming house, punishable under section 6 of Madras Act III of 1889. A common gaming house is defined thus in 15 Halsbury 217: "It is one in which a large number of persons are invited habitually to congregate for the purpose of gaming." In *Jenks* v. *Turpin* (1) Hawkins, J., says: "Neither.... do I think that it makes any difference that the use of the house and the gaming therein was limited to the subscribers and members of the club and that it was not open to all persons who might be desirous of using the same. If this could be set up as a defence to an indictment, any indictment for keeping a common gaming house might be defeated." I am willing to accept this statement of the law and I do not think that this is at variance with that contained in *In re Srinivasa Chary* (2) where the learned Judge Sir Arthur Collins, C. J., and Parker, J., observe "In the absence of any technical definition, the term 'common gaming house,' must at least imply that the house was one used as a place of public resort."

They do not say what a place of public resort is and, in the circumstances, I am not prepared to hold that the definition given in the Madras case is necessarily opposed to that given in the English case and in Halsbury.

The next question is, has the evidence in this case established that the accused keeps a gaming house in this sense? P. W. No. 3, a dismissed and disreputable Police Constable, no doubt says: "The accused is the owner of house. The accused collects the pool for himself for every 'rung' or 'run' for the use o his house and for the cost of the cards. The accused benefits up to Rs. 12 a day, never less than Rs. 5." It is extremely unsafe to act upon the uncorroborated testimony of a witness of this sort. He admits that he was himself taking part in the game and then turned an informer at the request of the Police. The only independent witness who speaks to the transaction from personal knowledge is P. W. No. 4 and he hopelessly contradicts P. W. No. 3, because, according to the former the accused was himself a player and he took money from the pool whenever he happened to be the winner. P. W. No. 4's station in life is not such as to inspire confidence, and I am not prepared, therefore, to act upon evidence of this kind and convict the accused.

It is somewhat remarkable that the Police should have attempted to prove a case of this nature by such worthless evidence, when, according to them, it is a notorious fact that the accused keeps a common gaming house, several persons have from time to time complained and the gaming house has been kept for about 10 years previous to the prosecution.

In the circumstances, I set aside the conviction and direct the fine, if it has been collected, to be refunded to the accused. The order as to confiscation is also set aside.

Conviction set aside.

V. N. V.

(1) (1884) 13 Q. B.D. 505; 53 L. J. M. C. 161; 50 L. T. 808; 15 Cox C. C. 486; 49 J. P. 20.
(2) 1 Weir 917.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 476 OF 1922.

July 23, 1923.

Present:— Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Coyajee.

LAXMAN MANKAR KASAR—PLAINTIFF—APPELLANT

versus

RAVJI DHANSING PATIL—DEFENDANT—RESPONDENT.

Vendor and purchaser—*Sale, oral*—*Possession*—*Subsequent sale by registered deed*—*Subsequent vendee, whether can eject prior vendee*—*Transfer of Property Act* (*IV of* 1882), *s.* 54.

A purchaser of land under an oral sale who has paid the consideration for the sale and has been put in possession cannot be ejected by a subsequent purchaser of the property under a registered sale-deed who takes with notice of the sale in favour of the prior purchaser. It is immaterial that on the date of the suit for ejectment the remedy of the prior purchaser by way of specific performance of the contract of sale in his favour had become barred by time. [p. 306, col. 1.]

Venkatesh Damodar v. *Mallappa Bhimappa*, 66 Ind. Cas. 868; 46 B. 722; 24 Bom. L. R. 242; (1922) A. I. R. (B.) 9, followed.

Lalchand v. *Lakshman*, 28 B. 466; 6 Bom. L. R. 510, distinguished.

Bapu Appaji v. *Kashinath Sadoba*, 39 Ind. Cas. 103; 41 B. 438; 19 Bom. L. R. 100 (F. B.), referred to.

Second appeal from the decision of the First Class Subordinate Judge, A. P., at Nasik, in Appeal No. 110 of 1921, reversing a decree passed by the Subordinate Judge at Malegaon, in Civil Suit No. 157 of 1920.

Mr. *R. J. Thakor*, for the Appellant.

Mr. *R. G. Pradhan*, for the Respondent.

JUDGMENT.

Shah, Ag. C. J.—The few facts which have given rise to this appeal are these. The original owner of the property orally sold the land in suit to defendant No. 1 on July 4, 1911, for Rs. 150. The defendant No. 1 was put in possession and the consideration was paid, but there was no registered conveyance to complete the sale as required by section 54 of the Transfer of Property Act. On January 19, 1920, the owner, who is defendant No. 2, sold this very land to the present plaintiff for Rs. 1,000. In that sale-deed there is the following recital:—

"In all Rs. 1,000 I have received as consideration. By this document I permanently sell to you for the above amount the below-mentioned immoveable property consisting of one field called 'Sonare' (being) *jirait* land belonging to me by right of ownership which has now been given under oral sale to Ravji Dhansing Patil has been in his possession and enjoyment."

It also appears that in 1911 when there was this oral sale without the necessary conveyance, there was mutation of names in favour of defendant No. 1.

The present suit was filed by the plaintiff on June 1, 1920. He based his claim on the sale-deed in his favour by defendant No. 2, and he was prepared to pay to defendant No. 1 Rs. 150, in pursuance of the conditions in his sale-deed, admitted to have been received by defendant No. 2 from defendant No. 1.

The Trial Court came to the conclusion that the title of defendant No. 1 was not proved, as there was no registered conveyance in his favour, and as the oral transaction between defendant No. 1 and defendant No. 2 was a mortgage. Accordingly a decree was passed in favour of the plaintiff for possession of property on his paying Rs. 150 to defendant No. 1.

The defendant No. 1 appealed to the District Court, and the learned First Class Subordinate Judge, with appellate powers, who heard the appeal, reversed that decree and dismissed the plaintiff's suit. He came to the conclusion that the transaction between defendants Nos. 1 and 2 was a sale, though it was not completed by a registered conveyance. He definitely found against the theory of that transaction being a mortgage. The learned Judge also found that the plaintiff was not entitled to possession under the circumstances as defendant No. 1 was entitled to rely upon his possession and the payment of consideration.

The plaintiff has appealed to this Court, and two points have been urged on his behalf: first, that the transaction of 1911 between defendants Nos. 1 and 2 was really a mortgage and not a sale. It is also urged that the Purshis given by the plaintiff's Pleader, Exhibit 29 in the case, has been misconstrued by the lower Appellate Court. Secondly, it is urged that

even if it be a sale, the claim for specific performance of the agreement for sale being barred at the date of the suit, the defendant cannot resist the plaintiff's claim for possession based upon a completed title. In support of this contention reliance is placed upon the decision in *Lalchand* v. *Lakshman* (1); and it is urged that the subsequent Full Bench decision in the case of *Bapu Appaji* v. *Kashinath Sadoba* (2), does not apply to the facts of this case, and that the subsequent interpretation of that decision in *Venkatesh Damodar* v. *Mallappa Bhimappa* (3), should not be accepted as it is inconsistent with the decision in *Lalchand* v. *Lakshman* (1).

As regards the first point, we think that the finding of the lower Appellate Court should be accepted as a finding of fact. It is quite true that the learned Judge has referred to the Purshis in his judgment, but the finding on this point is not based upon the Purshis. Even taking the Purshis to mean what the learned Pleader for the appellant contends it means, the finding of the lower Appellate Court cannot be disturbed. It is really a finding of fact based upon the circumstances and the evidence in the case. Having regard to the expression used in the sale-deed of January, 1920 it was open to the lower Appellate Court to come to the conclusion that the transaction was intended to be a sale, and not a mortgage. The very fact that the parties did nothing for nearly eight years shows that it was intended to be a sale. It is quite true that it was not completed by a registered conveyance, as it should have been, according to law.

This gives rise to the second point in the case to which I have referred. We think, however, that the decision in *Venkatesh Damodar* v. *Mallappa Bhimappa* (3), would clearly apply to the case. The fact that at the date of the suit the claim for specific performance was barred, even assuming it to have been barred, would not be a sufficient answer to the defendant's plea that he is entitled to rely upon his possession which he got in pursuance of the agreement for sale. The only difference between the case of *Venkatesh Damodar* v. *Mallappa Bhimappa* (3), and the present case is that in the former case the suit was filed by the original vendor and in the present case the suit is filed by the purchaser from the original vendor. But on principle the position is exactly the same, and if defendant No. 2 could not have successfully sued defendant No. 1 in 1920, I do not see how the plaintiff could do so on the sale-deed from defendant No. 2. The decision in *Lalchand* v. *Lakshman* (1) has been distinguished on the special facts of that case. I am unable to accept the contention that there is necessarily a conflict between that case and the decision in *Venkatesh Damodar* v. *Mallappa Bhimappa* (3). When the claim for specific performance is definitely negatived by the Court the position of the defendant in possession without a registered conveyance may be different. The authority of *Lalchand* v. *Lakshman* (1) is much shaken by the subsequent decisions and its scope must be limited to the facts of that case. Whether in a case, which on facts would be indistinguishable from that case, it should be followed or not must be considered when the question arises. The decision of the lower Appellate Court is right. I would confirm the decree of that Court and dismiss the appeal with costs.

Coyajee, J.—I agree.

Decree confirmed.

Z. K.

(1) 28 B. 466; 6 Bom. L. R. 510.
(2) 39 Ind. Cas. 103; 41 B. 438; 19 Bom. L. R. 100 (F. B.).
(3) 66 Ind. Cas. 868; 46 B. 722; 24 Bom. L. R. 242; (1922) A. I. R. (B.) 9.

OUDH JUDICIAL COMMISSIONER'S COURT.

SMALL CAUSE REVISION APPLICATION NO. 17 OF 1922.

March 21, 1922.

Present:—Mr. Khanhaiya Lal, J. C.

MIHI LAL—DEFENDANT—APPLICANT

versus

BABU LAL AND ANOTHER—DEFENDANT NO. 1—NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), ss. 2, 52—Legal representative—Personal decree.

ATMARAM *v.* BALAJI RAGHUNATH.

Where a person takes possession of the property of a deceased person, he can be made personally liable, as a legal representative, to the extent of the property of the deceased which he has appropriated or disposed of or which may still be in his possession.

Nathuram Siviji Sett v. *Kutti Haji*, 20 M. 446; 7 Ind. Dec. (N. S) 316, relied on.

Mr. *P. C. Gupta*, for the Applicant.

Mr. *H. D. Chandra*, for the Opposite Party.

JUDGMENT.—Bhagwandin owed certain money and died without repaying the same. He left no widow or issue. The applicant and another person took possession of his moveable property including bullocks and other things. They allege that they gave a portion thereof to certain persons to whom arrears of rent are alleged to have been due. In the suits brought by the creditor for the recovery of money due to him by Bhagwandin, the defence of the applicant was that he was not in possession of any assets of the deceased and was not his heir but the Court below found that he had taken possession of the assets of the deceased along with another person, the value of which was sufficient to pay the debts due by the deceased, and that they had disposed of a portion of the property without any right. It passed a decree accordingly against the applicant and the other person.

In view of section 52 of the Code of Civil Procedure and the observations in *Nathuram Siviji Sett* v. *Kutti Haji* (1), the applicant can be made personally liable as a legal representative to the extent of the property of the deceased which he has appropriated or disposed of or which may still be in his possession. Their value has been found to exceed the debts.

The application is, therefore, dismissed with costs.

N. H.

Application dismissed.

(1) 20 M. 446; 7 Ind. Dec. (N. S.) 316.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 528 OF 1922.

July 24, 1923.

Present:—Mr. Justice Fawcett and Mr. Justice Coyajee

ATMARAM BHILA BHATKAR—APPELLANT

versus

BALAJI RAGHUNATH JOSHI—RESPONDENT.

Possessory title—Ejectment suit against person having no title.

A person who has been in possession of property for over twelve years without a title is entitled to maintain a suit for ejectment of a person who has wrongfully dispossessed him from the property and who has no title to it. [p. 309, col. 1.]

Ismail Ariff v. *Mahomed Ghous*, 20 I. A. 99; 20 C. 834; 6 Sar. P. C. J. 305; 17 Ind. Jur. 321; 10 Ind. Dec. (N. S.) 561 (P. C.); *Pemraj Bhavaniram* v. *Narayan Shivaram Khisti*, 6 B. 215; 6 Ind. Jur. 416; 3 Ind. Dec. (N. S.) 601, followed.

Dharani Kanta v. *Gabar Ali*, 18 Ind. Cas. 17; 15 Bom. L. R. 445; 13 M. L. T. 185; (1913) M. W. N. 157; 17 C. W. N. 389; 17 C. L. J. 277; 25 M. L. J. 95 (P. C.), distinguished.

Second appeal from the decision of the District Judge, Ratnagiri, in Appeal No. 282 of 1920, confirming a decree passed by the First Class Subordinate Judge at Ratnagiri, in Civil Suit No. 101 of 1919.

Mr. *A. G. Desai*, for Mr. *T. N. Walavalkar*, for the Appellant.

Mr. *P. B. Shingne*, for the Respondent.

JUDGMENT.

Coyajee, J.—The plaintiff (respondent before us), who is one of two Khoti sharers in the village of Panhali, brought this suit to recover possession of certain lands which formed part of an occupancy tenancy *khata*. The lands comprised in that *khata* originally belonged to the family of the Bhatkar defendants (Nos. 1 to 7). Plaintiff's case is this. At a partition effected in or about the year 1890, between the first defendant Dhana and his three brothers, Shiva, Ragho and Zil, the suit lands fell to the share of Dhana. In 1895, they were put up to sale in execution of a money-decree passed against Dhana, and purchased by the eighth defendant. In 1899, he obtained possession of the lands through the Court and in 1901 surrendered them to the plaintiff. Since then, plaintiff had been in continuous possession and enjoy-

ment of the lands until 1916 when he was wrongfully dispossessed by defendants Nos. 2 to 7.

The first defendant Dhana did not resist the plaintiff's claim. It was contested by the third defendant (now appellant) who is a son of Zil. He contended that at the said partition Dhana did not get any share at all in the family estate, and was never in possession of the suit lands; the auction-sale was void, being in contravention of section 9 of the Khoti Settlement Act, 1880; the auction-purchaser never obtained possession of the lands; and finally he did not admit that plaintiff had ever been in possession.

On those pleadings and on the evidence adduced by the parties the learned Appellate Judge, in agreement with the Trial Judge, held that after the said partition Dhana had been in possession and enjoyment of the lands in suit, that he never objected either to the auction-sale or to the purchaser taking possession; that in 1911 he himself executed a rent-note in favour of the plaintiff; and that the plaintiff came into actual possession of the lands in 1901 and continued therein until 1916 when he was dispossessed by defendant No. 3 who had no title to those lands. He refers to certain rent-notes relied on by the plaintiff and says :—

"They prove Dhana's possession of the *bagayet* land as plaintiff's tenant. Taking this along with the sale-certificate and the *tabapatti* the clear inference is that all the suit lands belonged to Dhana and passed to the possession first of defendant No. 8 and then of plaintiff. Defendant No. 3 has lately come back from Bombay and he has taken possession...of the suit property."

As for the validity of the auction-sale the Judge observes :—

"From the deposition of the other Khoti sharer (Exhibit 53) and the admission of defendant No. 3 in his examination-in-chief that the rent used to be paid to plaintiff, I conclude that the suit-lands are wholly in the Khoti share of plaintiff. He brought these lands to sale and consequently his consent to alienation may be presumed. In fact all these transactions took place with the consent of the Khot plaintiff and the permanent tenant Dhana. Section 9 therefore of the Khoti Act does not stand in plaintiff's way."

The ninth section, as it now stands, is the result of Amending Act VIII of 1912; and it was urged before us on the appellant's behalf that the auction-sale having taken place in 1908 its legality should be determined according to the provisions of that section as it then was. It seems to me, however, that upon the concurrent findings of facts to which I have above alluded, that question has lost all its importance. It is not shown that the lands in suit ever stood in Dhana's *khata*. When the property was put up to sale in 1908 neither he nor any other person offered any objection. The purchaser having received possession through the intervention of the Court surrendered it to the plaintiff Khot in 1901. Later, Dhana himself executed the rent-note Exhibit 39 in his favour. It was not until 1916 that he was wrongfully dispossessed by defendant No. 3 who has no title whatever to these lands. It was this dispossession which led to certain proceedings which culminated in this suit. Assuming then that the auction-sale was void, as being in defiance of the provisions of the said Act, plaintiff has been in possession for about fifteen years without a title. In my opinion, this long possession is sufficient to enable him to eject the third defendant. This adverse possession has extinguished Dhana's right to the actual possession of the land. It may be that it did not also operate to annihilate his occupancy rights (if any) which it was competent to him to transfer to the Khot: *Vishnu Bhikaji Adhikari* v. *Babla Lakha Jathar* (1). It is admitted, however, that the plaintiff alone has been recovering the rents all these years; and the other Khoti sharer (Exhibit 53) lays no claim to these lands. Dhana submitted to his interest being sold in 1895, and later took up the lands as plaintiff's tenant. He does not dispute the plaintiff's claim in these proceedings.

(1) 61 Ind. Cas. 594; 23 Bom. L. R. 411; 45 B. 1001.

It is, therefore, clear that if he possessed occupancy rights before 1895, he resigned the lands within the meaning of section 10 of the Act. But, however, that may be, we are now concerned not with Dhana but with defendant No. 3, who is a wrong-doer.

It is true that the plaintiff did allege title by sale-certificate; but he by his plaint also referred to and relied upon his long possession between 1901 and 1916. This possession, which by the concurrent findings of the lower Courts has been satisfactorily proved, entitles the plaintiff to maintain ejectment against the third defendant, who has no title, who is a wrong-doer, and who dispossessed him in or about 1916: *Pemraj Bhavaniram* v. *Narayan Shivaram Khisti* (2). The following pronouncement, made by the Privy Council in *Ismail Ariff* v. *Mahomed Ghous* (3), is to the point:

"The possession of the plaintiff was sufficient evidence of title as owner against the defendant. By section 9 of the Specific Relief Act (Act I of 1877), if the plaintiff had been dispossessed otherwise than in due course of law, he could, by a suit instituted within six months from the date of the dispossession, have recovered possession, notwithstanding any other title that might be set up in such suit. If he could thus recover possession from a person who might be able to prove a title, it is certainly right and just that he should be able, against a person who has no title and is a mere wrong-doer, to obtain a declaration of title as owner, and an injunction to restrain the wrong-doer from interfering with his possession. The Appellate Court.....has dismissed the suit. Consequently, the defendant may continue to wilfully, improperly, and illegally interfere with the plaintiff's possession, as the learned Judges say he has done, and the plaintiff has no remedy. Their Lordships are of opinion that the suit should not have been dismissed."

(2) 6 B. 215; 6 Ind. Jur. 416; 3 Ind. Dec. (N. S.) 601.

(3) 20 I. A. 99; 20 C. 834; 6 Sar. P. C. J. 305; 17 Ind. Jur. 321; 10 Ind. Dec. (N. S.) 561 (P. C.).

The learned Pleader for the appellant has relied on certain observations made by the Privy Council in *Dharani Kanta* v. *Gabar Ali* (4); he argues that those observations shew that in a case of the nature it is not sufficient for the plaintiff to prove his prior peaceful possession —he must also prove his title. I do not agree with him; those observations should be read in their context. In that case, plaintiffs as *zemindars* sued to eject the defendants from possession of seven *puras* or 592 *bighas* of land. In the course of their judgment their Lordships recorded their finding, which is important, in these terms (page 450*):

"The defendants-respondents were for more than twelve years before the commencement of this suit in possession of the seven *puras* or 592 *bighas* of land in dispute."

It was with reference to the facts so found that they made these observations on which reliance is now placed (page 451*):

"The suit is one for the ejectment of persons who admittedly were at the date of suit in possession of the seven *puras* of land from which it is sought to eject them. It lay upon the plaintiffs to prove not only a title as against the defendants to the possession, but to prove that the plaintiffs had been dispossessed or had discontinued to be in possession of the lands within the twelve years immediately preceding the commencement of the suit."

It is obvious that there is nothing either in these observations or elsewhere to indicate that their Lordships dissented from the principles laid down in *Asher* v. *Whitlock* (5). In the present case plaintiff had been in exclusive possession of the lands in suit for over twelve years when he was wrongfully dispossessed by the appellant.

For these reasons, I would affirm the decree and dismiss the appeal with costs.

Fawcett, J.— I agree.

Z. K. *Appeal dismissed.*

(4) 18 Ind. Cas. 17; 15 Bom. L. R. 445; 13 M. L. T. 185; (1913) M. W. N. 157; 17 C. W. N. 389; 17 C. L. J. 277; 25 M. L. J. 95 (P. C.).

(5) (1866) 1 Q. B. 1; 35 L. J. Q. B. 17; 11 Jur. (N. S.) 925; 13 L. T. 254; 14 W. R. 26.

*Pages of 15 Bom. L. R.—[*Ed.*]

SARSUTI PRASAD *v.* EHTISHAM ALI.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 84 OF 1913.
PRIVY COUNCIL APPEAL NO. 8 OF 1915.
April 11, 1922.

Present:—Pandit Kanhaiya Lal, J.C.,
Mr. Daniels, A. J. C., and
Mr. Ashworth, A. J. C.

SARSUTI PRASAD AND OTHERS—DEFENDANTS—APPELLANTS
versus
M. EHTISHAM ALI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 22—Mortgage—Redemption suit—Accounts, method of— Appeal—Respondent whether can object to method agreed to by him—Estoppel—Contract Act (IX of 1872), s. 61—Appropriation of surplus profits—Construction of deed of further charge—Covenant to redeem along with earlier deeds, effect of—Covenant to pay interest out of pocket, effect of.

Plaintiff mortgaged with possession certain properties by two deeds of mortgage. Subsequently he executed three deeds of further charge one of which contained a provision for compound interest. In a suit for redemption the First Court disallowed compound interest and in the accounting which followed adopted the mode suggested by the plaintiff. In appeal the decision of the First Court was modified and compound interest was allowed. The plaintiff-respondent thereupon contended that a different method of accounting should be adopted:

Held, Per *Kanhaiya Lal, J. C*, and *Ashworth, A. J. C.* (*Daniels, A. J. C.* dissenting):—(1) that as soon as the Appellate Court set aside the decision of the First Court, in favour of a decision to award compound interest, the decision of the lower Court as to the method of accounting became adverse to the respondent and he could rely on O. XLI, r. 22, Civil Procedure Code, and claim to have the method of accounting adopted by the lower Court set aside; [p. 323, cols. & 12.]

(2) that whether the respondent could or could not claim a reversal of the method of accounting adopted by the lower Court, it was open to the Appellate Court to reverse the method as soon as it upset the decision of the Trial Court as to the nature of the interest to be allowed; [p. 323, col. 2.]

Per *Kanhaiya Lal, J. C.*—Where there are successive mortgages, the later ones qualifying or restricting the terms and conditions entered in the preceding ones, the rights of the parties must be governed, so far as may be, by the covenants as they ultimately stand. [p. 313, col. 1.]

There can be no estoppel in a matter of right accounting or true construction. A covenant by which a mortgagor binds himself to pay the mortgage-money out of his own pocket is a covenant of a non-essential nature and cannot be pleaded in bar of a set-off. A covenant in a deed of mortgage or further charge postponing the payment of earlier deeds till the last deed is paid does not prevent the payment of the latter, after it falls due, before the earlier deeds are paid. [p. 314, col. 2.]

Per *Ashworth, A. J. C.*—Where mortgaged property is made subject to a further charge, surplus profits in the hands of the mortgagee should, in the absence of any express agreement to the contrary, be used to liquidate the interest on the further charge in preference to liquidating other deeds which have no connection with the property. [p. 326, col. 1.]

Notwithstanding anything contained in section 61 of the Contract Act, in the absence of appropriation, payments of surpluses should be appropriated to interest before they are appropriated to principal on any particular debt. [p. 326, col. 1.]

In many cases where it is provided that a deed of further charge shall be paid up along with an earlier deed the meaning is nothing more than thatit shall not be paid up before. [p. 326, col. 1.]

Appeal against a decree of the Additional Judge, Hardoi, at Unao, dated the 20th March 1913.

Messrs. *A. P. Sen* and *Bisheshwar Nath Srivastava*, for the Appellants.

Messrs. *M. Wasim* and *J. N. Chak*, for the Respondent.

JUDGMENT.

Kanhaiya Lal, J. C.—This appeal was heard on the 8th November last and after the determination of the points raised an account was directed to be prepared in accordance with the findings arrived at. The account has since been prepared by the office, but the defendants-appellants have taken objection to its correctness.

The appeal arose out of a suit for redemption of certain mortgages and deeds of further charge, the terms of which have to be carefully examined in order to determine whether any money is due on the said transactions to either party.

The first mortgage was made on the 9th November 1873 and contained a provision that out of Rs. 244 per year, derivable from the profits of the *bazar* mortgaged, the mortgagee was to appropriate Rs. 180 towards the payment of interest due on the said deed and Rs. 24 on account of the salary of the *chaukidar* every year and pay the balance of Rs. 40 per year to the mortgagor. The time fixed for redemption was six years and the

amount secured by the mortgage was Rs. 1,000 repayable with interest at Rs. 1-8-0 per cent. per mensem. The mortgagee realised the profits but he did not pay the sum of Rs. 40 per year, representing the surplus derived from the mortgaged property, to the mortgagor.

The second mortgage was made on the 19th September 1875 for Rs. 500 repayable with interest at Rs. 1-8-0 per cent. per mensem within six years. The property mortgaged comprised the remaining income of the *bazar*, amounting to Rs. 160 per year, together with all the *zamindari* rights appertaining thereto, and among other things a portion of field No. 497, yielding a profit of Rs. 9 per year. Out of the above amount the mortgagee was to appropriate Rs. 90 per year towards the interest due to him and keep the balance of Rs. 79 per year as surplus in his hands until it amounted to Rs. 500 which was the principal money secured by the mortgage.

If these mortgages stood alone, there would have been no difficulty in adjusting the account. But on the 4th of May 1876 the mortgagor executed a deed of further charge for Rs. 99 which was tacked on to the mortgage of the 9th November 1873. It contained a covenant that the mortgagee was to appropriate Rs. 18 per year on account of the interest, due on that deed, from the surplus, amounting to Rs. 40 per year, which the mortgagor was to receive from the mortgagee under the mortgage of the 9th November 1873. The mortgagor undertook to pay the principal money due on that deed at the time of the redemption of the previous mortgage. The effect of this deed of further charge was to leave with the mortgagee a surplus of only Rs. 22 per year with effect from the 4th May 1876.

This was followed by another deed of further charge, which was executed in lieu of Rs. 99, repayable with interest at Rs. 1-8-0 per cent. per mensem, on the 16th September 1876. The mortgagee was to appropriate Rs. 18 per year from the surplus left with him, and the mortgagor undertook to pay the principal money at the time of the redemption of the *bazar* mortgaged by him on the 9th November 1873.

There was another deed of further charge, executed on the 11th January 1878, in which both the properties, covered by the mortgages of the 9th November 1873 and the 19th September 1875, were mortgaged. It was executed in lieu of Rs. 375 repayable with interest at 2 per cent. per annum compoundable half yearly. There was a covenant for the payment of interest at an enhanced rate in case of default in the payment of interest every half year; but this covenant was found by the Court on the 8th November 1921 to be penal and unenforceable. By virtue of this deed, the mortgagor undertook not to redeem any of the mortgaged properties entered in both the deeds abovementioned and surrendered his right to take any surplus out of the income of the *bazar* until the principal and interest due on that deed were paid up. He further undertook to pay the money due thereon after the expiry of the term fixed by the mortgages of the 9th November 1873 and the 19th September 1875 along with the mortgage moneys due on the said deeds and on the two deeds of further charge of the 4th May 1876 and the 6th September 1876 already referred to.

The account, prepared by the office, does not accurately carry out the terms of the contract, embodied in the above transactions. The surplus referred to in the mortgage of the 19th September 1875 was, for instance, to accumulate till the entire principal sum secured by that mortgage was paid up; but the account prepared by the office credits it in satisfaction of the principal and interest payable on the deed of further charge of the 11th January 1878. The learned Counsel for the plaintiffs-respondents contends that by virtue of the last deed of further charge, the redemption of the mortgage of the 19th September 1875 was postponed till the money due on the last deed of further charge was paid up, but redemption implies the surrender of possession on full payment and is not the same thing as gradual set off by agreement as provided for by the terms of the mortgage. The delivery of possession might in such a case be postponed till the deed of further charge is paid up. Again the deeds of further charge of the 4th May 1876 and

16th September 1876 mentioned the source from which the interest due on each of them was to be paid and provided for redemption after the 9th November 1879; but the office has mixed up those accounts and allowed credit towards the principal money forthwith.

It is obvious that by virtue of the deeds of further charge of 1876 the right of the mortgagor to receive Rs. 40 per year on account of surplus from the mortgagee under the mortgage of the 9th November 1873 was curtailed, and Rs. 36 out of that amount were to be credited towards the interest due on those deeds year after year. It is also clear from the mortgage of the 9th November 1873 that the mortgagor was not entitled to redeem that mortgage before the expiry of six years and the surplus left in the hands of the mortgagee could not, therefore, be applied in reduction of the principal money due on that mortgage till the said six years had expired and the deeds of further charge had been satisfied. By the deed of further charge of the 11th January 1878 it was provided that the mortgagor would not be entitled to redeem the mortgages of the 9th November 1873 and the 19th September 1876 till the money due on the last deed of further charge of the 11th January was repaid or to get the surplus available to him under those mortgages till such payment was effected. In fact the last deed of further charge contemplated an account being taken of the moneys due on all the deeds when the redemption of the last deed might be sought. The possibility of any of the deeds being satisfied earlier out of the usufruct was not outside the contemplation of the parties; but it was not intended that the mortgagee should be deprived of his possession of the properties respectively mortgaged till the last farthing due to him on the deeds of further charge, wherein they were hypothecated, was repaid.

The learned Counsel for the parties practically agree that the surplus profits of the mortgaged properties might be credited towards the mortgage moneys; but while the plaintiffs respondents desire that the surplus should be credited in satisfaction of the deeds of further charge, beginning with the last one and then in satisfaction of the moneys due on the mortgages to which they relate, the defendants-appellants desire that they should be allowed to appropriate the same after the mortgages fell due in order of priority throughout. The learned Counsel for the plaintiffs-respondents waives his right to claim interest on the surplus, if it is credited in the manner suggested by him, till such time as all the debts due on the mortgages and the deeds of further charge are discharged.

The right course seems to be that from the 9th November 1873 to the 4th May 1876 the surplus payable to the mortgagor under the mortgage of the 9th November 1873 should be allowed to accumulate, because the mortgagor had no right to redeem the mortgage before the expiry of 6 years. Before the expiry of that period the deed of further charge of the 4th May 1876 was executed, diverting Rs. 18 per year out of that surplus to the payment of the interest due thereon. The balance of Rs. 22 per year, which the mortgagee did not pay to the mortgagor, would remain in the hands of the former till the 16th September 1876, when the second deed of further charge was executed, because the deed of further charge of the 4th May 1876 did not allow redemption till the 9th November 1879 when mortgage-money due under the mortgage of the 9th November 1873 became payable. After the 16th September 1876 the surplus would be reduced to Rs. 4 per year, which would again accumulate, because the deed of further charge of the 16th September 1876 did not allow redemption before the expiry of a certain period.

On the 9th November 1879 the mortgage of the 9th November 1873 became due according to the original contract; but before that date a fresh deed of further charge was executed on the 11th January 1878, whereby the mortgagor agreed not to take the surplus until the money due on that deed was repaid. From the 11th January 1878 the surplus due on that mortgage after paying the interest due on the deeds of further charge of 1876 would, therefore, be applied in satisfaction of the

money due on the deed of further charge of the 11th January 1878.

The mortgage of 19th September 1875 contains a stipulation for the accumulation of the surplus till the principal money was repaid. Before the end of January 1882 the principal money due on this deed would be paid up and the profits mortgaged would thereafter be set free and become available for the discharge of the last deed of further charge of the 11th January 1878 in addition to the surplus available under the previous mortgage. The logical effect of the covenants contained in the last deed of further charge is to divert the surplus available under the mortgage of 1873 and the profits set free by the mortgage of 1875 to the satisfaction of the principal and interest due on the deed of further charge to which they are tacked. If any surplus remains, it can be applied to the payment of the deeds of further charge of 1876 in order of priority. As the redemption of the mortgage of the 9th November 1863 was postponed till all the deeds of further charge were paid up, the surplus profits available must be applied to the discharge of that deed last of all.

The mortgage of 1875 stands on a somewhat different footing, because the covenant contained therein for the accumulation of the surplus till it was sufficient to pay off the principal amount was not qualified by the last deed of further charge which provided for an "adjustment of accounts" of what might be due thereon at the time of the redemption of the last deed.

It is hardly necessary to discuss at length the reasons why the alternative methods of accounting, suggested by the defendants-appellants cannot be accepted. Where there are successive mortgages, the later ones qualifying or restricting the terms and conditions entered in the preceding ones, the rights of the parties must be governed so far as may be, by the covenants, as they ultimately stand.

The memorandum of accounts, filed by the plaintiffs in the Court below, was prepared in accordance with the directions and findings of the Court below. In the very beginning of the explanatory note appended to it, it was stated that the accounts had been *prepared in the light of the judgment* of the Court below and though an attempt was made therein to support certain methods of accounting and construction then adopted they do not debar the plaintiffs from supporting the decree by a different method, particularly when the defendants want to reopen the accounts and claim compound interest on their moneys which they do not wish to allow to the plaintiff on their surplus.

In his judgment the learned additional Judge held (page 113) that the plaintiffs were entitled, on taking the mortgage accounts, to credit for any unpaid money reserved to the mortgagor by the mortgage-deeds of 1873 and 1875 and not paid to him. He said further that any sum left in the hands of the mortgagee to the credit of the mortgagor would carry simple interest at Re. 1 per cent. per mensem. In regard to the possessory mortgage of 1875 he said that out of the income of Rs. 169 per year the mortgagee could take Rs. 90 towards payment of interest and appropriate the remaining Rs. 79 in reduction of the principal. In regard to the last deed of further charge he said (page 108) that the mortgagee should get simple interest at Rs. 37-8-0 per cent. per annum from the date of the bond to the date of the decree and that the interest so calculated amounted to Rs. 4,891-6-6.

The plaintiffs had to prepare the accounts on the basis of those findings to make them tally with the order of the 23rd October 1912; and as no compound interest was then allowed, it was immaterial at the time how the surplus was applied. The award of the compound interest now alters the whole position, and the plaintiffs can question the correctness of the method adopted by their Counsel. A man might not be willing to accept a method of account if compound interest is allowed, which he might have been willing not to contest, if simple interest was allowed. In a matter of right accounting or true

construction, there can be no estoppel, and if fresh accounts have to be prepared, they must be prepared by the right method with due regard to the covenants contained in the various deeds, sought to be enforced.

The defendants want that if the accounts are to be prepared afresh, the surplus income should either be allowed to accumulate till it is sufficient to pay all the deeds together, or applied to the discharge of all the deeds, other than the mortgage of 1875, in order of priority under section 61 of the Indian Contract Act (I of 1872). The question here is, however, not one of an application of a payment but that of a set off. Section 76 of the Transfer of Property Act (IV of 1882) provides that where the receipts of the mortgaged property exceed the interest due the surplus, if any, shall in the absence of a contract of the kind referred to in section 77 be applied in reduction or discharge of the mortgage money. The deed of further charge is not in itself a possessory mortgage; but it is tacked to two possessory mortgages, and the surplus income derived from it should go primarily to the discharge of the tacked deed. The same cannot be said about the deed of 1875 which is covered by the exception contained in sectior 77 of the Act.

The defendants also object to the surplus being applied half yearly to the payment of the moneys due on the deeds of further charge. There is evidence to show that the *bazar* in Asiwan is held bi-weekly, that is, on every Tuesday and Wednesday throughout the year. The defendants have not filed the accounts of their receipts and in the absence of any such accounts, the income must from the nature of the property be deemed to have been realised bi-weekly, that is, on every market day. The mortgage-deeds give the total annual income and do not suggest that it was only realizable at the end of the year and not half-yearly or at shorter intervals. If the defendants gave yearly leases or entered into any other arrangements to suit their own convenience without fixing the instalments by which the lease money was payable, the plaintiffs cannot be made to suffer for it. The interest was compoundable half yearly, and a half-yearly set off of the surplus is necessary in the circumstances. In the case of the mortgage of 1875, there is a covenant providing for the accumulation of the surplus till the principal amount secured by the mortgage is reached. The accumulation cannot be carried further.

The deed of further charge of the 11th January 1878 imposes a liability for the payment of compound interest and it has by reason of the covenants contained therein to be discharged first. It is not necessary, however, that the amounts due on all the five deeds, including anything due on the deed of 1875, should be paid together. A mortgage may not be redeemable till after a certain time, but part payments by set off may be made under section 76 (*b*) of the Transfer of Property Act from time to time.

Applying the surplus income of the *bazar* mortgaged in the deeds of 1873 and 1875 in satisfaction of the last deed of further charge and, when that deed is satisfied, in discharge of the deeds of further charge of 1876, which stand on an equal footing, in order of priority and then in satisfaction of the mortgage of 1873, a sum of Rs. 7,910-11-7 appears to be due to the plaintiffs on the date of the decree of the Court below. The account of the 21st February 1922 prepared by the office seems to be correct and in consonance with the covenants contained in the several deeds. A covenant by which a person binds himself to pay the money out of his own pocket is a covenant of a non-essential nature and cannot be pleaded in bar of a set off. A covenant postponing the payment of earlier deeds till the last deed is paid does not prevent the payment of the latter, after it falls due, before the earlier ones are paid.

The deeds of mortgages and further charges were clearly satisfied long before the institution of the suit. No cross-objections have been filed by the plaintiffs claiming interest at a higher rateeson the surplus or claiming future m ne profits.

The appeal should in my opinion be dismissed except in so far that the surplus allowed to the plaintiffs should be reduced to Rs. 7,910-11-7 as on the date on which the decree of the Court below was passed. The parties should in the circumstancs bear their own costs after the remand.

Daniels, A. J. C.—This is an appeal by the defendants-mortgagees in a redemption suit. The case has been before the Privy Council and has been remanded to this Court for decision of the remaining issues. The only question now remaining in dispute between the parties is the manner in which the account should be prepared. In fact the only ground of appeal passed before us is No. 5 of the Memorandum of Appeal which runs:

"That the lower Court should have at least allowed compound interest at the stipulated rate on the bond of 11th January 1878."

The appellants are willing to accept the method of accounting adopted by the plaintiffs-respondents in the Court below except in this one particular. The deed of 11th January 1878, allowed compound interest at two per cent. compoundable every six months on the amount secured by the deed which was Rs. 375. In default of payment of any six-monthly instalment of interest it allowed Rs. 3-2 per cent. instead of two per cent. The learned Subordinate Judge held that this stipulation amounted to a penalty and allowed simple interest at Rs. 3-2 per cent. The case was originally heard on 8th November 1921. On that date this Court was disposed to allow the contention of the appellants that they should be awarded compound interest at two per cent instead of simple interest at Rs. 3-2 per cent. The respondents suggested that if this alteration were made the whole account should be opened up. It was suggested that the office should be asked to prepare on this basis and the case was adjourned for this purpose. The parties were to be given an opportunity of criticising this account before final orders were passed on the appeal. That order was an interlocutory order and was not intended finally to decide the manner in which the account should be prepared. The question has been reargued before us after the submission of the account by the office.

There were five mortgage deeds executed by Ehsan Ali Khan predecessor of the plaintiffs in favour of Sohan Lal, predecessor of the defendants. The first two mortgages were usufructuary mortgages of portions of the income of *bazar* Ehsanganj, the third and fourth deeds were deeds of further charge on the income secured by the first deed, and the fifth deed was a further charge on the property secured by both the first two deeds.

The first deed was executed on the 9th November 1873 for a sum of Rs. 1,000. It was a charge on Rs. 244 of the annual *bazar* income. Of this Rs. 180 were payable to the mortgagees on account of interest and Rs. 24 for the pay of the *chaukidar*. The balance of Rs. 40 was to be paid by the mortgagees to the mortgagor year by year. There was no provision for applying this surplus towards the re-payment of the mortgage debt. The mortgage-debt was to be repaid in a lump sum by the mortgagor from his own pocket. The deed contemplated an annual cash payment of Rs. 40 by the mortgagees to the mortgagor on account of the surplus. The mortgagees have, however, in this suit accepted the position that they are liable to account for this surplus at the time of redemption.

The surplus of Rs. 40 payable to the mortgagor was successively reduced first to Rs. 22 and then to Rs. 4 by the third and fourth deeds (*i.e.* the first two deeds of further charge) executed respectively on 4th May 1876 and 16th September 1876.

The second deed was executed on 19th September 1875 for a sum of Rs. 500. It was a charge on an annual income of Rs. 169 consisting of Rs. 160, the remaining income of the *bazar* and Rs. 9 rent of a field. Rupees 90 of this income was set off against the interest in the deed leaving an annual balance of Rs. 79 in the hands of the mortgagees. There was a special covenant regarding this balance to the effect that

it was to remain in deposit with the mortgagees till it amounted to Rs. 500. The amount was then to be applied in full satisfaction of the mortgage debt. No difficulty whatever arises with regard to this deed.

The third and fourth deeds were deeds of further charge. Each was for a sum of Rs. 99 and both contained similar covenants that the annual interest amounting to Rs. 18 was to be deducted from the surplus payable to the mortgagor under the first deed. In the case of the deed of 4th May 1876, the third o the five deeds executed between the parties, no definite term was fixed. The covenant was that the mortgage money was repayable along with the amount secured by the first deed. In the case of the deed of 16th September 1876 there was a nominal term of six years but it was accompanied by the same condition of payment along with the amount of the first mortgage and the earlier deed of further charge. The covenant was that the principal money was to be paid in a lump sum after the expiry of six years along with the mortgage-moneys of the aforesaid first deed and the deed dated 4th May 1876. The combined effect of these provisions was that the first, third and fourth deeds were all to be redeemed together.

The fifth deed was the only one as to which any dispute was raised in the appeal and the dispute related only to the rate of interest. This deed was for a sum of Rs. 375 carrying compound interest as already stated. It was repayable along with the four earlier deeds. The actual covenant was.

"I hereby agree and reduce it to writing that the principal amount specified above shall be paid by me after the expiry of the time under both the registered deeds dated 9th November 1873 and 19th September 1875 along with the mortgage-money of the deeds mentioned above and the two deeds of further charge, dated 4th May 1876 and 16th September 1876 amounting to Rs. 99 or whatever money more or less on adjustment of accounts may be found due in respect of the deed, dated 19th September 1875; the whole of this I will pay at one time (*sab ek sath ada karunga*)."

Interest was not to be paid from any surplus in the hands of the mortgagees; supposing there to be such surplus, but by the mortgagor in cash. The expression used is a very strong one:

"I will pay the money from my own possession (*apne pas se pahunchata rahunga*)."

The validity of this covenant in so far as it might operate to prevent a surplus in the hands of the mortgagees being applied in the reduction of the amount due under the mortgage of 1878 has been strongly challenged before us but there appears to be no doubt that the intention of the parties at the time of the execution of the deed was as stated above.

There is a further covenant at the end that the mortgagor shall not be entitled to redeem any of the mortgaged properties or get any surplus income from the *bazar* without payment of the principal and interest secured by this deed.

The first question which arises on the respondents' Counsel's contention is whether they are entitled to re-open the method of accounting accepted by the Court below at their own request. If the parties are to be confined to their strict rights it appears to me that the respondents are not entitled to do this. The parties put in before the Court below accounts prepared by different methods differing widely from each other. The Court accepted the plaintiff's method as correct and passed a decree on the basis of it. The appellants challenged the method of accounting in paragraph 9 of their Memorandum of Appeal but withdrew this plea at the hearing. They pressed only the plea contained in paragraph 5 regarding the rate of interest. The respondents have neither appealed nor filed cross-objections. It is quite true that under O. XLI, r. 22 a respondent is entitled to support the decree of the Court below on any point which has been decided against him but this is not a point which was decided against the respondents. It is a point which was decided in accordance

with their wishes. The question to what extent the mortgagors should be relieved of the penal rate of interest under the deed of 1878 is absolutely distinct from the question of the manner in which the surplus arising under the earlier deeds should be credited and I can see no ground on which this Court's decision as to the rate of interest can be held to justify the adoption in the interest of the respondents of a fresh method of accounting.

It was suggested in the course of the argument that the account prepared was merely a mechanical thing and that the Court had given directions as to the manner in which it was to be prepared. This is incorrect. It is conceded that the Court had given no directions as to the manner of accounting under the deed of 1878 which is the real bone of contention between the parties. Moreover the report of the plaintiffs' Pleader accompanying the account (Exhibit Z 3) shows clearly that it was prepared in accordance with what he claimed to be correct. The report contains a paragraph stating that the Court has in effect held that the interest in the deed of 1878 would not form part of the yearly account between the parties but that principal and interest would be paid in a lump sum at the time of redemption. It then contains three arguments in support of this position numbered serially 1, 2 and 3 and concludes:

"Thus the finding of the Court is clearly supported by the contract between the parties as well as by the law on this subject and the mortgagee is not entitled to any accounting about the yearly profit of the property mortgaged and the yearly interest due on it so far as this deed is concerned and cannot get any thing beyond that which is fixed by the Court itself. (*Vide* page 99 of the Court's judgment)."

In allowing compound interest at two per cent. we have merely done away with excess interest allowed as a penalty for default and have reverted to the rate of interest agreed on by the parties themselves. Apart from the penalty clause, it is true that the result of allowing compound interest will be that a very large sum indeed will be found due to the mortgagees. This is not a reason for depriving them of their legal rights and it is to be remarked that this is not a sum which they can recover in cash from the mortgagors. Their only remedy is against the mortgaged property, and when once the amount of interest has exceeded the value of that property the difference between one lakh and ten lakhs makes no practical difference to the position of the parties. It may indeed be this consideration which has led the plaintiffs to refrain for so many years from any attempt at redemption.

The appellants-mortgagees are willing to allow simple interest at eighteen per cent., the same rate as was allowed under the earlier deeds, on the surplus in their hands. They have also expressed their willingness, not as a matter of right but as a matter of indulgence, to the preparation of a fresh account by which the surplus of the properties mortgaged by the deed of 1873 will be credited, after the term provided in that deed has expired, towards that deed and the two deeds of further charge, and, when these have been satisfied, towards the deed of 1878. They are also willing that after the deed of 1875 has been paid off from the surpuls profits of the property mortgaged by it all subsequent surpluses should be applied in reduction of the amount due under the deed of 1878. This offer was embodied in a statement signed by their Counsel Mr Sen, at the hearing on 25th January. He also agreed that interest on the surplus should be charged against him at 18 per cent. simple interest. By a subsequent application presented on 13th February 1922 the appellants have limited their claim to Rs. 50,000. As by either method of account the amount due to them exceeds this sum I would modify the decree of the Court below and pass a decree for redemption on payment of this amount with future interest at the usual rate.

As, however, my learned colleague is of opinion that the account should be re-opened as a matter of right it is desirable that I should express an opinion on the

method by which, if this is done, the account should be prepared.

The deed of 1875 stands by itself. It contains its own covenant for redemption. The surplus was to remain in deposit until the mortgage-debt was extinguished. The respondents have contended that this covenant was superseded by the execution of the deed of 1878 and that from the execution of that deed the surplus should be credited against the interest of the latter deed. This is clearly wrong. There is nothing in the deed of 1878 which in any way purports to modify the terms of the deed of 1875. In support of their arguments the respondents rely on the covenant at the end of the deed by which the mortgagors were not to be entitled to redeem any of the mortgaged properties without paying up also the money due under the deed of 1878. This, however, is to be read along with the covenant in the body of the deed by which the amount of the five deeds was to be paid up together including "any amount which on adjustment of accounts may be found due in respect of the deed dated 19th September 1875." These words show that it was in the contemplation of the parties that the deed of 1875 might have been satisfied earlier out of the usufruct and that at the time of redemption on taking account it might be found that little or nothing was due under it. The only question which arises under this deed is what should be done with the income of the property after the deed was paid off, which occured sometime in 1881.

As regards the deed of 1873 and the two deeds of 1876 it is clear that there could be no accounting under these deeds until the term of six years from the execution of the first deed expired, which was on 9th November 1879. The question was raised at the hearing whether the term of six years mentioned in the second deed of 1876 meant six years from its execution or referred back to the six years' period of the deed of 1873. The parties appear to be agreed on the latter construction which is supported by the context "after the expiry of six years along with the mortgage-moneys of the aforesaid deeds" and this may be accepted.

In the meantime the deed of 1st January 1878 had been executed and the respondents' contention is that from the date of its execution all surpluses in the hands of the mortgagees should be applied in reduction of the amount of this mortgage. This overlooks the fact that this deed was consolidated with the deed of 1873 and that the mortgage-money did not become payable until after the expiry of the term provided in the earlier deed.

There remains the question how from 11th November 1879 the surplus income of the property mortgaged by the deed of 1873 and the two deeds of further charge of 1876 should be applied. A similar question arises with reference to the income of the property mortgaged in 1875 from the date on which that mortgage was paid off. The mortgagees contend that the various mortgages should be paid off in order of time. The plaintiffs contend that the deed of 1878 as being the most onerous should be paid off first or that failing that the money should be applied rateably to all the deeds.

The appellants rely on the provisions of section 61 of the Contract Act. Those provisions of the Transfer of Property Act which relate to contracts are by section 4 of the Act treated as forming part of the Contract Act. In this case there has been no appropriation either by the debtor under section 59 of the Contract Act or by the creditor under section 60. Section 61 provides that where no appropriation has been made by either party "the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits". It is only where the debts are of equal standing in point of time that the payment is to be applied in discharge of each proportionately.

There is no authority for the suggestion that the money should be applied first in payment of the most onerous debt. There could be none in face of an express statutory provision to the contrary. The suggestion was based on

a misunderstanding of a quotation from the judgment of the Master of the Rolls in *Clayton's case* (1) dealing with the rule of the civil law on the subject, which is reproduced in the judgment in *Kundan Lal* v. *Jagan Nath* (2). The actual rule laid down in *Clayton's case* (1) was entirely different. The Contract Act as the learned Judges point out in their judgment in *Kundan Lal* v. *Jagan Nath* (2) modifies the rule of the civil law and appropriates the payments in order of date in the absence of express appropriation by the parties.

It has been pointed out in the course of argument that the method of accounting proposed by the plaintiffs leads to results absolutely incompatible with the intention of the parties as expressed in the deed. According to this method the deed of 4th May 1876 has been practically paid up in full at the time of its execution from the surplus of the deed of 1875. The surplus from 11th November 1873 to 11th May 1876 would be Rs. 100 and the deed of further charge was executed only a week earlier. If it was the intention of the parties that the surplus should be credited before the mortgage-money became payable it is hardly possible that the mortgagor should have executed a deed for a further advance of Rs. 99 agreeing that the interest should be deducted from the surplus payable and that he would pay up the money of the later deed at the time of redemption of the earlier one. Similarly with the deed of 1878. According to the defendants more than three quarters of this was already paid up from the date of its execution. If so it is impossible that the mortgagor should have executed a deed for a further advance reciting the previous mortgages, charging the further advance on the same properties, agreeing to redeem all the deeds together and covenanting to pay compound interest. (It may be noted here that the translation of the deed of 1878 given in the paper-book is incomplete in several particulars.) There must be something wrong in a method of account which leads to results like this. The account originally prepared by the office shows twice as much due to the mortgagors as was found due to them by the First Court and this in spite of the fact that the only persons who appeal against the decree are the mortgagees and we are allowing their appeal and modifying the decree in their favour by allowing compound interest on the deed of 1878.

The only other ground on which the respondents' Counsel seeks to take the case out of the provisions of section 61 is that according to him if the money were applied first in payment of the deed of 1873 that deed would be redeemed before the others and the mortgagors would have been entitled to get back the property contrary to the terms of the contract. This reasoning is fallacious. So long as the deed of 1873 stood alone the mortgagors could have redeemed on payment of its amount. The effect of the covenants in the deeds of 1876 and 1878 was to consolidate all the debts so that the mortgagors could only get back the property when the entire mortgage debt on all the deeds was extinguished. There is a distinct covenant in the deed of 1878 that all the mortgages will be paid off one and the same time. The covenants in this deed have nothing to say as to the manner in which the mortgage amounts shall be paid off. In whatever order the debts are paid redemption will only be effected when the whole consolidated debt has been cleared off. I am of opinion, therefore, that if the debts are to be re-opened otherwise than as a matter of concession on the part of the mortgagees these four deeds must be paid off in order of time, under the provisions of section 61 of the Contract Act.

It is argued that the deed of 1873 was the only deed (apart from the deed of 1875) under which possession was held and that, therefore, whatever covenants the later deeds may have contained, the mortgagors could get back the property as soon as the first mortgage was held to have been paid off. The point would be immaterial if the interest on all the deeds ran at the same rate, as the mortgagees

(1) (1816) 15 R. R. 161; 1 Mer. 572; 35 E. R. 781.
(2) 30 Ind. Cas. 92; 37 A. 649; 13 A. L. J. 908.

are being charged interest at eighteen per cent. per annum on the surplus in their hands. The importance of the point is that the deed of 1878 was carrying a higher rate of interest. The language of the deed of 1873 regarding redemption is, however, exactly parallel to that of the later deeds. The words used are:

"I, the declarant, having paid up the entire mortgage-money in a lump sum from my own pocket shall get the redemption effected".

The effect of the covenant in the later deeds was that instead of redemption being effected on payment of Rs. 99 it could only be effected on payment of the entire amount secured by all the deeds. Possession was, therefore, really held under all the deeds and not under the deed of 1873 alone.

If I am right in my view that the respondents are not entitled to re-open the method of account accepted, and indeed contended for by themselves in the Court below, the discussion contained in the foregoing paragraphs does not arise. The decree which should, in my opinion, be passed is that stated earlier in the judgment at the conclusion of the discussion of this preliminary issue.

Kanhaiya Lal, J. C., and Daniels, A. J. C. —As we differ on two questions, one of which is a pure question of law and the other a question of construction of certain deeds of mortgages and further charges or of the effect of the covenants contained therein, as affecting the method of accounting, we refer the case to a third Judge of the Court under section 98 of the Code of Civil Procedure for determining

(1) whether the plaintiffs-respondents are entitled to have the method of account embodied in the statement of account filed by them in the Court below on 11th March 1913 re-opened or varied? and

(2) if the method of account can be re-opened or varied what amount, if any, would, on a true construction of the deeds of mortgages and further charges in suit, be due either to the plaintiffs or to the defendants on accounts on the date of the decree of the Court below?

Ashworth, A. J. C.—This is a reference under the proviso to sub-section 2 of section 98 of the Code of Civil Procedure.

The present appellant M. Ehtisham Ali and one other co-plaintiff brought a suit against the defendants asserting their title to redeem certain mortgages on a *bazar* called Ehsanganj and alleging that upon the true taking of the accounts money was due to them from the representatives of the mortgagee. They asked for possession and for a decree for the surplus amount.

The Additional Judge of Hardoi decided this suit in their favour and after taking accounts awarded them a sum of Rs. 9,012-12-8. The mortgagee appealed to the Court of the Judicial Commissioner. The appeal was allowed on the preliminary question of the title of the plaintiffs. On a second appeal to the Privy Council the finding against the title of the plaintiffs was set aside and the appeal remanded to the Judicial Commissioner's Court for decision of the further questions raised in it. Four grounds of appeal remained to be decided but three of them were not pressed. The only ground of appeal that was pressed was that the Additionel Judge should have allowed compound interest on a certain bond of the 11th January 1878. The appeal came up before the Judicial Commissioner and the First Additional Judicial Commissioner and it was decided by a judgment dated the 8th November 1921 that compound interest should be allowed and the decree-writer of this Court was directed to prepare accounts in accordance with a certain direction. This direction involved a different method of taking accounts to that followed by the Additional Judge. In attempting to prepare accounts according to this direction, the decree-writer found some difficulty as the direction was not sufficiently in detail to cover all points of doubt. Where the direction was incomplete he relied upon his own interpretation of the documents. He put in his account along with a note of 15th December 1921. The appellant-mortgagee objected that the method of account adopted by the Additional Judge should be followed in preference. The respondent-mortgagor would not agree to this unless the appellant agreed to forego his claim to compound interest and pro-

posed his own method of taking the accounts. When the matter again came before the Judicial Commissioner and the First Additional Judicial Commissioner they disagreed. The Judicial Commissioner considered that the mortgagor-respondent was entitled to ask for a method of account different to that adopted by the Additional Judge on his, the mortgagor's, own request, as the situation had been changed by the allowance of compound interest and held that, on a proper construction of the deeds, the latest of the deeds should be discharged in the accounts first. The First Additional Judicial Commissioner held that the plaintiff-respondent was not entitled to ask for any alteration in the method of account adopted by the Additional Judge at his own request. In the event of a different method of account being allowed he was in favour of the deeds being discharged from the profits in order of priority. The appeal has been referred to me as third Judge of the Court for hearing upon the points of law on which they differed.

A description of the five deeds in question will be found in the judgments of both Judges dated the 3rd of March 1922. It appears that the profits of the *bazar* and of the rented field, which were mortgaged under the deeds in question in this case, amounted on the 9th November 1873, which was the date of the earliest deed, to Rs. 413 and those profits for the purposes of this case are to be deemed to have continued at the same figure up to date. By the deed of the 9th November 1873 Rs. 1,000 was advanced to be repaid in one lump sum after six years. The interest was to be at the rate of Rs. 1-8 per cent. per mensem which amounted to Rs. 180 a year. This interest together with Rs. 24 on account of the *chaukidar's* pay, in all Rs. 204, was to come out of the profits of the portion of the *bazar* mortgaged, which profits were to be taken as Rs. 244. Consequently there was a surplus of Rs. 40 a year which was to be paid over annually to the mortgagor.

The second deed dated the 19th September 1875 effected a mortgage of the remainder of the *bazar* bringing in an income of Rs. 413, less Rupees 244, that is Rs. 169 a year. Rupees 90 o this income was set off against the interest of the deed leaving a balance of Rs. 79 in the hands of the mortgagee. This yearly balance was to accumulate until the money advanced by the deed, namely, Rs. 500 was paid off.

The third and fourth deeds of further charge dated respectively 4th May 1876 and 16th September 1876 do not affect the second deed at all but only the first deed, that of 1873. Their effect briefly was to increase the mortgage-money of the first deed from Rs. 1,000 to Rs. 1,198. They also by reason of the provision that the interest was to come out of the Rs. 40, excess payable to the mortgagor under the first deed, reduced that Rs. 40 to Rs. 4.

The last and the fifth deed dated the 11th January 1878 is the deed that has given trouble in this case. This deed was a deed of further charge both on the property mortgaged by the deed of 9th November 1873 and on that mortgaged by the deed of 19th September 1875. Rs. 375 were advanced. This sum was not to be repaid until the expiry of the time under both the deeds of 1873 and 1875. There was a third provision that the Rs. 375 should be paid with the principal mortgage-moneys due under all the other deeds. The interest on the Rs. 375 was to be two per cent. per mensem and was to be paid every six months by the mortgagor from his own pocket. If not paid the interest was to be Rs. 3-2 per cent. per month and compound with six-monthly rests. It was further provided that so long as any interest and principal was due under this last deed no surplus arising in favour of the mortgagor from the profits of the *bazar* should be paid over.

It is common ground in this case that no surplus profits were ever paid over to the mortgagor at any time. It will be observed that from the 9th November 1873 up to the date of the third deed, 4th May 1876, the excess profits were Rs. 40 and from the date of that deed they were Rs. 22 up to the date of the fourth deed on 16th September 1876. From the date of this fourth deed they

were only Rs. 4. Although there is some contention as to the disposal of this Rs. 4, the main question in this case is as to the disposal of the Rs. 169 which on the 8th November 1881 became available by reason of the satisfaction out of the usufruct of the sum of Rs. 500 advanced under the second deed, for the liquidation of interest or principal due under the other deeds. In the Court of the Additional Judge it was held that this money should be treated as accumulating up to the date when the accounts were taken in the case and 12 per cent. per annum interest was allowed to the mortgagor on it. In the order of the Judicial Commissioner and the First Additional Judicial Commissioner dated 8th November 1921, wherein compound interest was allowed in respect of the fifth deed, the direction was on the contrary that this Rs. 169 as soon as set free, should be used for the satisfaction of interest due on the other four deeds. Inasmuch as the interest due on the first, the third and the fourth deeds was already provided for out of the profits it followed that this direction meant that Rs. 169 should be used from 8th November 1881 for defraying arrears of interest and current interest due under the fifth deed.

The first point I am asked to determine is whether the plaintiffs-respondents are entitled to have the method of account embodied in the statement of account filed by them in the Court below on the 11th March 1913 re-opened or varied.

For the purpose of deciding this point it is necessary to set forth the exact manner in which the Additional Judge came to adopt the method which he has adopted. There has never been any dispute as to the method of accounting that would be required if the fifth deed had not been in existence. In the plaint and written statement there was no allegation as to the effect of this deed on the method of accounting by the plaintiffs or by the defendants. Some attempt has been made to construe a certain paragraph of the plaint, namely paragraph 2 (*d*) (*v*), as an allegation favouring the method of account adopted by the Additional Judge but in my opinion this attempt fails. That paragraph of the plaint is merely an inaccurate recital of the terms of the deed itself, and, that the defendants understood this to be so, is clear, from the fact that in the written statement the reply to this portion of the plaint is "for the terms laid down in the deeds, the deeds may be perused." In the additional pleas of the defendants it is urged that the sum due to the mortgagee from the property in dispute amounts to more than five lakhs but this vague statement cannot be construed as asserting any method of account. The consequence was that no issue was framed by the Additional Judge as to the method of accounting or (and this is really the same thing) as to the construction to be placed on the language of the fifth deed. There was no denial that the fifth deed did provide for compound interest. The only question was whether the Court should enforce this compound interest. When the Court had decided that it would not enforce compound interest the office was ordered in the judgment to prepare an account in view of the terms of the findings. It is curious that the Court set forth in its judgment the terms of the first four deeds and then used these words "having understood the terms of these four deeds it would be easy to prepare the accounts." It never explained the terms of the fifth deed and, as a matter of fact, it was impossible to prepare the account without coming to a decision as to the construction to be placed on this fifth deed. It is probable that the office found some difficulty in preparing the account and we find that both parties put in applications giving their views as to the method in which the account should be filed. The plaintiffs-respondents in their petition, Exhibit Z 3 (which has played an important part in the arguments before me) stood out very strongly for the method finally adopted by the Additional Judge which is the very method which they reprobate now. The defendants-appellants set forth three methods and expressed their preference, in favour of one with which we are not now concern-

ed. The Additional Judge passed an order, "the account filed by the plaintiffs, Exhibit Z 3 on the 11th March 1913 has been carefully gone into. I find the account has been prepared in accordance with the findings announced." It may be mentioned that the reason why the plaintiffs' Pleader urged the method of accounts which he did urge and which he now reprobates was that if compound interest was not to be allowed he got some advantage by that method over other possible methods. The Judicial Commissioner has held that the plaintiffs-respondents cannot be held down to their application, Exhibit Z 3, inasmuch as it was an application put in on the understanding that compound interest would not be allowed. The first Additional Judicial Commissioner has dissented from this view on the ground that the only section in virtue of which the plaintiffs-respondents could claim to have set aside the method of account adopted by the lower Court is O. XLI r. 22, which allows a respondent to support the decree of the lower Court on any of the grounds decided against him in the Court below. He has held that there was a definite decision on this point not against the respondents but in their favour and that consequently the provision of law just mentioned will not apply. He rejected the suggestion that the method of account adopted by the lower Court was one adopted by the Court inevitably in pursuance of its decision in favour of simple interest and consequently one for the adoption of which the respondents could not be held responsible. If it appeared to be necessary to meet the argument that the decision by the lower Court to adopt the method of account that has been adopted was a decision in favour of the respondents and not against them, I would point out that this decision was only in favour of (not adverse to) the respondents so long as the decision to award simple and not compound interest was maintained. As soon as this Court set aside that decision in favour of a decision to award compound interest the decision by the lower Court as to the method of taking accounts became adverse to the respondents. I should not, therefore, be disposed to hold that they could not rely on O. XLI, r. 22. At the time that the respondents had to open their mouths in respect of the account the decision of the lower Court as to method had become unfavourable to them. At the same time I would prefer to support the finding of the Judicial Commissioner on another ground. It is this. All proceedings as to the method of taking accounts occurred in the lower Court after its decision to allow only simple interest. Such proceedings must be read along with that decision and as soon as that decision was upset by this Court it was open to this Court to give such directions as it thought fit as to the taking of accounts. It is to be observed that in the order of this Court dated the 8th November 1921 it was taken for granted that this Court could give such directions as it thought proper as to the taking of accounts, irrespective of any method adopted by the lower Court. This order was concurred in by the First Additional Judicial Commissioner so that it is clear that he took the view I am now favouring at the time. It was only subsequently that he changed round to the view that the method adopted by the lower Court could not be varied. In short my decision is that whether the respondents could or could not claim a reversal of the method of accounting adopted by the lower Court, it was open to this Court to reverse that method as soon as it upset the decision of the lower Court as to the nature of interest to be allowed. It has been argued before me that the emphatic statement in Exhibit Z 3 of the plaintiffs-respondents in favour of an interpretation of the fifth deed requiring the method adopted by the lower Court acts in some way as an estoppel. It is sufficient to say that the question of the proper construction to be placed on the deed was a question of law and that there can be no estoppel by a pleading of law inasmuch as the other side must be presumed to know what the law is. Accordingly I decide that the Judicial Commissioner was correct in holding

that it was open to this Court to vary the method of account embodied in the statement of account filed by the plaintiffs-respondents in the Court below on the 11th of March 1913.

The second question is:—

What amount, if any, on a true construction of the deeds was due to the plaintiffs or the defendants on the date of the decree of the Court below?

With respect to this question I would point out that under section 98, Civil Procedure Code, it is necessary for me to concur in the view of law, that is in the construction placed on the fifth deed, adopted by one or other of the differing Judges in order that there should be a decision of the majority. If I do not concur with either of the other Judges, the appeal would fail.

The resume of the deeds given above by me will serve to sufficiently set forth the terms of the first four deeds but the decision in this case rests on the construction of the fifth deed and it appears to me desirable to set forth certain terms in this deed precisely. The money advanced was Rs. 375 and it was advanced as a further charge (*zar-i-mazid*) on the two shares in the profits of the *bazar* mortgaged respectively with possession in the first deed of the 9th November 1873 and the second deed of 19th September 1875. Then follows this sentence according to the translation of the First Additional Judicial Commissioner:

"I hereby agree and reduce it to writing that the principal amount specified above shall be paid by me after the expiry of the time under both the registered deeds dated 9th November 1873 and 19th September 1875, along with the mortgage-money of the deeds mentioned above and the two deeds of further charge, dated 4th May 1876 and September 1876, amounting to Rs. 99 or whatever money more or less on adjustment of accounts may be found due in respect of the deed dated 19th September 1875, the whole of this I will pay at one time (*sab ek sath ada karunga*)."

The time for redemption of the first deed was the 9th November 1879 and the time for redemption of the second deed of 1875 was when the surplus profits of Rs. 169 wiped out the principal. It is common ground that this was on the 1st January 1882. Consequently this fifth deed could be redeemed at this later date. The meaning of the rest of the passage must be that the principal money due under this fifth deed was to be paid "along with the mortgage-money due under the deed of 1873 as swelled by the two deeds of 1876 for Rs. 99 each and whatever money 'equal to or less' *than* the principal of Rs. 500 should be found due on the deed of 1875 after accounts." The question of the meaning of the words "along with" will be discussed later. The next sentence is:

"And I agree that I will pay from my own pocket the interest on the principal money secured by this deed until redemption of the deed every six months at the rate of two per cent. per mensem on the dates fixed below and that if the interest of any six months be not paid the interest on the principal amount calculated at six pies per rupee per mensem instead of Rs. 2 per mensem shall be added to the principal after every six-months and compound interest thereon also which may be found due under accounts shall be paid at the time of redemption after the expiry of the said term."

This has been taken by the First Additional Judicial Commissioner to mean that the interest must be paid independently of any surplus profits from the property. The deed goes on to state:

"I agree that unless I pay up the money I shall not be entitled to redeem any of the mortgaged properties entered in the above mentioned deeds, nor shall I get any surplus amount out of the income of the *bazar* without payment of the interest and principal amount due under this deed."

The First Additional Judicial Commissioner taking into consideration the three conditions, that the money under this fifth deed should be paid along with the money due under the other four deeds, that the interest on this fifth deed should be paid out of the covenantor's own pocket, and lastly that no profits should be paid over to the covenantor from the *bazar* until this deed was paid up in full, has expressed an

opinion that the meaning was that there could be no redemption of the property until the covenantor tendered at one and the same time the moneys, principal and interest, due under the first four deeds and the money principal and interest due under the fifth deed. He was not to be allowed to set off any profits against the interest or principal of the fifth deed and consequently any surplus profits after redemption of the first four deeds would merely remain in suspense, with interest paid by the mortgagee at one per cent. until the date of decree of this Court. This opinion he has expressed in the preamble to his judgment. Further on he expressed the opinion that, right or wrong, the method of the lower Court cannot be varied; and finally he expresses the opinion that if it is varied the surplus profits should be used in the account to liquidate the deeds principal and interest according to their priority in time. It is not clear to me why having expressed in the first part of his judgment the view that the lower Court's method was correct, he should not have held that, even if one could go behind the method of account adopted by the Additional Judge, that method should be found the right one.

I disagree with his view. In my opinion it was so inequitable to require that the interest on this fifth deed should mount up at six pies per rupee per mensem *i. e.*, Rs. 37-8 per cent. per annum while the mortgagee had more than enough in surplus funds to pay this interest (from the share of the *bazar* mortgaged under the deed of 1875 after that deed was satisfied out of the usufruct), that I would favour any construction of the deed in reason which would avoid such a result. Again the condition providing that the mortgagor should not get any surplus amount out of the income of the *bazar* without paying the principal and interest due under this fifth deed certainly suggests that this surplus amount should be used for liquidating the interest and principal of this fifth deed. I do not find that the provision that the mortgagee should pay out of his own pocket the interest on this fifth deed an insurmountable difficulty to this interpretation. It must be remembered that between the 11th January 1878 (the date of this fifth deed) and 1st January 1882 there were three years to elapse and the immediate intention of the parties may well have been that this interest should be paid out of the pocket of the mortgagor. Nor again do I consider that too much importance should be attached to the words "along with" in the provision that the principal due under this fifth deed should be paid along with the mortgage-money due under the other four deeds What appears to have been considered most important by the parties at this time was that this fifth deed should not be redeemed before the other four deeds, for the obvious reason that, if the other four deeds were redeemed first, the mortgagee would lose possession of the property which was security also for the money advanced by this fifth deed. I would interpret the words "along with" to mean "not before". The deed is not expressed generally in such exact language as to require a meticulous adherence to every word of it as apart from its obvious intention. It is clear for instance that the expression "more or less" is used for "equal to or less". In support of this interpretation of the words "along with", I would draw attention to a judgment of this Court *Chandrika Pershad* v. *Jagannath* (3). In that case the terms of the contract required that a certain prior mortgage should not be redeemed until a deed of further charge was paid up. The judgment of this Court contains the following passage:

"I am of opinion, therefore, that the deed of 1889 was intended to create a further charge on Gangapur and that the Court below has rightly held that the plaintiff should pay it off at the time of redeeming Gangapur".

Now in this judgment it is obvious that the meaning of the words "at the time of redeeming" was "not before". When therefore we find this Court in a judgment using the words "at the time of" loosely for "not before" it is not extraordinary if the same thing occurred in this deed. I think it may be said that

(3) 8 O. C. 227 at p. 230.

in many deeds where it is provided that a deed of further charge shall be paid up along with an earlier deed the meaning is nothing more than that it shall not be paid up before. Accordingly I hold that the method adopted by the lower Court was not the correct one.

The next question is to consider whether accounting according to priority of the deeds, which is the method supported by the First Additional Judicial Commissioner in the last part of his judgment, is the proper one?

For the following reasons I hold that it is not. In the first place it is to be observed that this fifth deed is a further charge not only on the share in the *bazar* mortgaged by the deed of 1873 but also on that mortgaged by the deed of 1875. While hesitating to assent to the argument that this fifth deed was a deed under which the mortgagee took possession of the mortgaged property (inasumch as it gave the mortgagee a right to continue in possession of the property mortgaged by the deed of 1875 after that mortgage was redeemed from usufruct) and consequently brought into operation section 76 (*h*) of the Transfer of Property Act, at the same time I hold that where property is made subject to a further charge, surplus profits should be used to liquidate the interest on the further charge in preference to liquidating other deeds which have no connection with the property, in the absence of any express agreement to the contrary. Secondly it has freqently been ruled that, notwithstanding anything in section 61 of the Contract Act, in the absence of appropriation, payments of surpluses should be appropriated to interest before they are appropriated to principal on any particular debt. The fifth deed being a further charge on both the properties mortgaged by the deed of 1873 and by that of 1875 has to be treated as constituting along with those deeds a consolidated debt. Any interest, therefore, due under this fifth deed should be paid off in preference to any principal due under the deed of 1873. Lastly I hold that the clear intention of the fifth deed was that the interest and principal under it should be liquidated before any principal due under any of the other four deeds.

We now come to the method adopted by the Judicial Commissioner. This method is based on the view that the fifth deed must be satisfied in preference to the others. It is stated as follows:

"Applying the surplus income of the *bazar* mortgaged in the deed of 1873 and 1875 in satisfaction of the last deed of further charge and when that deed is satisfied in discharge of the deeds of further charge of 1876, which stand on an equal footing in order of priority and then in satisfaction of the mortgage of 1873, a sum of Rs. 7,910-11-7 appears to be due to the plaintiffs on the date of the decree of the Court below. The account of the 21st February 1922 prepared by the office seem to be correct and in consonance with the covenants contained in the several deeds.....The appeal should in my opinion be dismissed except in so far that the surplus allowed to the plaintiff should be reduced to Rs. 7,910-11-7 as on the date on which the decree of the Court below was passed. The parties should in the circumstances bear their own costs after the remand."

I am of the opinion that this is in accordance with the proper construction of the fifth deed and my answer to the second question is that I agree with the Judicial Commissioner that the sum just mentioned should on a true construction of the deeds be found due to the plaintiffs.

Kanhaiya Lal, J. C. and Lyle, A. J. C.—In accordance with the opinion of the learned Second Additional Judicial Commissioner this appeal is dismissed except in so far that the surplus allowed to the plaintiffs by the Court below would be reduced to Rs. 7,910-11-7, as on the date on which the decree of the Court below was passed. The parties should in the circumstances bear their own costs in this Court after remand. The costs incurred by the plaintiffs in the Court of first instance and in the appeals to this Court and to His Majesty in Council prior to the remand shall be charged against the defendants.

Z. K. *Order accordingly.*

BADRI DAS JANAKIDAS *v.* MATHANMAL.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL NO. 173 OF 1921.

February 6, 1922.

Present :—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Abdul Qadir.

THE FIRM BADRI DAS-JANAKIDAS OF DELHI—DEFENDANT—APPELLANT

versus

MATHANMAL AND OTHERS—DEFENDANTS PLAINTIFFS—RESPONDENTS.

Letters Patent (Punjab), cl. 10—"*Judgment,*" *meaning of—Interlocutory judgment—Order refusing stay of execution—Appeal.*

The term "judgment" in section 10 of the Letters Patent (Punjab) includes an interlocutory judgment which decides, so far as the Court pronouncing such judgment is concerned, whether finally or temporarily, any question materially in issue between the parties and directly affecting the subject-matter of the suit. [p. 328, col. 1.]

The order of a Single Judge of the High Court refusing to stay execution of a decree, which is under appeal to the High Court, is a "judgment" within the meaning of the term in clause 10 of the Letters Patent (Punjab) and is appealable. [p. 328, col. 2.]

Brij Coommaree v. *Ramrick Das*, 5 C. W. N. 781 and *Gokal Chand* v. *Sanwal Das*, 55 Ind. Cas. 933; 1 L. 348; 12 P. W. R. 1920; 79 P. L. R. 1920; 2 L. L. J. 32, followed.

Letters Patent Appeal against the order of Mr. Justice Harrison, dated the 23rd June 1921.

Lala *Sardha Ram*, for the Appellant.

Lala *Moti Sagar*, R. S., Lalas *Prem Lal* and *Rupram*, for the Respondents.

JUDGMENT.—This is an appeal under clause 10 of the Letters Patent against an order of Mr. Justice Harrison, dated 23rd June 1921, rejecting an application for staying execution of a preliminary decree, passed against the defendants-appellants by the Senior Subordinate Judge of Delhi. The plaintiff firm sued the defendant firm for a dissolution of partnership and for accounts and obtained a preliminary decree on the 11th June 1921, by virtue of which the Official Receiver was authorised to go into the accounts of the defendants and to certify the result to the Court for the purpose of a final decree being passed. The defendant firm preferred an appeal to this Court against the preliminary decree and after the appeal was admitted, applied that the execution of the preliminary decree be stayed, on the ground that substantial loss would be caused to the defendants, if the Receiver would take charge of their assets and their account-books, as this might result in the closing of their business. They also urged that the time and money spent in carrying out the orders of the Court as embodied in the preliminary decree, would be wasted if it is set aside on appeal. The learned Judge in Chambers, who disposed of the application, passed the following order in rejecting it:—"I do not think that sufficient reason has been shown for staying execution and preventing the preliminary decree from developing into a final decree until the appeal has been decided."

The defendant firm has appealed against the above order and the main grounds of appeal are that if a final decree is allowed to be passed the appeal from the preliminary decree will become useless and that the proceedings in execution are likely to be expensive and protracted. Rai Sahib Moti Sagar on behalf of the respondents, has raised a preliminary objection, that the order under appeal is not a "judgment" and is therefore not appealable. It is contended that the word "judgment" for the purposes of an appeal under Letters Patent, means a decision which affects the merits of the question between the parties by determining some right or liability and that the order passed by the learned Judge in Chambers does not belong to the category of such orders as amount to judgments. We are referred to a decision of the Madras High Court, in *Palaniappa Chetti* v. *Chidambaram Pillai* (1) which relates to an order staying the further trial of a suit passed by a Single Judge of the High Court, against which it was held, there could be no appeal. The next case cited is a decision of the Bombay High Court *Vanichand Rajpal* v. *Lakhmichand Maneckchand* (2) in which it has been held that an order refusing to restrain the defendant from prosecuting a suit filed by him against the plaintiff in a Court of a Native State is not a judgment and no appeal lies against it. We have also been referred to *Muralidhar Chamaria* v. *Dalmia* (3), in which

(1) 30 Ind. Cas. 942; 18 M. L. T. 312.
(2) 53 Ind. Cas. 395; 21 Bom. L. R. 955.
(3) 49 Ind. Cas. 120; 45 C. 818.

it is held that an order of a Single Judge sitting on the Original Side, refusing an application by a defendant for leave to file his written statement is not a judgment and no appeal lies from it. It is not necessary to mention all the cases cited on behalf of the respondents, as like the cases noted above, they were referred to only by way of analogy and are not directly applicable to the question before us.

Lala Sardha Ram, who argued before us the case for the appellants, relies on a decision of the Calcutta High Court, *Brij Coomaree* v. *Ramrick Das* (4) which is an authority in point. There a Single Judge to whom an application was made for staying execution of an order passed by the same Judge in the matter of Probate, refused to stay execution. It was held that a Letters Patent Appeal was competent against the said order. Reliance is also placed on *Gokal Chand* v. *Sanwal Das* (5) in which a Division Bench of this Court has laid down that an appeal lies from the order of a Single Judge refusing to stay execution of a decree, which is under appeal to the High Court and that "the term judgment in section 10 of the Letters Patent includes any interlocutory judgment which decides, so far as the Court pronouncing such judgment is concerned, whether finally or temporarily, any question materially in issue between the parties and directly affecting the subject-matter of the suit." This view appears to be in accord with the comprehensive definition of the word "judgment" given by Sir Arnold White, in the Full Bench ruling of the Madras High Court, published as *Tuljaram Row* v. *Alagappa Chettiar* (6). We cannot see much difference in principle between the case before us and that decided by the Calcutta High Court in *Brij Coomaree* v. *Ramrick Das* (4), *Gokal Chand* v. *Sanwal Das* (5) is clearly applicable to this case. The preliminary objection is, therefore, overruled.

As regards the merits of the case Lala Sardha Ram argues as indicated above, that the execution of the preliminary decree would mean substantial loss to the appellants. This is disputed by the other side and it is further urged that the learned Judge in Chambers having exercised a discretion vested in him by law in favour of the respondents, his order should not be disturbed, unless there is anything to show that it was without jurisdiction, or was passed with material irregularity, or there is any adequate proof that some loss would be occasioned by it to the appellants which can be called substantial. While recognizing the soundness of this proposition, we think, after weighing carefully the arguments addressed to us on both sides, that there are circumstances in this case which go to show that the appellants do stand to lose substantially if the preliminary decree is executed and is allowed to develop into a final decree before their appeal from the preliminary decree is adjudicated upon. One obvious loss is that the appeal which is pending becomes useless. Another probable loss is that the business of the appellant firm will be seriously disturbed by their account-books passing into the hands of the Receiver. Where the process is likely to be a protracted and expensive one, as appears to be the case in the present instance, the balance of convenience is in favour of staying the execution rather than proceeding with it. We, therefore, accept this appeal and stay the execution proceedings till the decision of the appeal from the preliminary decree. The appellants must, however, furnish security to the satisfaction of the Executing Court for any decree for which he may be found liable. We also direct that in order to avoid a undue hardship to the respondents, an early date be fixed for hearing of the said appeal in this Court. We leave the parties to bear their own costs of this appeal.

N. H. *Appeal allowed.*

(4) 5 C. W. N. 781.

(5) 55 Ind. Cas. 933; 1 L. 348; 12 P. W. R. 1920; 79 P. L. R. 1920; 4 L. L. J. 32.

(6) 8 Ind. Cas. 340; 35 M. 1; (1910) M. W. N. 697; 8 M. L. T. 453; 21 M. L. J. 1.

DWARA PRASAD *v.* RAM DEI.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 22 OF 1922.

April 19, 1923.

Present:—Mr. Dalal, A. J. C.
and Mr. Simpson, A. J. C.

DWARKA PRASAD—PLAINTIFF—APPELLANT

versus

Musammat RAM DEI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Alienation by co-parcener—Separation—Suit by co-parcener to challenge alienation—Transaction, whole, whether can be set aside—Limitation, commencement of—Limitation Act (IX of 1908), Sch. I, Art. 120.

Under the Mitakshara a single member of a joint Hindu family, whose rights have been infringed by a sale of joint family property, can have the entire sale set aside. [p. 330, col. 1.]

Sahu Ram Chandra v. *Bhup Singh*, 39 Ind. Cas. 280; 39 A. 437 at p. 442; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R 498; 26 C. L. J. 1; 33 M L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.); followed.

A member of a joint Hindu family may purport to alienate his own share in the family property, but by doing so he does not effect separation. [p. 331, col. 1.]

A suit by a Hindu co-parcener for a declaration that an alienation of family property by another co-parcener is void *ab initio* is governed by Art. 120 of Sch. I to the Limitation Act, and limitation begins to run from the date on which the plaintiff comes to know of the alienation. [p. 331, col. 2; p. 332, col. 1.]

Appeal from the decree of the Subordinate Judge, Bahraich, dated the 20th February 1922.

Messrs. *Gokaran Nath Misra* and *K. P. Misra*, for the Appellant.

Mr. *H. K. Ghosh*, for Respondents Nos. 1 and 2.

JUDGMENT.

Simpson, A. J. C.—This is a first appeal by a plaintiff. The suit was one to set aside a sale. The pedigree will be found on page 2 of the record but it is not entirely correct. The plaintiff's case is that he is the only son of *Musammat* Lalita, the second wife of Har Bhajan, while Mata Prasad, Ram Narain and Salig Ram are his half-brothers, being the sons of Har Bhajan by his first wife *Musammat* Dhanbhasa. The sale which is attacked is dated 11th June 1909 and the deed was executed by *Musammat* Dhanbhasa, defendant No. 3, Suraj Bakhsh, defendant No. 4, Mata Prasad, defendant No. 12, Ram Narain, defendant No. 15, and Salig Ram, defendant No. 18 in favour of Ram Nidh and Ram Adhin. Both vendees are dead. The first defendant, *Musammat* Ram Dei is the widow of Ram Adhin. The second defendant is the son of Ram Nidh. The other defendants will all be found in the pedigree. They are the people who executed the sale-deed and their sons. The plaintiff's case is that the family originally came from Gwalior and that they still hold some property there. Har Bhajan had two wives; the first *Musammat* Dhanbhasa of Bahraich district who lived in Gajadharpore and the second *Musammat* Lalita who came from Gwalior. Har Bhajan died, being then a member of joint family which consisted of himself, his three sons by his first wife, namely, Mata Prasad, Ram Narain, Salig Ram, his son by his second wife, Dwarka Prasad, and his nephew Suraj Bakhsh. Five months after his death his second wife *Musammat* Lalita, not getting on well with *Musammat* Dhanbhasa, went back to Gwalior, taking with her her infant son the plaintiff. Thus it came about that on 11th June 1909, the plaintiff being then a minor and absent in Gwalior, this sale-deed was executed without his knowledge and in derogation of his rights. Accordingly he sues to set it aside. The defendants Nos. 1 and 2 representing the vendees contested the suit on various grounds. The first was that the plaintiff is a fictitious person, that Har Bhajan had only three sons. Their next point was that the sale was for family necessity, and the third that the suit is barred by time. The defendant Nos. 3, 4, 12, 15 and 18 who had actually executed the sale-deed did not put in a written statement. It would have been difficult for them to do so. They must either have said that the plaintiff's claim was bad, which they are not prepared to do, for they are supporting him, or have admitted that they themselves had practised a fraud upon the vendees. The other defendants put in a written statement admitting the pedigree, saying that no cause of action had accrued against them, and claiming exemption from

costs The Court of trial decided all the points in the plaintiff's favour. On the first issue it was found that the plaintiff was the legitimate son of Har Bhajan. On the second it was found that the joint family is still undivided. On the third it was found that the property in suit is ancestral property of the joint family. On the 4th and 5th and 7th it was found that there was no legal necessity and on the 8th it was held that the suit was in time. Accordingly a decree was passed in favour of the plaintiff. But the sale-deed was not set aside *in toto*. A declaration was given that the sale-deed was not binding on the plaintiff to the extent of his share in the disputed property, and that share was declared to be 1/8th. The only point taken by the plaintiff in appeal is that on the findings of the Court of trial the decree ought to have been for a declaration that the sale was void *in toto*. There is no doubt that that is the Mitakshara Law as it is administered in these Provinces and in Bengal. A single member of a joint Hindu family, whose rights have been infringed by a sale of joint family property, can have the entire sale set aside. Either the vendors were entitled to deal with the joint family property, in which case the alienation is valid, or they were not entitled to do so, in which case they cannot alienate even their own share. This proposition of law is not disputed by the respondents. Indeed it is elementary. But I may quote from the recent Privy Council ruling; *Sahu Ram Chandra* v. *Bhup Singh* (1):

"Under the law of the Mitakshara the joint family property owned, as stated, by all the members of the family as co-parceners, cannot be the subject of a gift, sale or mortgage by one co-parcener, except with the consent, express or implied, of all the other co-parceners. Any deed of gift, sale or mortgage granted by one co-parcener on his own account or over the joint family property is invalid, the estate is wholly unaffected by it and its entirety stands free of it."

As regards the appeal, therefore, there is only one question of decision and that is whether the plaintiff can ask to have the sale set aside *in toto*, or only as regards his own share. The plaint is not as clear as it might have been, but there is more than one indication in it that the plaintiff was asking to have the whole sale-deed set aside. Thus in paragraph 7 of the plaint, it is stated that "the sale-deed is invalid and void" and in paragraph 10 in the relief a declaration is asked for "that the sale-deed is invalid and void and liable to be cancelled." It is true that in paragraph 7 the words are "contrary to the plaintiff's right" and in paragraph 10 "prejudicial to the plaintiff's rights." But we construe these words as being merely an assertion of the plaintiff's right to sue, not as limiting the relief sought. The word used in both cases is *haquq* (rights). There is no reference in the plaint to the plaintiff's *hissa* (share). Again the valuation of the claim for the purpose of jurisdiction is Rs. 11,000 which is the value of the whole of the property, not of the plaintiff's share. There is no more to be said about the appeal.

It is the cross-objection which raises the real points of the case. The vendees, defendants Nos. 1 and 2, have raised again most of the points which they raised in the Court of Trial. The points for decision are as follows:—

1. Is the plaintiff a son of Har Bhajan?
2. Has there been a separation between Suraj Bakhsh on one side and the plaintiff and his brothers, on the other?
3. Is the property in suit ancestral?
4. Are the vendees protected by section 41 of the Transfer of Property Act?
5. Is the suit within limitation?
6. Was the sale made for family necessity?

On the first point we agree with the finding of the Court of Trial. The question is one of fact and it has been adequately dealt with in the judgment under

(1) 39 Ind. Cas. 280; 39 A. 437 at p. 442; 21 C.W. N. 698; 1 P. L. W. 557; 15 A. L. J 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 813; 44 I. A. 126 (P. C.).

appeal. It is sufficient to say here that the plaintiff himself went into the witness-box, that his mother and his step-mother were both examined on commission, and that there were numerous other witnesses both from Bahraich and Gwalior to the plaintiff's parentage. There are also certain proceedings in the Revenue Courts of Gwalior in which Ram Narain obtained mutation of the village Hurras in the name of himself and his brothers Mata Prasad and Dwarka Prasad. This will be found at page 10 of Part III. It is dated 24th February 1905. Similarly there is Exhibit 6 on page 31 of Part III dated 12th February 1912 in which mutation of names in favour of Ram Narain is set aside and it is ordered that Dwarka Prasad and Mata Prasad's names must be added. These proceedings are all along before the present litigation. We find then that the plaintiff is really the son of Har Bhajan.

The evidence offered of the separation consists of alienations of their shares made by the various members of his family. This is no doubt *pro tanto* evidence of separation but, taken by itself, it is not sufficient. A member of a joint family may purport to alienate his own share. By doing so he does not effect separation. These alienations are all earlier than the sale-deed now in question and they relate to the same property, which is described in the sale-deed as joint and ancestral. We find, therefore, that there was no separation. We may add that the point was never clearly pleaded.

The only point brought to our notice to prove that the property was not ancestral is Exhibit 12 on page 1 of Part III which shows that when Ghheda Singh died, mutation was effected in favour of Har Bhajan, his brother and Suraj Bakhsh Singh, his nephew. All these names will be found in the pedigree on page 2 of Part I. This entry, however, is not in favour of the respondents, for, if the property had passed as self-acquired property by inheritance, Har Bhajan would have got the whole of it. The fact that Suraj Bakhsh was entered as having a half share in it shows that he and Har Bhajan took the property by survivorship as ancestral property. Another important piece of evidence will be found on page 53 of Part III. This is an admission of the vendees as plaintiffs in a suit which they had to bring to get possession of the property, that it is ancestral (paragraph 8 of the plaint). We find, therefore, that the property is ancestral.

Are the vendees protected by section 41 of the Transfer of Property Act?

This is part of a larger question. If the plaintiff's suit is honest, section 41 has no application because there would be no consent of the plaintiff to the vendors appearing as ostensible owners. When Har Bhajan died, *Musammat* Dhanbhasa, the senior widow, succeeded in getting mutation in her own name, not only to the exclusion of the plaintiff and his mother, but also to the exclusion of her own three sons. The mere fact that the plaintiff allowed *Musammat* Dhanbhasa's name to stand in the *khewat* would not attract the provisions of section 41 of the Transfer of Property Act.

Is the suit within limitation?

This issue is also a part of the larger issue, whether the plaintiff's suit is honest? The plaintiff's account of the matter is that he did not know that there had been any sale-deed at all until he received the letter Exhibit 7 printed on page 89 of Part III. We are not impressed by this letter. It is written by one Ram Bahadur Singh who had no particular occasion to write it. He is not even of the same caste as the plaintiff. It reads to us like a letter manufactured for the purposes of the case and we find it difficult to believe that the plaintiff was up to that time in blissful ignorance. It is true that the vendees have never yet obtained possession of the property. This is why the present suit is one for declaration. But there has been a great deal of litigation. Now if the plaintiff was aware of these proceedings he is beyond limitation. Article 91 does not apply to a suit of this nature. The plaintiff is not suing to cancel or set aside the sale-deed but for a declaration that the sale-deed is void *ab initio*. On the other hand he is not suing for possession. The article applicable is 120. The period is six years beginning

from the time when the right to sue accrued and that would be when the plaintiff came to know of the sale-deed. The present suit was brought on the 13th September 1920. It was in time if the cause of action accrued on or after 14th September 1914. The sale-deed was executed on 11th June 1909. The first attempt to defeat the vendees was by means of a lease dated 10th June 1909. The vendees had to bring the suit for the cancellation of this lease. This is Suit No. 2 of 1911 and it was settled by a compromise dated 13th February 1911 whereby a decree was passed for the cancellation of the lease. Still the vendees did not get possession and for that they had to bring another suit on 7th March 1918 for possession under their sale-deed. Suraj Bakhsh Singh and others, vendors, disputed the case, taking every plea they could think of except that they did not mention the existence of the plaintiff, Dwarka Prasad. The Court of Trial dismissed the suit on a finding that the alienation was not supported either by family necessity or by antecedent debt. An appeal was filed, which was heard by a Bench of this Court. It was considered advisable to settle for the Courts in Oudh a point whether a debt secured by a mortgage of joint family property but not yet time-barred as a simple money debt, is to be regarded as an antecedent debt such as would support an alienation of joint family property. It was decided by that Bench that such debt is an antecedent debt. Accordingly the appeal was allowed and the suit decreed with costs in both the Courts. The date of that decision is 6th July 1920. But as the date we are in search of is the year 1914 the whole of this second litigation is beside the point. There is nothing to show that the plaintiff was aware of the proceeding which resulted in the cancellation of the lease in the year 1911. He appears to have been born in 1894, so that he would appear to have been passed of age at that time, and so far as we know, he was living in Gwalior. The evidence that he made collections of rent in Bahraich is all later than 1914. When he was in the witness box he was not cross-examined at all effectively on this point. He said "During these three years I visited Gajadharpore on four or six occasions." But that is all. In the Court of Trial he set up a cause of action which was within time, and that was accepted. We are disposed to reject that cause of action. It remains probable that he had a cause of action within time. He cannot be expected to prove the negative that he did not know of the sale-deed and there is nothing to show that it was communicated to him at any period which would put him beyond time.

The question of family necessity was very faintly argued. It is a question of fact and the various items have been fully discussed in the judgment under appeal. The sale-deed was executed for the purpose of paying off various debts incurred by the individual members of the family and it is not shown that these individual debts were taken for family purposes.

There remains the general consideration whether the plaintiff's suit is honest. It is clear that the vendors have not been honest. After they had given this sale-deed and got good money for it, they proceeded to give a lease of the same property. Even after this lease was cancelled by the Court, they withheld possession of the property, and denied the execution of the sale-deed. When that case was finally decided against them, they remained silent. When the plaintiff brings the present suit no doubt they are supporting him, for both Suraj Bakhsh and *Musammat* Dhanbhasa are plaintiff's witnesses. It is with some regret that we find ourselves unable to give effect to this consideration. It is quite probable that defendants Nos. 1 and 2 might have succeeded if they had been represented by competent Counsel in the Court of Trial. Facts might have been brought out which would have established collusion between the plaintiff and the vendors. For example, Suraj Bakhsh went into the witness-box. If he had had to face a competent cross-examiner something would have been elicted from him. The question would have been put "When you executed this sale-deed, did you intend to cheat your half-brother Dwarka Prasad by selling joint family property which was partly his, or did you intend to cheat the vendees by pretending to sell what you knew you were not entitled to sell." But no question of the sort was put to him. On the

record, as it stands, we find no material on which we can differ from the findings of the Court of Trial. All these findings therefore stand good and the cross-objection is dismissed with costs. The appeal on the other hand succeeds and the plaintiff will get a declaration that the sale is altogether void as far as he is concerned and that the whole of the family property stands unaffected by it. He will also get his costs in both Courts. As to the liability of the vendors to their co-defendants vendees, that question is not before us and we say nothing about it.

Dalal, A. J. C.—I agree.

Z. K.

Appeal allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 180 OF 1920.

February 17, 1923.

Present:—Mr. Justice Scott-Smith and Mr. Justice Fforde.

RODHA RAM—DEFENDANT—APPELLANT

versus

AMAR CHAND—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Hindu Law—Joint family—Alienation by father—Necessity—Inquiry—Burden of proof.

A person who takes a mortgage from a Hindu father in consideration of a present advance, as opposed to an antecedent-debt, is bound to establish in a suit brought by a son of the mortgagor to challenge the validity of the alienation, so far as it affects his interests, that the advance was made by him after a reasonable and fair inquiry which satisfied him, as a prudent man, that the money was required for the legal necessities of the family. [p. 334, col. 1.]

Second appeal from a decree of the District Judge, Jullundur, dated the 28th October 1919, affirming that of the Munsif, First Class, Jullundur, dated the 2nd April 1919.

Diwan *Mehr Chand*, for the Appellant.

Messrs. *H. D. Bhalla* and *Faqir Chand*, for the Respondents.

JUDGMENT.—The suit out of which this appeal arises was brought for a declaration that a certain sale-deed, dated the 20th October 1916, should be held not to affect the reversionary rights of the plaintiff.

The deed in question was for the sale of certain ancestral lands by Maya Mal the father of the plaintiff, to one Radha Ram.

Both the Courts below have held that the plaintiff is entitled to the declaration prayed for. The grounds relied upon by the plaintiff in his suit were that the lands being ancestral, and the family being a joint Hindu one governed by Hindu Law, the sale can only be valid as against the plaintiff if made for consideration and for valid necessity. The main point in issue was whether or not there was valid necessity. The necessity alleged by the defence was the requirement of the purchase-money for payment of the expenses of the plaintiff's marriage.

It was found, however, by the Court below that it was not proved that the money was in fact raised for the purposes of the marriage. It appeared that the alienor was possessed of considerable property, and was in no need to raise funds.

On behalf of the alienee, defendant No. 2, it was argued that even upon these findings the transaction could not be impeached unless it could be shown that he had knowledge of these facts. It was concluded that the alienee was not bound to inquire into the actual necessities for the sale, and still less was he under any duty to inquire into the actual application of the purchase-money.

In support of this proposition, Counsel for the defendant cited the case of *Hunoomanpersaud Panday* v. *Musammat Babooee Munraj Koonweree* (1) and relied upon the following passage in the judgment delivered by Knight Bruce, L. J. :—

"Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself as

(1) 6 M. I. A. 393; 18 W. R. 81*n*.; Sevestre 253*n*.; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstances, he is bound to see to the application of the money."

The principles there expressed, however, when applied to the facts before us instead of supporting the appellant's case are entirely in favour of the respondent. The burden of proving that he acted *bona fide* and without knowledge that the necessity was fictitious lay upon the alienee. This has been very definitely established in *Charanjit Singh* v. *Telu Mal* (2) where it was held that a person who takes a mortgage of ancestral property from a father in consideration of a present advance, as opposed to an antecedent debt, is bound to establish in a suit brought by a son to challenge the validity of the alienation so far as it affects his interests, that the advance was made by him "after a reasonable and fair inquiry which satisfied him, as a prudent man, that the money was required for the legal necessities of the family."

In the present case it has been proved that the money was not required for the necessities of the family, and, moreover, the alienee has entirely failed to show that he made any inquiry whatsoever as to the necessity for the alienation. Not only has he not discharged this onus of proof, but it is quite obvious upon the indisputable facts before us that the smallest inquiry would have shown him that the alleged necessity was a pure fiction. The two defendants lived in adjoining villages within 200 *karams* of one another, and the vendee must have known perfectly well that the vendor was a man in excellent financial circumstances.

We are satisfied that the alienation was not for legal necessity, and that the decisions of the Courts below are correct, and we accordingly dismiss the appeal with costs.

But as the plaintiff and his father are members of a joint Hindu family, we amend the decree and make it one for a declaration that the alienation in question does not affect his rights.

Appeal dismissed.

Z. K.

(2) 152 P. R. 1888.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 735 OF 1920.

March 22, 1922.

Present:—Mr. Justice Ross.

MANNOO LAL CHOUDHURY AND OTHERS—DEFENDANTS—APPELLANTS

versus

LALJI CHAUBE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Bengal Tenancy Act (VIII of 1885), s. 51—Rent-suits—Res judicata—*Presumption.*

Whether the decision in a previous rent-suit operates as *res judicata* in a subsequent rent-suit, must be determined with reference to the question whether the issue in the previous suit related to the amount of rent payable for a particular period or to the rent payable for the full term of the lease. In the former contingency, the decision is not *res judicata*, in the latter event it is. [p. 335, col. 1.]

The decision in a previous rent-suit for a particular period of the lease may, however, be taken to determine the rent claimed in that suit, and to give rise to a presumption under section 51 of the Bengal Tenancy Act that the rent for the subsequent years remained the same. The effect to be given to this presumption depends on the whole evidence. [p. 335, col. 2.]

Mr. *Sambhu Saran*, for the Appellants.

Mr. *Lakshmi Narayan Singh*, for the Respondents.

JUDGMENT.—The plaintiff is the tenant of 2 *bighas* 11 *kathas* 18 *dhurs* of land which he alleges he held at an annual Hunda rental of 15 maunds of grain. In the recent Revisional Survey his rent was recorded as 30 maunds, and he has brought this suit for a declaration that his rent is 15 maunds a year. The defence was that

the rate of rent was 30 maunds, that in the Cadastral Survey it had been recorded erroneously as 15 maunds and that subsequently, the plaintiff agreed to pay at the higher rate. It was further pleaded that in Suit No. 2483 of 1918, rent was decreed for the years 1322 to 1325, at the rate of 30 maunds per annum. The Munsif decreed the plaintiff's suit and the learned Subordinate Judge dismissed the appeal.

The main question raised in second appeal is whether the rate of rent is not *res judicata* by reason of the decision in the suit of 1918. It is further argued that even if the matter is not *res judicata*, the decision in that suit raises a presumption as to the rate of rent and it would be for the plaintiff to show a subsequent agreement reducing the rent. In *Kishun Dayal Rai* v. *Kulpati Kuer* (1). Mr. Justice Atkinson laid down that "a judgment in a rent-suit did not in point of law amount to an estoppel and did not accord with the principles of *res judicata* unless the rent was payable at a rate stipulated by contract." Mr. Justice Mullick observed. "The question whether a decision as to the rate of rent operates as *res judicata* depends on the frame of the issue." In *Hurry Behari Bhagat* v. *Pargun Ahir* (2) it was held that the question depended upon whether the previous decision was that the plaintiff should recover from the defendant the sum admitted by him to be due, or that the sum so admitted to be due was the proper amount of rent payable for the period in question. In *Hara Chandra Bairagi* v. *Bepin Behary Das* (3) the rule was thus stated by Mr. Justice Mukherji*: "Whether the decision in the previous suit operates as *res judicata*, must be determined with reference to the question. whether the issue in the previous suit related to the amount of rent payable for a particular period or to the rent payable for the full term of the lease. In the former contingeney, the decision is not *res judicata*, in the latter event it is."

In the present case the pleadings in the previous suit have not been produced, and from the judgment there is nothing to show that it was not simply a suit for rent for the years 1322 to 1325. The issue was: "What is the Hunda payable by the defendant to the plaintiffs for the rent claimed land." This issue is equivocal and may be either general or particular. It is true that the judgment is not based on any special considerations, particularly relating to the years then in suit; but on the other hand, there is nothing to show that the Munsif was deciding anything more than the claim to the rent for the years for which rent was claimed. This judgment does not satisfy any of the tests laid down in the decisions cited above. The true rule applicable in this case is that stated in *Maharani Beni Pershad Koeri* v. *Raj Kumar Chowbey* (4): "We think that, so far as the rents of the years, which were in contest in that suit were concerned, the decision no doubt is an absolute bar under the doctrine of *res judicata* to any suit for the rents of those years. But so far as the rents or rates of rent of subsequent years are concerned, we do not think that the judgment can be held to be an absolute bar, so as to prevent the parties from raising the question in a subsequent suit. In our opinion, the prior decision may be taken to determine the rent claimed in that suit, and to give rise under section 51 of the Bengal Tenancy Act to the presumption that the rents for subsequent years remained the same." All that this judgment does is to raise a presumption as to the rate of rent for the following years and that in the absence of evidence of a subsequent agreement it remained the same. The effect to be given to this presumption depends on the whole evidence. The defendants' case was that there had been a *panchayat* at which the plaintiffs agreed to pay 30 maunds. It has been found that this was not proved. It has further been found to be proved that the plaintiff had paid 15 maunds previously and also that the defendants

(1) 45 Ind. Cas. 316; 3 P. L. J. 372; (1918) Pat. 238;
(2) 19 C. 656; 9 Ind. Dec. (N. S.) 880.
(3) 6 Ind. Cas. 860; 13 C. L. J. 38.
(4) 6 C. W. N. 380.

*See 2 Ind. Cas. 11—[Ed.]

failed to prove payment at 30 maunds subsequently. The case is, therefore, concluded by the findings of fact.

The appeal must be dismissed with costs.

N. H. *Appeal dismissed.*

LAHORE HIGH COURT.

CIVIL REVISION NO. 558 OF 1921.

January 4, 1922.

Present:—Mr. Justice Le-Rossignol.

FARIDA—PLAINTIFF—PETITIONER

versus

KHAIRA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115 O. IX, r. 9—Dismissal of suit for default—Restoration, application for, dismissal of—Revision.

Where a Court refuses to restore a suit dismissed for default, holding that no sufficient cause has been established for the absence of the plaintiff on the date of hearing, the order is not open to revision, as the Court cannot be said to have acted illegally or with material irregularity.

Civil revision from an order of the Munsif, First Class, Zira, District Ferozepore, dated the 13th June 1921.

Mr. *Abdul Ghani*, for the Petitioner.

Mr. *M. Hassan*, for the Respondents.

JUDGMENT.—The Court below has disbelieved the evidence that the plaintiff was unable to appear on the date fixed by reason of an attack of colic and it has refused to set aside the order of dismissal of the suit for default.

I fail to see how the Court below can be said to have acted illegally or with material irregularity. On the contrary, it appears to have had good reason for rejectin the plaintiff's story.

If plaintiff was ready to go on with the case and was absent only for a few minutes, wny did he not apply to the Court at once instead of on the next day? His witnesses say they were present and heard the case called. Why did they not go and call the plaintiff?

It is significant that on the day fixed for the hearing plaintiff had called no witnesses at all through the Court.

The Munsif's order was correct; in any case there is no scope for revision. I dismiss the petition with costs.

Z. K. *Revision dismissed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 434 OF 1922.

August 3, 1923.

Present:—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Coyajee.

CHANBASAPA PUTTAPPA—DEFENDANT—APPELLANT

versus

CHANBASAVA MALLAPPA YALIGAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Widow—Alienation—Necessity—Inadequacy of price.

Where a Hindu widow alienates a portion of her husband's estate for necessity, then unless the difference between the true price of the property alienated and the actual price paid by the alienee is particularly inadequate, the sale ought not to be set aside. A reasonable allowance ought to be made for the difference in price in favour of the alienation. [p. 337, col. 2.]

Second appeal from the decision of the District Judge, Dharwar, in Appeal No. 130 of 1920, reversing a decree passed by the Subordinate Judge at Haveri, in Civil Suit No. 340 of 1919.

Mr. *Nilkant Atmaram*, for the Appellant.

Mr. *R. A. Jahagirdar*, for the Respondents.

JUDGMENT.—This is a suit by the daughters of Mallappa to set aside an alienation made by the widow of Mallappa in 1905. It appears that Mallappa had mortgaged two lands, one of which was the land in suit, for Rs. 300. Though the terms of the mortgage have not been translated, it appears from the judgment that interest was to be paid in a regular manner, and if there was a default in the payment of interest, the mortgagor was liable to pay a much higher rate of interest. The widow, Hanmava, sold the property in suit for Rs. 300, as now found to the present defendants' father, and thereby paid off the mortgage effected by her husband. As result of this transaction she got the other land free from the mortgage for her own benefit, and parted with this land for good in favour of the defendants' father Hanmava died in 1918 and the present suit was filed by the plaintiffs in June 1919 to recover possession of the property on the ground that the alienation could not operate

beyond the lifetime of their mother, Hanmava. The defendants, who are the minor sons of the original alienee, were represented by their mother who pleaded that the sale was for legal necessity. The Trial Court came to the conclusion that the sale was for necessity and accordingly dismissed the plaintiffs' suit. The lower Appellate Court, however, has reversed that decree and set aside the alienation on condition of the plaintiffs paying Rs. 300 with interest, an also Rs. 600 for improvements effected by the defendants. It is found now, and the finding must be accepted for the purposes of the present second appeal, that the property at the date of the alienation was worth about Rs. 450, and it must also be accepted that the alienation was for Rs. 300 paid by the alienee to the widow who paid off the mortgage created by her husband. In effect it was a sale of property worth Rs. 450 for Rs. 300. It is found that the sum of Rs. 300 has been paid by the alienee, and it is not proved that any excess sum was paid beyond the necessity nor is it suggested that any excess was kept by the widow for her own benefit. It is true that the defendants' case was that the real consideration was Rs. 418, and that that was the sum which was really payable in respect of the mortgage. But the finding of the lower Appellate Court is against that allegation, and, therefore, that must be left out of account. Taking the alienation to be for Rs. 300 of property worth Rs. 450 for legal necessity, the question is whether it ought to be set aside. We are of opinion that having regard to the circumstances of this case, the alienation ought not to be set aside. It was an alienation for legal necessity. Though the price paid for the land may not have been adequate, there was good reason for the widow to effect this arrangement in 1905, in order to secure one land free of the mortgage for her own benefit; and there is nothing in the case to suggest that in 1905 when this transaction was effected there was any kind of unfair advantage taken by the alienee, or that there was anything improper in the transaction. It is not inconceivable that the property which is now found to be worth Rs. 450 in 1905 may not actually fetch that price at the time. Given the necessity for the sale, it seems to us that unless the difference between the true price and the actual price paid is particularly inadequate, the sale ought not to be set aside. Reasonable allowance ought to be made for the difference in price in favour of the alienation. Having regard to all the circumstances of this case, we think that the decree passed by the Trial Court is right. We reverse the decree of the lower Appellate Court and restore that of the Trial Court, except as to costs. Having regard to the circumstances of the case, we direct that each party should pay his or her own costs throughout.

Z. K. *Decree reversed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL NO. 3 OF 1923.

March 9, 1923.

Present:—Pandit Kanhaiya Lal, J. C. and Mr. Simpson, A. J. C.

HARIHAR PRASAD, MINOR, UNDER THE GUARDIANSHIP OF *Musammat* CHHOGAR KUAR—OBJECTOR—APPELLANT

versus

Babu SHANKAR DAYAL—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Execution of decree—Adjustment out of Court not certified within time, whether can be recognised.

An Executing Court is justified in refusing to take cognisance of an adjustment which is not certified to the Court within the time allowed by law under O. XXI, r. 2 of the Civil Procedure Code. [p. 338, col. 2.]

Appeal against an order of the Subordinate Judge, Lucknow, dated the 23rd October 1922.

LIQUIDATOR UNION BANK OF INDIA *v.* GOBIND SINGH.

Mr. *Daya Kishen Seth*, for the Appellant.

Mr. *Haider Husain*, for the Respondent.

JUDGMENT.—There is no force in this appeal. The appellant Harihar Prasad owed money under a decree, passed by the Court of the Subordinate Judge, Lucknow, to the respondents Durga Prasad, Shankar Dayal and Pearay Lal. Harihar Prasad was a minor. His certificated guardian was *Musammat* Chhoger Kuar, his mother, who applied for permission to sell certain property in order to pay up the abovesaid decree. In the course of the proceeding, instituted in the Court of the District Judge, Lucknow, Durga Prasad, one of the decree-holders, appeared and stated that he would accept in full satisfaction of the decree held by him and his brothers, Shankar Dayal and Pearay Lal, Rs. 26,800 provided that sum was paid on or betore the 15th December 1920, and that he would consult his brothers and persuade them to agree to that proposal. He further stated that he was giving up Rs. 2,000 out of the decretal money due to him and his brothers, and that if the amount so found due be different, a deduction of Rs. 2,000 will be made from what might be found due. The District Judge appointed certain Commissioners for the sale of some of the property belonging to the minor, which were included in the mortgage, and Rs. 25,155 were eventually realised by the sale. One of the purchasers, Raghunandan Lal appeared before the District Judge, and paid Rs. 10,000 out of the purchase-money payable by him and promised to pay the balance on or before the 15th January 1921. The decree-holders, Durga Prasad and Shankar Dayal, were present and informed the District Judge that they were willing to receive Rs. 15,706-15-3 that day and the balance by the 17th January 1921. Pearay Lal was not present but an application was filed on that day before the District Judge, purporting to have been signed by Shankar Dayal and Pearay Lal, to the effect that they authorised Durga Prasad to receive all payments on their behalf. There is no authority given thereby to Shankar Dayal by Pearay Lal to surrender any portion of the claim. The amount promised to be paid on the 17th January, 1921 was moreover not specified, and final payment of Rs. 11,055 was made on 17th January 1921 to all the the decree-holders. Durga Prasad did in fact accept that money in full payment, as was stated in a subsequent letter sent by him on the 21st January 1921, but it is not possible to say whether the other decree-holders did the same because the receipt of the 17th January 1921 does not recite that Rs. 11,055 had been received in full satisfaction of the decree. In any case the adjustment was not certified to the Court which passed the decree within the time allowed by law under O. XXI, r. (2), of the Code of Civil Procedure and the Court below was justified in refusing to take cognizance of the alleged adjustment.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

Z. K.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL NO. 240 OF 1922.

March 30, 1923.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice LeRossignol.

LIQUIDATOR, UNION BANK OF INDIA —PLAINTIFF—APPELLANT

versus

GOBIND SINGH—DEFENDANT—RESPONDENT.

Companies Act (VII of 1913), ss. 186, 234—Contract Act (IX of 1872), s. 43—Company in liquidation—Compromise between Liquidator and contributory, whether binding on Company—Procedure—Debt due to Company by firm—One partner contributory—Debt whether can be recovered summarily.

A compromise between the Liquidator of a Company in liquidation and a contributory of the Company is not binding upon the Company until it is sanctioned by an extraordinary resolution of the Company, as provided by section 234 of the Companies Act. [p. 339, col. 2.]

Cyclemakers' Co-operative Supply Co. v. Sims, (1903) 1 K. B. 477; 72 L. J. K. B. 160; 88 L. T. 360; 15 T. L. R. 153, distinguished.

LIQUIDATOR, UNION BANK OF INDIA *v.* GOBIND SINGH.

When a debt is due to a Company by a firm, one of the partners in which is settled as a contributory of the Company, the Liquidator of the Company can call upon the contributory under section 186 of the Companies Act to liquidate the whole debt. The principle contained in section 43 of the Contract Act is applicable to such a case. [p. 340, col. 1.]

Letters Patent Appeal against the judgment of Mr. Justice Broadway, published as 71 Ind. Cas. 724, dated the 11th November 1922.

Mr. *Prem Lal*, for the Appellant.

Mr. *G. C. Narang*, for the Respondent.

JUDGMENT.—These cross-appeals arise out of liquidation proceedings in connection with the Union Bank of India, Ltd. The respondent Gobind Singh was a shareholder in the Bank and was also indebted to the Bank on promissory-notes. The Bank went into voluntary liquidation in October 1914 and one Pandya was appointed Liquidator. Up to the date when liquidation proceedings commenced the defendant had paid Rs. 1,750 on fifty shares and the Liquidator called upon him under section 186 of the Companies Act to pay the sum of Rs. 3,250 on account of unpaid calls and Rs. 5,507-14-0 on account of promissory-notes representing loans by the Bank to the defendant. With the addition of interest the total claim against the defendant amounted to Rs. 9,989-10-6. The learned Judge in Chambers appears to hold that the Liquidator Pandya did enter into a compromise with the defendant; that if he did that compromise would be binding on the Company; that inasmuch as the promissory-notes, though executed by the defendant, were executed by him as a partner in a firm, the debt was not recoverable by summary proceedings under section 186 of the Companies Act inasmuch as the firm itself was not a contributory. The learned Judge, therefore, accepted the defendant's appeal and held him liable to pay only the calls on his shares amounting to Rs. 3,250 together with interest at 6 per cent. and left the Bank at liberty to sue the defendant's firm known as Ralia Ram-Daya Ram in respect of the debt due on the promissory-notes. Before us there is one appeal on behalf of the defendant in which he contends that on the finding of the learned Judge that a compromise had been entered into by the Liquidator Pandya, and Gobind Singh and as the terms of the compromise had been fulfilled by Govind Singh, the defendant should have been discharged from all further liability in the case. The counter-appeal is on behalf of the present Liquidator who contends that the amount due on the promissory notes is recoverable by the summary procedure provided by section 186 of the Companies Act.

To deal first with the alleged compromise; from its terms it does not appear to be a completed transaction but merely a proposal. On its face, it was conditional on the acceptance of one Ganesh Das who appears to have been Manager of one of the branches of the Bank. This man Ganesh Das has not been called as a witness and we are unable to hold that he gave his consent to the proposed composition. In any case such a compromise, though it might, if proved, be binding upon the Liquidator personally, would not be binding upon the Bank until sanctioned by an extraordinary resolution of the Company, as provided in section 234 of the Companies Act. The defendant relies upon *Cycle-makers' Co-operative Supply Co.* v. *Sims* (1), but that case is readily distinguishable. In that case the Liquidator had made a compromise in a suit and it was held that until that compromise had been set aside no cause of action remained to the Company, and consequently the second suit did not lie in view of the judgment on the compromise. That case was of a peculiar nature and the general remarks of the learned Judges were made entirely with reference to the facts of that case.

For these reasons we dismiss the appeal of the defendant Gobind Singh with costs.

The next point is the applicability of the summary procedure under section 186 of the Companies Act to the debt due on the promissory-notes. Now the loan from the Bank was taken by the firm Ralia Ram-Daya Ram of which Gobind Singh is the principal partner. It was Gobind

(1) (1903) 1 K. B. 477; 72 L. J. K. B. 160; 88 L. T. 360; 19 T. L. R. 153.

Singh who signed the promissory notes, it was he who got the money. The partners of the firm are jointly and severally responsible on the bills and although the firm is not settled on the list of contributories one of the partners Gobind Singh is so settled and it is open to the Bank to select him from among the partners and call upon him as a contributory to liquidate the whole debt. We see no reason why the principles of section 43 of the Contract Act should not apply to the present case. We accordingly accept the appeal of the Liquidator and hold that the money due on the promissory-notes is recoverable from Gobind Singh by summary procedure under section 186 of the Companies Act.

There remains still one question, namely, whether the claim on the promissory-notes is within limitation and on behalf of the Liquidator it is contended that the claim was made within time inasmuch as the defendant has paid interest on the debt and also has re-paid principal in part and that the requirements of sections 19 and 20 of the Limitation Act have been fulfilled. The learned District Judge has calculated interest on the promissory-notes at 10 per cent. but inasmuch as the Official Liquidator did not claim more than 9 per cent., we do not think that the rate should be calculated at more than 9 per cent.

With the foregoing directions the case is returned to the learned District Judge for disposal after determination whether the claim on the promissory-notes was made within time. Costs to be costs in the case.

Appeal accepted;
Case remanded.

K. K.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 221 OF 1922.

April 17, 1923.

Present:—Mr. Simpson, A. J. C.

UDAIRAJ SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RAM UDIT TEWARI—PLAINTIFF—RESPONDENT.

Hindu Law—Joint family—Mortgage by father—Necessity, absence of—Transfer of Property Act (IV of 1882), s. 68 (c)—Civil Procedure Code (Act V of 1908), O. II, r. 2—Suit for possession—Mortgage money, right to recover—Abandonment of claim—Subsequent suit, whether barred.

An alienation of family property by a Hindu father which is not supported by family necessity is void *ab initio*. [p. 341, col. 2.]

Gajodhar Bakhsh v. *Gauri Shankar*, 61 Ind. Cas. 205; 8 O. L. J., 81, followed.

Where a mortgage of family property by a Hindu father is declared void, the mortgagee becomes entitled to sue for the mortgage-money under section 68 (*c*) of the Transfer of Property Act and limitation for such a suit begins to run from the date on which the mortgagee is refused, or is ousted from, the possession of the mortgaged property. [p. 341, col. 2.]

Where a mortgagee is refused possession of the mortgaged property he can sue for possession, or under section 68 (*c*) of the Transfer of Property Act, he can sue for the mortgage-money. If he sues for possession without suing for the mortgage-money a claim in respect of the latter will become barred by virtue of the provision contained in O. II, r. 8 of the Civil Procedure Code. [p. 341, col. 2.]

Appeal from a decree of the District Judge, Fyzabad, dated the 30th March 1922, confirming that of the Additional Subordinate Judge, Fyzabad, dated the 31st May 1921.

Mr. *A. P. Sen*, for the Appellants.

Mr. *Bishambhar Nath* holding brief of Mr. *Bisheshwar Nath Srivastava*, for the Respondent.

JUDGMENT.—This is a second appeal by defendants. The suit arises out of a mortgage-deed executed by Ram Lal Singh deceased, father of the two defendants-appellants in favour of the plaintiff on 23rd June 1906. The amount of the debt secured by the mortgage was Rs. 1,000. The rate of interest was Rs. 6-4 per cent. per annum. It was provided that if in any year the interest remained unpaid by the end of the month of Jeth the mortgagee was to take possession of the property mortgaged, the income of which is

stated in the deed to be Rs. 85-4-0. He was then to pay Rs. 22-12-0 as land revenue and to appropriate Rs. 62 8-0 in lieu of interest. It was provided that the mortgagor can redeem it in any year at the time when there is no harvest on the ground, whether the mortgagee had obtained possession or not.

There was also this warranty, that if in the aforesaid land any defect should arise, then the mortgagor will be responsible for the loss and expense and that in the event of any particular plot going out in part or in whole he will provide other land of the same quality. It appears that there was a default in the payment of interest, and that in the year 1908 the mortgagee claimed possession and the mortgagor refused it. The mortgagee, therefore, brought a suit for possession in August 1917 against his mortgagor alone, not joining his sons, the present appellants, as parties. During the pendency of that suit, the father died, and the sons were brought on the record as his legal representatives. They then raised an objection that the property was ancestral, and that there was neither legal necessity nor antecedent debt to support the alienation. They succeeded on this point. They raised another objection that the mortgage was without consideration, and on this point they also succeeded. They raised a third objection that the mortgage had not been executed at all. But here they failed. On the other two findings, however, that suit was dismissed. The date of the judgment is 28th February 1918. The present suit was instituted on 12th August 1920. It is brought by the mortgagee to recover his money, Rs. 1,000 principal, and Rs. 883-9-8 interest. The suit was decreed by the learned Additional Subordinate Judge of Fyzabad. The defendants appealed to the District Judge and their appeal was dismissed

They come here on second appeal. Three grounds have been argued before me. The first is limitation. In the plaint, paragraph 5, the cause of action is the judgment in the previous suit dated 28th February 1918. This cause of action is explained in paragraph 4 to be that, when, the mortgage was held to be invalid, then, for the first time, the plaintiff became entitled to get back his money. The Issue No. 2 was directed on this point, and the view of the learned Subordinate Judge was that the suit is based on a breach of the warranty of title, that Art. 116 applies and the period of six years begins to run when the contract is broken, that is to say when the decision is given in the suit for possession. The learned District Judge took the same view. I am unable to agree with this decision. The deed dated 23rd June 1906 is the basis of this suit. It was a mortgage deed, but as such it was invalid and void *ab initio*, because the property which Ram Lal purported to mortgage did not belong to him but to the joint family. This point is settled for me by the decision in *Gajodhar Bakhsh* v. *Gauri Shankar* (1). There remains any other remedy which the mortgagee may have.

Whether or not there was a personal covenant to re-pay the money, there was a right on the part of the mortgagee to recover his money under section 68 (*c*) of the Transfer of Property Act. It is that right which he is exercising now. I do not think the clause which I have quoted about defect in the land really applies to the present suit. It is the fact that the mortgagee cannot get possession which entitles him to get his money back. The question is when this right accrued?

Now according to his plaint in the former suit the mortgagor refused to give him possession in the year 1908. That was his cause of action for the suit for possession which he brought in 1917. He could have sued then for his money. Thus that cause of action became barred by time in 1914. No other cause of action has accrued since.

There is another bar to the plaintiff's suit. It is the provision of O. II, r. 2, Civil Procedure Code. When he was refused possession he could bring the suit for possession. But under section 68 (*c*) of the Transfer of Property Act he could also bring a suit for his money. He is not allowed to bring first one suit, then the other, unless he obtains the leave of the Court at the time of bringing the first suit,

(1) 61 Ind. Cas. 205; 8 O. L. J., 81.

That rule is strictly interpreted in *Muhammad Hafiz* v. *Muhammad Zakariya*, (2).

On the point of *res judicata* I hold, following *Giriya Chettiar* v. *Sabapathy Mudaliar* (3) which appears to be on all fours with the present case, that there is no *res judicata* here, because the Munsif who tried the former suit could not, by reason of his limited pecuniary jurisdiction, have tried the present suit.

In the result the appeal succeeds and the plaintiff's suit is dismissed as barred by time. The appellants will get their costs in all the three Courts.

Appeal allowed.

Z. K.

(2) 65 Ind. Cas. 79; 49 I. A., 9.; 20 A. L. J. 17; 26 C. W. N. 297; (1922) M. W. N. 89; 35 C. L. J. 126; 42 M. L. J. 248; 15 L. W. 377; 24 Bom. L. R. 341; 30 M. L. T. 224; (1922) A. I. R. (P. C.) 23; 44 A 121; 3 P. L. T. 279 (P. C.).

(3) 29 M. 65.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 658 OF 1921.

February 9, 1923.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

TALAKCHAND BHERAJI—DEFENDANT—APPELLANT

versus

ATMARAM KESHAV VAIDYA—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 92, applicability of—Construction of document—Sale or mortgage—Burden of proof—Oral agreement, evidence of, admissibility of.

Plaintiffs conveyed certain property to defendant No. 1 by what purported to be a sale-deed, but the property remained in the possession of the plaintiffs. Defendant No. 1 subsequently sold the property to defendant No. 2. Plaintiffs attested the deed of sale. Part of the consideration was paid to defendant No. 1 and the balance to the plaintiffs and possession of the property was transferred to defendant No. 2. Some years afterwards the plaintiffs sued to redeem the property on the allegation that the transfers in favour of defendant No. 1 and defendant No. 2 were both mortgages:

Held, (1) that by attesting the sale-deed in favour of defendant No 2 and transferring possession of the property to him plaintiffs became in effect parties to the transfer and the onus lay on them of proving that the transaction was a mortgage and not a sale; [p. 344, col. 1.]

(2) that evidence of an oral agreement that defendant No. 2 had agreed to reconvey the property to the plaintiffs after he had paid himself the principal and interest out of the profits, was inadmissible under the provisions of section 92 of the Evidence Act. [p. 344, col. 1.]

Maung Kyin v. *Ma Shwe La*, 42 Ind. Cas. 642; 44 I. A. 236 20 Bom. L. R. 278; 15 A L. J. 825; 33 M. L. J. 648; 3 P L. W. 185; 6 L. W. 777; 22 C. W. N. 257; 23 M. L. T. 36; 27 C. L. J. 175; (1918) M. W. N. 300; 45 C. 320; 9 L. B. R. 114; 11 Bur. L. T. 21 (P. C.), distinguished.

The language of section 92 of the Evidence Act in terms applies only as between the parties to an instrument and their representatives-in-interest. Whenever evidence is tendered as to a transaction with a third party it is not governed by the section or by the rule of evidence which it contains, and in such a case the oridnary rules of evidence of equ y and good conscience come into play unhampered by statutory restrictions. [p. 345, col. 1.]

Second appeal from the decision of the Joint Judge, Thana, in Appeal No. 199 of 1920, reversing a decree passed by the Second Class Subordinate Judge at Dahanu, in Civil Suit No. 238 of 1919.

Mr. *H. C. Coyajee* (with him Mr. *K. N. Koyajee*), for the Appellant.

Mr. *Rangnekar*, (with him Mr. *W. B. Pradhan*) for Respondents No. 1 to 4.

Mr. *A. G. Desai*, for Respondent No. 5.

JUDGMENT.—The facts leading up to this suit are as follows: The plaintiffs who are four brothers executed a deed on May 30, 1907, purporting to convey the suit property to one Ramchandra Ganesh for Rs. 99. The sale-deed provided that if the vendors returned the sum of Rs. 99 with compound interest at the rate of one per cent. per mensem within one year the vendee should return the property and pass a legal document for the same with possession.

On August 12, 1910, the plaintiffs executed a sale-deed of the same property in favour of one Kesrichand Hiraji. The consideration was Rs. 150 which was made up by paying Rs. 72-8-0, the balance owing under the transaction of May 30, 1907, to Ramchandra and Rs. 77-8-0 to the plaintiffs, who still remained in possession. Kesrichand died leaving a minor son Fatehchand.

On August 10, 1912, Navalmal Hiraji, as guardian for the minor, conveyed the property to Talakchand Bheraji for Rs. 399 with possession. The four plaintiffs attested the deed.

The plaintiffs alleged that plaintiff No. 2 was an agriculturist at the dates of all these transactions. They further alleged that the sale-deed of August 12, 1910, was really a mortgage, that as they wanted further moneys and Navalmal was pressing for the money due to the minor Fatehchand, an agreement was entered into with Talakchand, defendant No. 2, to mortgage the properties to him for Rs. 399 of which Rs. 200 was to be paid to Navalmal and Rs. 199 to the plaintiffs. Defendant No. 2 was to be put in possession of the properties and out of the profits he was to deduct interest at twelve per cent. per annum and appropriate the surplus towards paying off the principal.

Accordingly they sued for a declaration that the sale-deeds of August 12, 1910 and August 10, 1912, were really mortgages, for accounts under the Dekkhan Agriculturists' Relief Act of the mortgage in favour of defendant No. 2 and for redemption. Both the lower Courts have found that plaintiff No. 2 was not an agriculturist.

The trial Judge decided that the transactions of August 12, 1910, and August 10, 1912, were not proved to be mortgages and dismissed the suit.

The Joint Judge in appeal held that the plaintiffs were entitled to prove the real nature of the transactions and came to the conclusion on the evidence that all the three transactions referred to above were mortgages, and allowed plaintiffs to redeem on paying to defendant No. 2 Rs. 276-6-5 for principal and interest and Rs. 750 for improvements.

The second defendant has appealed.

The Joint Judge in discussing the evidence in paragraph 10 of his judgment says that the evidence coupled with the conduct of the parties proved beyond doubt that the transactions with Kesrichand of August, 1910, and with defendant of August, 1912, were mortgages. The object of the transfer by Navalmal to defendant No. 2 was no other than to pay off the prior debt which was demanded and to obtain a further advance on the same security. There would be no doubt that defendant No. 2 was aware of that intention because otherwise there would be no necessity to ask the plaintiff No. 2 to engross the deed and obtain the signatures of his brothers to the document. That conduct was incompatible with the ignorance of defendant No. 2 of the real nature of the transaction with Kesrichand. The amount paid was distributed as alleged by the plaintiffs. If, therefore, knowing the relationship between Kesrichand and the plaintiffs defendant No. 2 obtained a sale out and out from Navalmal, it would be to the knowledge of both parties a transfer *non domino* as was held in *Maung Kyin* v *Ma Shwe La* (1), the facts of which case the learned Judge thought to be on all fours with the facts in this case. It would be tantamount to fraud on the plaintiffs.

The flaw in this argument is apparent when we point out that, assuming for the moment that plaintiffs wished to sell the properties to defendant No. 2 for Rs. 399 to enable them to pay off Kesrichand's mortgage and keep the balance of the consideration for themselves, the transaction would have been effected in the same way as the transaction of August 10, 1912. As Kesrichand's son was the ostensible owner he would be the party to convey through his guardian and the plaintiffs by attesting the deed could be taken as giving their assent as owners of the equity of redemption. An attesting witness need not as such be considered as being aware of the contents of the document he attests, but this document was actually engrossed by plaintiff No. 2. The plaintiffs gave possession to defendant No. 2 and it is difficult to see in what other manner they could have acted, if they had, as a matter of fact, intended that defendant No. 2 should become full owner of the properties. Taking it for granted that defendant No. 2 knew that the transaction of August 12, 1910, was a mortgage, there could be no fraud on the part of defendant No. 2, unless it could be proved that defendant No. 2 agreed to re-convey on

(1) 42 Ind. Cas. 642: 44 I. A. 236; 20 Bom. L.R. 278; 15 A. L. J. 825; 33 M. L. J. 648; 3 P. L. W. 185; 6 L. W. 777; 22 C. W. N. 257; 23 M. L. T. 36; 27 C. L. J. 175; (1918) M. W. N. 300; 45 C. 320; 9 L. B. R. 114; 11 Bur. L. T. 21 (P. C.).

the understanding that possession was given to him to pay himself principal and interest out of the profits. If defendant No. 2 had got possession from Navalmal's guardian knowing that Navalmal was a mortgagee, then undoubtedly the plaintiffs would have the right to redeem the mortgage within twelve years under Art. 134. The learned Judge does not seem to have realised the importance of the fact that plaintiffs themselves gave possession to defendant No. 2 and so became in effect parties to the transaction of August 10, 1912, and it would lie upon them to prove that it was a mortgage. At any rate it would be difficult to contend that the defendant No. 2 took the property from one who was not the owner when by giving possession they could be taken as representing to defendant No. 2 that he was the owner.

It would be different if the plaintiffs were suing to redeem the mortgage of 1910 on the ground that their mortgagee had purported to sell as owner to defendant No. 2, the latter knowing that he was not the owner. But plaintiffs are suing to redeem on the footing that the transaction of August 1912 was a mortgage, and they are the mortgagors to defendant No. 2. It would seem, therefore, that in the peculiar circumstances of the case the provisions of section 92 of the Indian Evidence Act would apply and plaintiffs would be debarred from proving the agreement, they alleged was entered into when the sale-deed of August 1912 was executed. We now turn to the case cited by the learned Judge to see whether the decision therein can assist the plaintiffs. The facts were as follows:—

Myaing was the owner of four plots of land *A*, *B*, *C*, and *D*. On November 30, 1921, Myaing having borrowed from Maung Kyin and Ma Ngwe Zan his wife Rs. 8,500 at Rs. 1-8-0 per cent. per month granted an out and out conveyance of *A* and *B* to Kyin and his wife. No possession passed, interest was paid and Rs. 3,500 out of the loan were repaid leaving a balance of Rs. 5,000. On March 4, 1903, Kyin and his wife obtained payment of Rs. 5,000 from U Shwe Pe and his wife and conveyed *A* and *B* to them. On February 13, 1902, Kyin and his wife having advanced Rs. 11,565 to Myaing purchased properties *C* and *D* by public auction but no possession passed. On March 4, 1903, Kyin and his wife transferred their properties to U Shwe Pe and his wife for Rs. 11,000, Rs. 565 having been paid in the meantime by Myaing. U Shwe Pe and his wife, therefore, became by *ex facie* conveyances from Kyin and his wife vested in all the properties in suit. Myaing was no party to these transactions, but there was correspondence showing that he was desirous of having, and obtained the benefit of, a reduction in the rate of interest from one-eighth per cent. per month to one per cent.

On November 20, 1905, Myaing convered his equity of redemption to Kyin and his wife on the footing that he considered he had only granted mortgages over his property.

U Shwe Pe having died his widow and children brought the suit for possession of the lands against Kyin and his wife. They resisted possession being given on the ground that U Shwe Pe and his wife well knew that in spite of the absolute conveyance to them, the true nature of the transaction was one of mortgage upon the security of the properties, in particular that they knew that Kyin and his wife were not in fact the owners, but themselves only lenders thereon. So that the transfer, although absolute in form was in truth and to the knowledge of both parties a transfer *a non domino* and the Kyins were purporting to sell and the Shwe Pes were purporting to buy what they both knew belonged to Myaing. When the case first came before the Board on appeal from the Chief Court of Burma which had granted a decree for possession, it was held that the plaintiffs-appellants' case disclosed a charge of fraud against the respondents in relation to matters antecedent to the deeds of March 4, 1903, upon which charge much of the evidence tendered would be material, and that section 92 did not preclude evidence of fraudulent dealing with a third person's property, nor proof of notice that the property purporting to be conveyed absolutely

belonged to a third party who was not a party to the conveyance. Accordingly a new trial was ordered with the direction that the evidence should be admitted subject to objection. The Trial Judge held that Myaing and the Kyins intended the transfers between them to be mortgages, that Myaing's object in the negotiations which resulted in the deeds of March 4, 1903, was to transfer the mortgages to U Shwe Pe and that the latter knew this and agreed to take over the mortgages and so were guilty of fraud in taking absolute conveyances. So the suit was dismissed. In appeal the learned Judges agreed with the findings as to the knowledge of U Shwe Pe and the intention of the parties but were of opinion that as Myaing knew the nature of the instruments there was no antecedent fraud, nor was fraud at the time of, or antecedent to, the deeds of March 4, 1903, alleged, and accordingly passed a decree for possession. The defendants appealed to the Privy Council. Their Lordships on the finding of fact that when Shwe Pe took the conveyance from the Kyins he knew that it was a conveyance of property which belonged to Myaing held that the fraud proceeded *a non domino*. If section 92 of the Indian Evidence Act applied, proviso 1 would be in point because it would be a fraud to insist upon a claim to property arising under such a transaction, the claimant knowing that the true owner had never parted with it. But in their Lordships' opinion section 92 did not apply because the evidence, the admissibility of which was in question, was evidence going to show what were the rights of a third person, namely, Myaing, in the property. The language of section 92 in terms applied and applied alone "as between the parties to any such instrument or their representatives in interest." Whenever, accordingly, evidence was tendered as to a transaction with a third party it was not governed by the section or by the rule of evidence which it contained, and in such a case accordingly the ordinary rules of evidence of equity and good conscience came into play unhampered by the statutory restrictions. It may also be noted that it was proved by the original Judge of the Chief Court that Myaing and the Kyins meant their transactions to be mortgages and that Myaing's object in the negotiations which resulted in the conveyances to U Shwe Pe and his wife was to transfer those mortgages at a lower rate of interest, and U Shwe Pe's letters showed he knew this and agreed to take over a mortgage, so that by deliberately getting deeds of sale executed a gross fraud on Myaing was perpetrated. On the other hand the Appellate Judges appear to have thought that Myaing was acquainted with the nature of the instruments so that the fraud could appear to be not so much the taking of absolute conveyances, but the assertions that they were absolute conveyances, and not transfers of the original mortgages from the mortgagee. But a defendant relying on a rule of evidence which prevents a Court from taking certain evidence can hardly be said to be guilty of a fraud. It may be otherwise in the case of a plaintiff. Applying the facts of that case to the facts of the case before us various discrepancies at once become apparent. The transaction of August 1912 was not in any event a transfer of the mortgage of August 1910, it was really a transaction between the owner and defendant No. 2 whereby Rs. 399 were paid out of which Rs. 200 went to the prior mortgagee, thus extinguishing that mortgage. No question of fraud arises unless it be fraud to contend that a document which is on the face of it a sale-deed cannot be proved by oral evidence to be something else, in which case section 92 would be practically useless. The plaintiffs are now asking the Court to admit evidence that at the time the conveyance of August 1912 was executed as a result of which they got free of their debt to defendant No. 1, obtained Rs. 199 for themselves and gave possession to the defendant No. 2, there was an oral agreement to re-convey, defendant No. 2 agreeing to pay himself his capital and interest out of the profits. Admitting that defendant No. 2 knew that defendant No. 1 was only a mortgagee, we cannot conclude that defendant No. 2 got no title considering the other circumstances. When the learned Appellate

Judge says that the object of the transfer to defendant No. 2 was to pay off the prior debt to obtain a further advance on the same security he is begging the question. If a sale had been intended it would have been effected in exactly the same way, and the plaintiff has to prove, not that he can redeem the first mortgage as having been transferred to defendant No. 2, but whether he can redeem an entirely different mortgage which he alleges exists between himself and defendant No. 2. Therefore, in our opinion, though the decision in *Maung Kyin* v. *Ma Shwe La* (1) enables the plaintiffs to prove that the transaction of August 1910 was a mortgage that alone will not entitle them to recover back the property from defendant No. 2. The learned Trial Judge points out that the real transferors in August 1912 were the plaintiffs, though Navalmal, as guardian of the minor defendant No. 1, executed the conveyance in order to avoid the trouble and expense of taking a reconveyance from Navalmal, and that the whole consideration of Exhibit 32 had gone to the plaintiffs. But he seems to have thought on the strength of the evidence of certain exhibits that the value of the property in 1912 was in excess of Rs. 399 though the Government assessment was very low, and he believed the plaintiffs' story about an agreement to re-convey because defendant No. 2 only derived it by saying he had left everything to Punamchand, and Punamchand was not called as a witness though he was in Court. The Joint Judge thought that the price paid was inadequate for an absolute transfer but the whole of his reasoning by which he comes to the conclusion that the transaction of August 1912 was a mortgage is in our opinion fallacious. We do not exclude the possibility that defendant No. 2 treated the transaction as a mortgage and that if the plaintiffs are believed when they say there was an agreement to re-convey to them, that would be a finding of fact which we could not refuse to acknowledge in second appeal. But if the findings are based on inference which, in the opinion of the Court, is wrong, then it becomes a question of law. The conclusion we have come to is that on the fact of this case it can be distinguished from the case of *Maung Kyin* v. *Ma Shwe La* (1) and that the provisions of section 92 of the Indian Evidence Act preclude the plaintiffs from proving the agreement they rely upon. We would allow the appeal and dismiss the suit with costs throughout except as against defendant No. 1.

Appeal allowed.

Z. K.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 4 OF 1923.
SECOND CIVIL APPEAL NO. 208 OF 1922.
March 19, 1923.

Present:—Mr. Kanhaiya Lal, J. C.

MOHKAM SINGH—PLAINTIFF—APPELLANT

versus

THAKUR CHANDRA PAL SINGH—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 7—Redemption, suit for—Usufructuary mortgage—Decree, form of—Accounts.

Under O. XXXIV, r. 7, of the Code of Civil Procedure it is open to the Court either to order that an account shall be taken of what will be due to the defendant for the principal and interest due on the mortgage, and for his costs of the suit, if any, or to declare the amount due at the date of such order; but in either case the Court should proceed to ascertain the amount which would be found due on the date which is to be fixed for payment and specify what the consequence of the payment of that amount or the non-payment thereof would be. If it merely directs that an account should be taken of what would be due to the mortgagee for the principal and interest due on the mortgage, its order would be nothing more than an interlocutory order, to be followed by the making up of such an account, till which the preparation of the preliminary decree should be postponed. [p. 347, col. 1.]

Appeal from a decree of the Officiating Subordinate Judge, Unao, dated the 5th September 1921.

Mr. *Bisheshwar Nath Srivastava*, for the Appellant.

Pandit *Gokaran Nath Misra*, for the Respondent.

JUDGMENT.—These appeals arise out of a suit for redemption instituted by one of the original mortgagors in respect of a usufructuary mortgage effected by him and other persons in favour of Umrao Singh, the grandfather of the defendant-respondent on the 1st October 1874. The main questions for consideration were whether the usufruct of the mortgaged property was sufficient to pay the interest payable under the deed of mortgage, whether any surplus or deficiency had accrued on account thereof and whether either party was entitled to claim interest thereon.

The Trial Court passed a preliminary decree directing accounts to be taken without determining the amount which was payable by the mortgagor on redemption. Subsequently it went into the accounts and determined the amount payable to the mortgagee and directed the plaintiff-appellant to pay the same within a certain period. No final decree was, however, framed in accordance with that direction.

The entire procedure adopted by the Court below was irregular. Under O. XXXIV, r. 7, of the Code of Civil Procedure it is open to the Court either to order that an account shall be taken of what will be due to the defendant for the principal and interest due on the mortgage, and for his costs of the suit, if any, or to declare the amount due at the date of such order; but in either case the Court should proceed to ascertain the amount which would be found due on the date which is to be fixed for payment and specify what the consequence of the payment of that amount or the non-payment thereof would be. If it merely directs that an account should be taken of what would be due to the mortgagee for the principal and interest due on the mortgage, as was originally done by the learned Subordinate Judge here, its order would be nothing more than an interlocutory order, to be followed by the making up of such an account, till which the preparation of the preliminary decree should be postponed. The Trial Court proceeded to prepare a preliminary decree without waiting for the determination of the amount due on the mortgage and the consequence was that the preliminary decree omitted to specify the amount which the mortgagor was required to pay. When the accounts were finally adjusted no preliminary decree was prepared but a formal order was framed, for which in a case of this character it was wholly inappropriate.

The appeals are, therefore, allowed and the preliminary decree and the subsequent formal order prepared by the Trial Court are set aside and the suit remanded to that Court with a direction to reinstate it under its original number and to prepare a preliminary decree for redemption in accordance with law. The costs here and hitherto will abide the event.

Appeals allowed.

Z. K.

MADRAS HIGH COURT.

CIVIL APPEAL NO. 145 OF 1921.

April 17, 1923.

Present:—Mr. Justice Phillips and Mr. Justice Venkatasubba Rao.

THAREESARUMA AND OTHERS—DEFENDANTS NOS. 6 TO 8—APPELLANTS

versus

THE DEPUTY COLLECTOR, COCHIN AND OTHERS—PLAINTIFF AND DEFENDANTS—RESPONDENTS.

Land Acquisition Act (I of 1894), ss. 23, 24—Compensation, assessment of—Special value, whether can be taken into account—Agricultural land assessed as building site—Trees, value of, whether can be allowed.

In determining the amount of compensation payable for the compulsory acquisition of land by Government under the Land Acquisition Act the correct principle to apply is to assess the market value of the property not according to its present disposition but as laid out in the most lucrative and advantageous way in which owners could dispose of it. In assessing the market value of land used for agricultural purposes, the Court must take into account its adaptability for building purposes and such other beneficial purposes to which it can be applied. [p. 349, col. 2.]

If, however, the special value exists only for the particular purchaser who has obtained power of compulsory purchase it cannot be taken into consideration in fixing the price. But when the special value exists also for other possible

purchasers, the owner is entitled to have this element of value taken into consideration. [p. 349, col. 1.]

The Queen v. *Brown*, (1867) 2 Q. B. 630: 36 L. J. Q. B. 322. *In re Lucas and Chesterfield Gas and Water Board*, (1909) 1 K. B. 16 at pp. 30, 31: 77 L. J. K. B. 1009, 99 L. T. 767; 72 J. P. 437; 6 L. G. R. 1106; 24 T. L. R. 858; *In re Bwllfa and Merthyr Dare Steam Collieries* (1891), *Limited and the Pontypridd Waterworks Company*, (1902) 2 K. B. 135 at p. 141; 71 L. J. K. B. 613; 87 L. T. 291; 50 W. R. 627; 18 T. L. R. 694; *Wernicke* v. *Secretary of State for India*, 2 Ind. Cas. 562; 13 C. W. N. 1046 at p. 1049; *Kailas Chandra Mitra* v. *Secretary of State*, 18 Ind. Cas. 638; 17 C. L. J. 34 at p. 35; *Premchand Burral* v. *Collector of Calcutta*, 2 C. 103; 1 Ind. Jur. 267; 1 Ind. Dec. (N. S.) 363; *Collector of Poona* v. *Kashinath Khasgiwala*, 10 B. 585; 5 Ind. Dec. (N. S.) 778; *In the matter of the Lands Acquisition Act X of 1870*; *Munji Khetsey*, 15 B. 279; 8 Ind. Dec. (N. S.) 189 and *Raghunath Rao* v. *Secretary of State for India*, 60 Ind. Cas. 187; 13 L. W. 11; 39 M. L. J. 623; (1920) M. W. N. 759; 28 M. L. T. 397; 44 M. 264, considered and applied.

Where agricultural lands are valued as building sites, the claimants are not entitled to ask that the trees standing on the lands should be separately assessed and valued as fruit bearing trees, since what is awarded is an inclusive price. [p. 351, col. 1.]

Appeal against an order of the District Court, South Malabar, in Land Acquisition Case No. 2 of 1919.

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellants.

Messrs. *M. C. Madhavan Nair*, *O. T. Govindan Nambiar* and *T. S. Viswanatha Aiyar*, for the Respondents.

JUDGMENT.

Phillips, J.—I think the District Judge is inclined to allow insufficient weight to the award itself, which is the estimate of an impartial officer, based upon evidence and personal enquiry, and cannot therefore be ignored in coming to a conclusion on the evidence, but notwithstanding this I am not prepared to differ from his conclusions and I agree in the order proposed by my learned brother.

Venkatasubba Rao, J.—The land acquired is 6 acres 56 cents in extent and is in Cochin Town. The learned District Judge has very clearly set out in his judgment the situation of the land, and it is sufficient for the present purpose to say that it is close to Kalvetti densely covered with houses and that a tidal channel runs through it. On the west is the European quarter fronting the sea and on the north is the commercial land abetting on the back water. The learned District Judge has proceeded on the assumption that the value of the land in the aforesaid two localities cannot furnish any basis for purposes of comparison and this has not been seriously attacked before us.

The main question, however, is, is the value to be assessed on the footing that the land is agricultural, as has been done by the Deputy Collector or its adaptability for building purposes to be taken into consideration, as has been done by the District Judge? On behalf of the Government three witnesses were examined. The first witness, who is a Municipal Councillor, admits that on the acquired portion people have lived for a long time and that there were tiled dwelling houses. He, however, states that it is marshy and not fit for commercial purposes and that respectable people would not live there. The second witness says that, except for 60 feet breadth of the canal, the whole site is available for house building and admits that the most profitable way of developing the acquired land would be to deepen the channel and use the banks for warehouses. He also says that respectable people would not live on the site and the third witness similarly deposes that the land is not fit for mercantile purposes, that it is not healthy and that well-to-do people would not live there. The effect of the evidence is that the sanitary conditions are not satisfactory and that people, who can afford to live in more healthy surroundings or in more fashionable parts of the town, would not generally reside on the site acquired. The land has been acquired for building purposes and it is not disputed that, when it is reclaimed, it can be rendered suitable for house sites.

The learned District Judge has held that the owner is entitled to the value obtainable in open market for the land if put to its most lucrative use. It seems to me that he has stated the principle correctly. In *the Queen* v. *Brown* (1) agricultural land was held to have a potential value for building purposes, Cockburn, C. J., observing "Jury

.. ..

may take into account not only the present purpose to which the land is applied, but

(1) (1867) 2 Q. B. 630; 36 L. J. Q. B. 322.

also any other more beneficial purpose to which in the course of events at no remote period it may be applied....."

If the special value exists only for the particular purchaser who has obtained power of compulsory purchase it cannot be taken into consideration in fixing the price. But when the sepcial value exists also for other possible purchasers, the owner is entitled to have this element of value taken into consideration. See the observations of Lord Moulton in *In re Lucas and Chesterfield Gas and Water Board* (2). The principle underlying this *dictum* is that the purpose for which the land is acquired should not be taken into consideration, for, if it were so, the public would be purchasing as it were, its own improvements. See *Werniche* v. *Secretary of State for India* (3). Land Acquisition Act, section 24 (5) embodies this rule. But when the special value exists for other possible purchasers, there is a market in which the special value goes towards fixing the market price. See again the observations of Lord Moulton in *In re Lucas and Chesterfield Gas and Water Board* (2) above cited. Under section 23, the Court is to take into consideration the market value of the land. The expression "market value" has been described as the price that an owner, willing and not obliged to sell, might reasonably expect to obtain from a willing purchaser, *Kaila Chandra Mitra* v. *Secretary of State* (4), and the special adaptability for building purposes has been repeatedly held to be an element to be taken into consideration. "If, for instance, says Vaughan Williams, L. J., in *In re Bwllfa and Merthyr Dare Steam Collieries* (1891), *Limited and the Pontypridd Waterworks Company* (5) "he (the umpire) has to assess the value of land which is used as an agricultural land, he is entitled to take into consideration its adaptability for building land, because that is a fact which is in existence at the time the notice to treat is given."

The value for future purposes is generally referred to as the potential value of the land. "The Tribunals assessing compensation may take into account not only the present purpose to which the land is applied, but also any other more beneficial purpose to which, in the course of events, it might within a reasonable period be applied....." Lord Halsbury's Laws of England, Vol. II, p. 37.

This is a well established principle and has been recognised in numerous decisions in India. It was held in *Premchand Burral* v. *Collector of Calcutta* (6) that the correct principle to apply is to assess the market value of the property not according to its present disposition but as laid out in the most lucrative and advantageous way in which the owners could dispose of it (page 108.) Similarly in *Collector of Poona* v. *Kashinath Khasgiwala* (7) where the land acquired was originally devoted to agricultural purposes, compensation was awarded on the footing of the most lucrative use of the land, and it was not disputed that there the most advantageous way was to use it for building purposes. This principle was applied in *In the matter of The Land Acquisition Act X of 1870; Munji Khetsey* (8) where the land acquired lay in the vicinity of a town where building was going on and there was a fair probability of the owner being able, owing to its situation, to sell or lease his land for building purposes. I may also refer to a recent decision of this Court in *Raghunath Rao* v. *Secretary of State for India* (9) which recognises this principle.

The Deputy Collector arrived at the value of the land by capitalizing income. The income was necessarily of the land according to its present disposition and not as laid out in the most lucrative and advantageous way in which the owner could dispose of it. The income was of the land as used for agricultural purposes. The method adopted is opposed to the principle

(2) (1909) 1 K. B. 16 at pp. 30, 31; 77 L. J. K. B. 1009; 99 L. T. 767; 72 J. P. 437; 6 L. G. R. 1108; 24 T. L. R. 858.
(3) 2 Ind. Cas. 562; 13 C. W. N. 1046; at p. 1049.
(4) 18 Ind. Cas. 638; 17 C. L. J. 34 at p. 35.
(5) (1902) 2 K. B. 135 at p. 141; 71 L. J. K. B. 613; 87 L. T. 291; 50 W. R. 627; 18 T. L. R. 604.
(6) 2 C. 103; 1 Ind. Jur. 267; 1 Ind. Dec. (N. S.) 363.
(7) 10 B. 585; 5 Ind. Dec. (N. S.) 778.
(8) 15 B. 279; 8 Ind. Dec. (N. S.) 189.
(9) 60 Ind. Cas. 187; 13 L. W. 11; 39 M. L. J. 623; (1920) M. W. N. 759; 28 M. L. T. 397; 44 M. 264.

as enunciated in the decisions on the subject both English and Indian. The learned District Judge, on the other hand, has adopted the method of valuation of fixing the price with reference to the value of the lands adjacent to the land acquired and possessing similar advantages. I have no doubt whatsoever that he has adopted the correct method.

I have so far dealt with the principle to be applied in determining the compensation. The next question to be decided is, has the District Judge come to a right conclusion on the evidence before him? In my opinion he has correctly appreciated the evidence and as I agree with his conclusion I shall deal with this aspect of the case very briefly. He has adverted to the sale-deeds covering the lands in the vicinity. Of these it seems to me that the following are material and furnish the basis for the valuation of the land in question (1) Exhibit IX relates to No. 369 sold in 1913 at Rs. 75 per cent. (2) Exhibit VI relates to No. 362 sold in 1916 at Rs. 80 per cent. (3) Exhibit VIII relates to No. 360 sold in 1917 at Rs. 100 per cent. (4) Exhibit XI relates to the 30 year leases granted by the Municipality in 1918 at Rs. 176 to Rs. 225 per cent of the Survey No. 578 reclaimed by the Municipality. Then we have another class of sale-deeds which have not the same direct bearing on the question but which in a greater or less degree prove that the value of the land has been rising and is generally high throughout Cochin (1) Exhibit VII which relates to No. 79 sold for Rs. 170 per cent in 1919 after the date of the notification, (2) Exhibit III which relates to No. 607 which fetched in 1918 Rs. 700 a cent, (3) Exhibit XXIII which elates to No. 571 which fetched Rs. 1,440 per cent. This was in 1919 after the date of the notification. On this material and on some oral evidence the District Judge came to the conclusion that Rs. 100 a cent fairly represents the value of the sites with a good road frontage in the locality in question. I am not prepared to disagree with him. As was observed in *The Trustees for the Improvement of the City of Bombay* v. *Karsandas* (10), no evidence of former sales can be obtained which shall be precisely parallel in all its circumstances to the sale of the land compulsorily acquired and differences exist and it is impossible to state with precision what allowance should be made for them. The learned District Judge has rightly refused to adopt a valuation based upon Exhibits III and XXIII. The lands comprised by them are situated in the northern portion which, as already observed is the valuable commercial land abutting on the back water. No, 79 fetched no doubt Rs. 170 per cent, but this fact is not very useful not only because the sale was subsequent to the date of the notification but also because the plot is as the District Judge describes it, 'a good corner block.' I may here state that, in respect of the land covered by Exhibit XI, it costs the Municipality Rs. 80 per cent to re-claim it. It was argued on behalf of some of the claimants that the 30 years leases of this re-claimed land fetched on the average Rs. 200 per cent and deducting Rs. 80 from it a compensation of at least Rs. 120 per cent should have been awarded. But this argument ignores the fact that the situation of the re-claimed land No. 578, is more favourable than that of the land in question. The former is much nearer the commercial quarter of the town. Dealing with individual claims in regard to Nos. 373 to 375, the District Judge thinks that as they constitute a compact site Rs. 100 per cent would be reasonable and he deducts as cost of re-clamation Rs. 60 and awards Rs. 40 per cent. I am satisfied that this is a fair valuation. It is difficult to say whether Rs. 100 or Rs. 120 or a little more or less is the proper value of the land and it is equally difficult to say whether the cost of re-clamation would be Rs. 80 or Rs. 60 or some other figure near it. The District Judge had before him the evidence that it costs the Municipality Rs. 80 per cent. to re-claim the land covered by Exhibit XI. It is, indeed, impossible to accurately estimate the cost of the reclamation. It will depend upon the state of the land acquired and cost of labour and material. As their Lordships of the Judicial Committee observed *Secretary of State for Foreign Affairs* v. *Charlesworth Pilling & Co.* (11), "In such an enquiry

(10) 1 Ind. Cas. 451; 33 B. 28 at p. 32; 10 Bom. L. R. 688.

(11) 26 B. 1; 28 I. A. 121; 3 Bar. P. C. J. 1 (P. C.).

relating to subjects abounding with uncertainties there is more than ordinary room for guess-work and it would be very unfair to require an exact exposition of reasons for the conclusions arrived at." On the whole however I have come to the conclusion that Rs. 40 per cent, is a proper valuation.

In regard to the valuation of a house on this site there has been some dispute. The learned District Judge allowed Rs. 2000 for it. There is evidence that it is worth that sum and there is no evidence *contra*.

Mr. Anantakrishna Aiyar argued on behalf of the claimants to whom these portions of the land belonged that his clients were entitled to the value of the trees on the land on the footing that they were fruit bearing trees. This contention is untenable because the basis of the calculation being that the lands are valued as building sites, the claimants cannot also have an advantage to which they will be entitled only if the lands have been dealt with as agricultural lands, on the other hand what has been awarded is an inclusive price; and the claimants cannot be heard to say that the trees should be separately assessed as fruit bearing trees.

The next item to be dealt with is item No. 392. For the land and houses the District Judge has awarded Rs. 6,000. The valuation of Rs. 75 per cent allowing for the inferiority of the site is, in my opinion right. The houses are valued at Rs. 4,800 and I am not prepared to say that the amount is excessive. The District Judge also takes note of the fact that there was an offer of Rs. 6,000 for the land and the houses together. I see no reason to differ from the findings of the District Judge on any of these points.

These conclusions will entail the dismissal of Appeal No. 145 of 1921 and the memorandum of cross-appeal filed on behalf of the first respondent, the Deputy Collector of Cochin. They will accordingly be dismissed with costs. So far as the memorandum of objections is concerned, the costs will be paid by the first respondent to the appellant and third respondent separately and will be taxed on the respective amounts claimed against each in the memorandum of objections.

There remains only one matter to be dealt with, the compensation fixed in respect of No. 378. The District Judge allowed only Rs. 50 per cent on the ground that the land in question did not have a proper access or a good frontage. He further allowed Rs. 1,000 for a house standing on the site. Adding the statutory 15 per cent he fixed the total sum at Rs. 1,840. This valuation was not seriously disputed either by the claimant or by the learned Advocate-General who appeared on behalf of the Government. The District Judge however, was under a misapprehension as regards this portion of the claim. He thought that there was an omission on the part of the owner to make a claim pursuant to the notice given under section 9, and he held that section 25 (2) was, therefore, applicable and refused to grant as compensation more than the amount awarded by the Collector, namely, Rs. 1,530 odd although on the merits he came to the conclusion that Rs. 1,840 was the correct valuation. It is now conceded that there was a claim pursuant to the notice under section 9 and that there was an oversight on the part of the District Judge. The learned Advocate-General, however, sought to support the judgment on the ground that it appears from the record that the application by the owner under section 18 requiring a reference to the Court was made after the expiry of the period of six weeks mentioned in clause 2 of that section. The point was for the first time taken before us, and we are not in a position to say that if an opportunity had been given to the owner, he would not have had an answer on this part of the case, and we cannot see our way to allow this objection to prevail. That objection failing, we must necessarily allow the memorandum of cross-objections filed by the second respondent to the extent found in his favour by the District Judge. He will pay and receive proportionate costs both here and in the lower Court.

V. N. V. *Decree modified.*

Z. K.

SIVA RAM V. SALIK.

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL NO. 34 OF 1922.

March 14, 1923.

Present:—Mr. Simpson, A. J. C.

SIVA RAM—PLAINTIFF—APPELLANT

versus

SALIK—DEFENDANT—RESPONDENT.

Shankalup *grant, whether transferable*—Marwat, *whether transferable.*

Land which is *shankalup* and resumable is not transferable.

A *marwat* grant though not resumable is not transferable.

Appeal from a decree of the Third Additional District Judge, Sitapur, dated the 12th September 1922, reversing that of the Assistant Collector, First Class, Sitapur, dated the 5th October 1921.

Mr. *H. K. Ghosh*, for the Appellant.

Mr. *Rabi Shanker*, for the Respondent.

JUDGMENT.—This is second appeal by a plaintiff. The suit was one for arrears of rent. The land in suit forms part of a *muafi*. The facts are probably stated more or less correctly by Salik the defendant examined as D. W. No. 1. The grant was made to Salik's father Jhao Ram who was killed fighting for the *taluqdar*. The grant of this kind is called *marwat* and is not transferable. There is other evidence to which I will come later that the grant was not *marwat* but was *shankalup* and resumable. In that case also it was not transferable. I do not decide this point.

As I have said Salik is the son of Jhao Ram. Jhao Ram had altogether seven sons. But apparently five of them have died childless and Salik is the only surviving son. There is, however, Sudarshan, son of Bindra who was the eldest son. According to Salik, Bindra managed the land while Salik was away at another village. But Bindra used to pay him half of the profits. After Bindra's death Salik undertook the management of the land and for a time Salik cultivated part and Sudarshan cultivated part. Then Sudarshan gave a possessory mortgage, presumbly of his own portion of land, to one Raghubar who appears to have cultivated it in right of this mortgage. He died and apparently his son Beni Madho cultivated after him. Then Sudarshan redeemed this mortgage and granted possessory mortgage in favour of the plaintiff. But Salik had obtained possession of the land and was cultivating it. On these facts plaintiff sued Salik for the whole of the rent. The learned Assistant Collector gave him a decree regarding Salik as a tenant, Sudarshan as the owner and the plaintiff as the representative of Sudarshan. Salik appealed. The learned Sessions Judge reversed this decree. He held in the first place that Sudarshan had no right of alienation and consequently the plaintiff possessed no right in land. Secondly he held that the relation of landlord and tenant did not exist between the parties

As regards the second point it can be got over by a resort to section 127 of the Rent Act. Salik may not be the plaintiff's tenant, but if the plaintiff is entitled to eject him as a trespasser, he has an option of treating him as a tenant and suing him for rent.

If the first objection holds good, the plaintiff cannot resort to section 127 because he has no title to possession, his own title being defective.

According to Exhibit C which is a list prepared in the year 1863 this land is *shankalup* and resumable. No resumable grant is transferable. According to the defendant's evidence the land is *marwat* and in that case it is not transferable, although it is not resumable, and that point can undoubtedly be taken by Salik because he has certain rights of inheritance in this land which might be prejudiced by a decision against him. In the present suit also he is in possession and the plaintiff cannot get the land from him unless he shows a title in himself or at least an acceptance of his title by the defendant.

For these reasons the appeal is dismissed with costs.

Z. K.

Appeal dismissed.

JANG BAHADUR SINGH v. RANJIT SINGH.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 267 OF 1922.

April 27, 1923.

Present:—Mr. Dalal, J. C.

JANG BAHADUR SINGH—DEFENDANT —APPELLANT

versus

RANJIT SINGH AND OTHERS—PLAINTIFFS — RESPONDENTS.

Hindu Law—Joint family—Alienation by father—After-born son, whether can challenge alienation—Suit by son in existence, effect of—Necessity—Burden of proof—Presumption.

Where a Hindu son brought a suit to challenge an alienation of family property made by his father, but before the suit could be decided another son was born to the alienor:

Held, that the cause of action had not been exhausted before the birth of the second son and the latter was, therefore, entitled to bring a suit to challenge the alienation. [p. 354, col. 1.]

Bhup Kuar v. *Balbir Sahai*, 64 Ind. Cas. 885; 19 A. L. J. 978; 44 A. 190; (1922) A. I. R. (A.) 342, relied on.

Where there has been a transfer of family property by a Hindu father for cash down and the son of the transferor contests the legality of the sale the burden lies on the vendee to prove the valid nature of the consideration. [p. 354, col. 1.]

Where a Hindu father makes a transfer of family property and his minor sons are nominally joined in the transfer the presumption is that the transfer has been made by the father in his capacity as manager of the family. [p. 354, col. 2.]

Mahesh Dat v. *Ram Asre*, 67 Ind. Cas. 814; 9 O. L. J. 138; 4 U. P. L. R. (O.) 38; (1922) A. I. R. (O.) 114, distinguished.

Appeal from a decree of the District Judge, Fyzabad, dated the 25th May 1922, upholding that of the Additional Subordinate Judge, Fyzabad, dated the 3rd November 1921.

Mr. *Rajeshwari Prasad*, for the Appellant.

Mr. *H. Husain*, for the Respondents.

JUDGMENT.—One Gaya Bakhsh Singh has two sons, the plaintiff Ranjit Singh and the defendant Chhedi Singh. On 22nd May 1911, Gaya Bakhsh Singh sold a certain ancestral family property to the defendant Jang Bahadur. On that date Chhedi Singh was in existence, but not the plaintiff Ranjit Singh. On 21st January 1916, Gaya Bakhsh Singh and his two sons, under the guardianship of their mother, mortgaged some other ancestral family property for Rs. 700 to the same Jang Bahadur Singh and subsequently on 16th July of the same year a deed of further charge of Rs. 200 was executed under similar circumstances. Ranjit Singh brought the present suit in 1920 for possession of the property transferred under the sale-deed and the two deeds of mortgage on the ground that the transfers were not made by the manager of the joint Hindu family for legal necessity or for the payment of antecedent debts. The Court of first instance of the Additional Subordinate Judge of Fyzabad decreed the suit on condition of the plaintiff paying to the transferee Rs. 3,149-5-0, the amount which he considered to be valid of the considerations of the sale-deed and the mortgage-deeds.

Jang Bahadur's appeal to the learned District Judge of Fyzabad was dismissed and he has come here in second appeal. It was first argued that the plaintiff had no cause of action as regards the sale because he was not in existence at the time of the sale-deed. Chhedi Singh was in existence at the time, but it was represented that the cause of action, which existed in Chhedi Singh, was exhausted by his bringing a suit in 1913 for the recovery of the property sold. It was admitted that Ranjit Singh on birth would have acquired a cause of action to sue on the basis of the sale-deed because of the existence of Chhedi Singh at the time of the sale, if Chhedi Singh had not brought a suit to contest the sale-deed prior to the birth of the plaintiff. It has to be noticed, however, that the suit was not decided till after the birth of Ranjit Singh. For this reason, I am of opinion that the cause of action still existed in the family and that Ranjit Singh on his birth acquired a right to it. Such was the opinion of the Allahabad High Court under circumstances similar to those of the present case in *Bhup Kuar* v. *Balbir Sahai* (1). It was argued by the appellant's learned Counsel that the dismissal of the suit was to have effect from the date of institution of his suit by Chhedi Singh and that, therefore, it should be held

(1) 64 Ind. Cas. 885; 19 A. L. J. 978; 44 A. 190; (1922) A. I. R. (A) 342.

that Chhedi Singh had no cause of action on the date of the institution of the suit. This argument does not impress me. In that suit it was not held that Chhedi Singh had no right to sue. Chhedi Singh's suit failed on the merits. There can be no question about his having a cause of action to get the sale set aside so far as it was not executed for legal family necessity or for the payment of antecedent debt. The cause of action did exist, and the only question is whether it had come to an end when Ranjit Singh was born. If it had come to an end of course there would have been no cause of action when Ranjit Singh was born to sue to avoid the sale-deed. The present suit by Ranjit Singh is, therefore, tenable.

The next point was that the property having passed out of the family the burden lay on the plaintiff son to prove that the transfer was made for an immoral purpose by the manager of the family. This principle of law applies only where the property has passed out of the family by foreclosure or sale in execution of a decree or where such a decree has been passed and new rights have come into existence. Where there has been a transfer for cash down and the son contests the legality of the sale the burden lies on the vendee to prove valid nature of the consideration. The argument of the appellant's learned Counsel that the fact of Chhedi Singh filing a suit to recover half the property amounted to a partition between him and his father deserves no comment. Chhedi Singh was a minor at the time and there was no intention on his part to separate from his father. It has been held by both Courts that there has been no separation in the family. This argument was advanced to confine the plaintiff's suit to half the property in suit.

The other grounds of appeal were common to both transactions of sale and mortgage. It was argued that the bulk of the consideration in both cases was held to be valid and that, therefore, the suit should have been dismissed. In the case of sale, Rs. 2,000 out of the consideration of Rs. 3,000 was held by the lower Courts to be valid, and in the case of the two mortgages over Rs. 730 out of Rs. 1,900 was held to have been borrowed without legal necessity. It cannot, therefore, be said that the transfer was valid for the bulk of the consideration.

As regards the mortgages it was argued on the authority of *Mahesh Dat* v. *Ram Asre* (2) that the plaintiff could obtain possession of only his one-third share of the property in suit because he was a party to the transfers under the guardianship of his mother. The case referred to by the learned Counsel was one where a brother and his two minor brothers under the guardianship of their mother had executed a transfer. In such a case a presumption may arise that the manager (brother) was not acting as the *karta* or manager of the family. The present case where a father makes a transfer and his minor sons are nominally joined, the presumption is that the transfer has been made by the father in his capacity as manager.

As regards ground No. 5 Chhedi Singh did not sue in 1913 in a representative character, and the decision in his suit cannot bind the plaintiff.

I shall not consider grounds of appeal Nos. 6, 7, 8 and 9, because they relate to the validity or otherwise of certain items making up the considerations of the different transfers and in this matter the findings of the lower Courts are binding on this Court.

I dismiss this appeal with costs.

Appeal dismissed.

Z. K.

(2) 67 Ind. Cas. 814; 9 O. L. J. 138; 4 U. P. L. R. (O.) 38; (1922) A. I. R. (O.) 114.

JAMNABAI *v.* FAZALBHOY HEPTOOLA.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

June 12, 1923.

Present:—Lord Sumner, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.

JAMNABAI—APPELLANT

versus

FAZALBHOY HEPTOOLA AND OTHERS—RESPONDENTS.

Contract Act (IX of 1872), s. 22—Compromise—Mistake of fact—Substantial injustice.

A compromise arrived at by the parties to a suit under a mistake of fact by one of them cannot be set aside unless serious and substantial injustice is shown to result therefrom. [p. 356, col. 1.]

Consolidated appeals from a judgment and two decrees of the Bombay High Court.

Messrs. *De Gruyther, K. C.*, and *J. M. Parikh*, for the Appellant.

Sir *George Lowndes, K. C.*, and Mr. *E. B. Raikes*, for the Respondents.

JUDGMENT.

Lord Sumner.—These are consolidated appeals by one Jamnabai, the widow and executrix of Tricum Nathoo, who died so long ago as 1892. He had been a partner in a *muccadamage* firm, Khimji Jiwa and Co., with a gentleman called Khimji Jiwa, who had retired from the firm and had died before the time at which Tricum Nathoo died. The widow Jamnabai commenced these proceedings against certain persons who continued to carry on the same business as had been carried on by her late husband in partnership, although they changed the name of the firm. She brought an action for accounts, the principal object of which, so far as the present appeals are concerned, was to obtain an account and a share of certain buildings and the rents produced by those buildings, which originally had been purchased by her late husband and his partner while they were still in partnership. The buildings consisted on the one hand of a house built on the estate of the Port Trust in Bombay, and on the other of sundry godowns which were used in some way, not very clear, down to the date of the proceedings, by the defendants.

There are two appeals, from two decrees, which have been consolidated.

The first appeal relates to the alleged right of the plaintiff to have an account taken oves a long series of years of the rents and profits of the godowns, she herself bringing into account the rents of the house, but this apparently is a secondary matter, for the house has fallen into decay and is almost worthless.

The second appeal is brought in order that the appellant, Jamnabai, may have the opportunity of establishing her late husband's interest in the partnership business beyond the date to which the partnership account had been stated and balanced, and may have an account for that purpose. In order to succeed in that appeal, she has to establish her right to have an order set aside, which was in point of fact consented to by her Advocate before the learned Judge who made the order. It may be convenient to dispose of the second appeal quite shortly.

The learned Judge records that when he had expressed the opinion that the form in which a previous order had been drawn up did not prevent the plaintiff from being entitled to have its terms rectified and to have the accounts, which she desired to obtain, taken on a footing wider than its terms stated, her Counsel, having apparently considered the matter, intimated that he did not press to have an account actually taken, and that he would be content with an order in her favour for payment of a particular sum which, according to the note which the learned Judge took, was accepted by the learned Counsel, because he conceived it to be an amount agreed up to the date of the death of Tricum Nathoo, whereas it appears that it was really an amount agreed only up to the date of the last adjustment made in his life time, which was something like two years earlier. To that extent there is ground for saying if the learned Judge's note was correct as a statement of the reasons which prompted the Advocate at the time, that the Advocate gave this consent under a mistake of fact, the gravity of which may be substantial or may not, and when the plaintiff discovered, as she afterwards did, that this order had been made, under which she would get payment of this particular sum, but would not get the account which she desired, she took proceedings to get the con-

sent order set aside and to prefer her claim to the account.

Their Lordships have had on both appeals the advantage of an argument from Mr. DeGruyther, on behalf of the appellant, equally illuminating and candid. With regard to this appeal he accepted as the law, which governs his position, that serious and substantial injustice to his client must be shown to result from letting the consent order stand which was made under the circumstances mentioned. There has been some controversy as to whether his client was consulted by her Advocate at the time when the consent was given. Upon that the High Court express no definite opinion, and all their Lordships need say is that they have not formed the affirmative opinion that she and her brother, who was assisting her and was present in Court, were not cognisant of what was going on, but it is unnecessary to express a definite opinion about it. The High Court after examining the circumstances with some care came formally to the conclusion that, so far from any possible injustice having been done to the appellant by the course taken it probably was beneficial so far as she was concerned, because, while the account which she asked for apparently might have secured some few hundred further rupees in addition to the very much larger sum that she got under the consent order, she would have had to run risks as to costs and possibly otherwise, from which it was advisable to protect her.

Their Lordships see no reason whatever for revising the opinion upon this point formed by the High Court, and, that being so, the foundation upon which Mr. DeGruyther based his right to ask to have that order set aside and the account directed has failed. This appeal, therefore, is unsuccessful.

The first appeal Mr. DeGruyther has also frankly stated to have been rested all along upon the contention that the properties in question, the dwelling house and the godowns, were assets of the partnership firm of Khimji Jiwa and Co., and not merely buildings which these two gentlemen, the plaintiff's deceased husband and Mr. Khimji Jiwa, had bought for their own reasons and apparently held as co-owners in equal moieties.

The High Court examined the facts with some care and based their judgment upon the conclusion of fact that the true position was co-ownership in the properties and not that they were partnership assets belonging to the firm of Khimji Jiwa and Co.

Their Lordships cannot see their way upon this question of fact to say that the conclusion of the High Court in this appeal was wrong. They have been pressed by Mr. De Gruyther, who has missed no point which possibly could have been raised on behalf of his client, to say that because the record does not set out the account to which the High Court referred in one or two passages, and because it may be argued that the mode of dealing with the rents of the properties, which the learned Judges either inferred or had stated to them, might have been different, the conclusion that they were dealt with in the way assumed is one that ought not to be supported.

It appears to their Lordships that they ought to presume that the High Court did not make these statements and come to this conclusion as to the facts without having had materials before it. Although normally all the materials are to be found in the record in one shape or another, certain documents have not been printed in this record which were available in the Court below, and the proceedings were proceedings in which there was much common ground, and their Lordships, therefore, think that they have nothing to justify them in saying that the *prima facie* assumption of the correctness of the judgment below, which the appellant has to displace, has been successfully met.

The result, therefore, is that the appellant fails in this appeal also.

In their Lordships' opinion both appeals ought to be dismissed with costs, and they will humbly advise His Majesty accordingly.

N. H. *Appeal dismissed.*

Solicitor for the Appellant:—Mr. *E. Dalgado.*

Solicitors for the Respondents:—Messrs. *Nicholl, Manisty & Co.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER NO. 241 OF 1922.

April 27, 1923.

Present:—Mr. Justice Dass and Mr. Justice Kulwant Sahai.

PANCHU BANIA—PLAINTIFF—APPELLANT

versus

ANAND THAKUR AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182—Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Decree against some of several defendants—Appeal against others—Execution of decree—Limitation, operation of.

Where a suit is decreed as against some of several defendants and dismissed as against the rest and the plaintiff prefers an appeal, he is entitled to wait till the decision of the appeal, before proceeding with the execution of the decree he has already obtained, if, in the case of the Appellate Court comin to the conclusion that his appeal had failed, there is a possibility of the suit being entirely dismissed under O. XLI, r. 33 of the Civil Procedure Code. If such a possibility is there, the time for the execution of the decree would run from the date of the decision of the appeal.

Christiana Sens Law v. *Benarsi Prosad Chowdhury*, 22 Ind. Cas. 685; 19 C. W. N. 287 and *Loke Nath Singh* v. *Gaju Singh*, 31 Ind. Cas. 426; 20 C. W. N. 178; 22 C. L. J. 333, followed.

In such a case as the above the Execution Court should see whether the original decree was really one decree, or an incorporation of several decrees and whether the appeal against it imperilled the whole decree or not for the execution of which the application is made.

Appeal from an order of the District Judge, Darbhanga, dated the 24th June 1922, affirming that of the Munsif, Darbhanga, dated the 18th March 1922.

Mr. *Muhammad Hassan Jan*, for the Appellant.

Mr. *P. C. Rai*, for the Respondents.

JUDGMENT.

Dass, J.—This appeal must be dismissed. It is contended that the order appealed from could not possibly have affected the decree sought to be executed because, as the judgment of the lower Appellate Court shows, the defendants Nos. 3, 7 and 15 claimed definite shares in the subject-matter of the dispute. We have been referred to the decree passed by the lower Appellate Court in support of the argument that defendants Nos. 3, 7 and 15 claimed definite identifiable lands. The decree of the lower Appellate Court, however, does not irresistibly lead to that conclusion; but in my opinion, the appellant must fail even if we assume that the defendants claimed definite identifiable lands out of the lands in suit. The plaintiff appealed against the decree of the lower Appellate Court by which the lower Appellate Court had dismissed the plaintiff's suit as against the defendants Nos. 3, 7 and 15. No doubt the plaintiff appealed only against that portion of the judgment of the lower Appellate Court by which it had dismissed the suit as against the defendants Nos. 3, 7 and 15; but in appealing against the decision of the lower Appellate Court the plaintiff put it in the power of the High Court to say that the whole suit of the plaintiff should be dismissed.

It is contended by the learned Vakil that the High Court had no such power under O. XLI, r. 33. The question is not whether the High Court would have exercised the power; the question is whether there was a possibility of the High Court in the appeal of the plaintiff dismissing the plaintiff's entire suit. In my opinion the case of the plaintiff being that all the defendants were joint tort-feasers and had jointly taken possession of the plaintiff's land, it was open to the High Court, under the provision of O. XLI, r. 33, to dismiss the plaintiff's entire suit if it came to the conclusion that his appeal as against the defendants Nos. 3, 7 and 15, could not succeed. I do not say that the High Court would, in the particular case, or in fact in any case, take that course, but the possibility was always there, and, in my opinion, the plaintiff was entitled to wait till the appeal was disposed of in the High Court before proceeding with his execution as against those defendants against whom his suit had succeeded in the Court of first instance. As it was laid down in *Christiana Sens Law* v. *Benarsi Prosad Chowdhury* (1) the Court should see whether the original decree was really one decree or an incorporation of several decrees and whether the appeal against it imperilled the whole decree or not for

(1) 22 Ind. Cas 685; 19 C. W. N. 287;

the execution of which the application is made. In my opinion the appeal presented by the plaintiff to this Court against the decree of the lower Appellate Court imperilled his whole decree. That being so according to the decision of the Calcutta High Court in *Christiana Sens Law* v. *Benarsi Prosad Chowdhury* (1) and *Loke Nath Singh* v. *Gaju Singh* (2) time would begin to run from the date of the decree of the High Court.

The order of the Court below is right and the appeal must be dismissed with costs.

Kulwant Sahai, J.—I agree.

Appeal dismissed.

N. H.

(2) 31 Ind. Cas: 426; 20 C. W. N. 178; 22 C. L. J. 333.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 13 OF 1922.

October 11, 1923.

Present:—Mr. Dalal, J. C., and Mr. Neave, A. J. C.

Shekh MOHAMMAD AHSAN ALI—DEFENDANT—APPELLANT

versus

Shekh MASUD ALI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Will, construction of—Devise of property in subordination to principal devisee, meaning of—Devise of profits whether includes corpus—*U. P Land Revenue Act (III of* 1901), *ss.* 111 (c), 138 (5)—*Jurisdiction of Civil and Revenue Courts—Partition of* mahal—*Question of title*—Taluqdari *property—Sanction of Local Government.*

A testatrix provided in her Will that her daughter would be the *taluqdar* after her death, and then went on to direct that out of her entire property her daughter would be deemed to be the owner of an eight annas share and that the remaining eight annas would be owned by her husband's nephews in subordination to her daugther and that the profits of the property would be appropriated by the legatees according to their shares.

Held, that the proprietary share in half the property had been bequeathed to the nephews and that the subordination in which they were placed to the daughter was one of respect and position and not in respect of their proprietary title. [p. 360, col. 2.]

In order to show that an unlimited devise of profits is less than a devise of the *corpus* some evidence should be found in the context of the Will or in the circumstances affecting the property. [p. 361, col. 2.]

Faiz Muhammad Khan v. *Muhammad Said Khan*, 25 C. 816; 25 I. A. 77; 2 C. W. N. 385; 7 Sar. P. C. J. 320 (P. C.), followed.

A discussion as to the power or willingness of a Revenue Court to partition a *mahal* is beyond the jurisdiction of a Civil Court. A Civil Court has authority to decide that a particular person is owner of a certain share in a *mahal* but cannot direct Revenue Court to separate that share by partition: Similarly, a Civil Court cannot prevent partition of a share even if the proceedings of the Revenue Court be contrary to the rules and regulations laid down for its guidance. [p. 362, col. 1.]

The question of stay of partition proceedings in respect of *taluadari* property for want of the sanction of the Local Government can be agitated only in the Revenue Court. [p. 362, col. 1.]

Appeal from a decree of Assistant Collector, First Class, Lucknow, dated the 8th December 1921.

Mr. *A. P. Sen* holding brief of Messrs. *Bisheshwar Nath Srivastava* and *Mohammad Ayub*, for the Appellant.

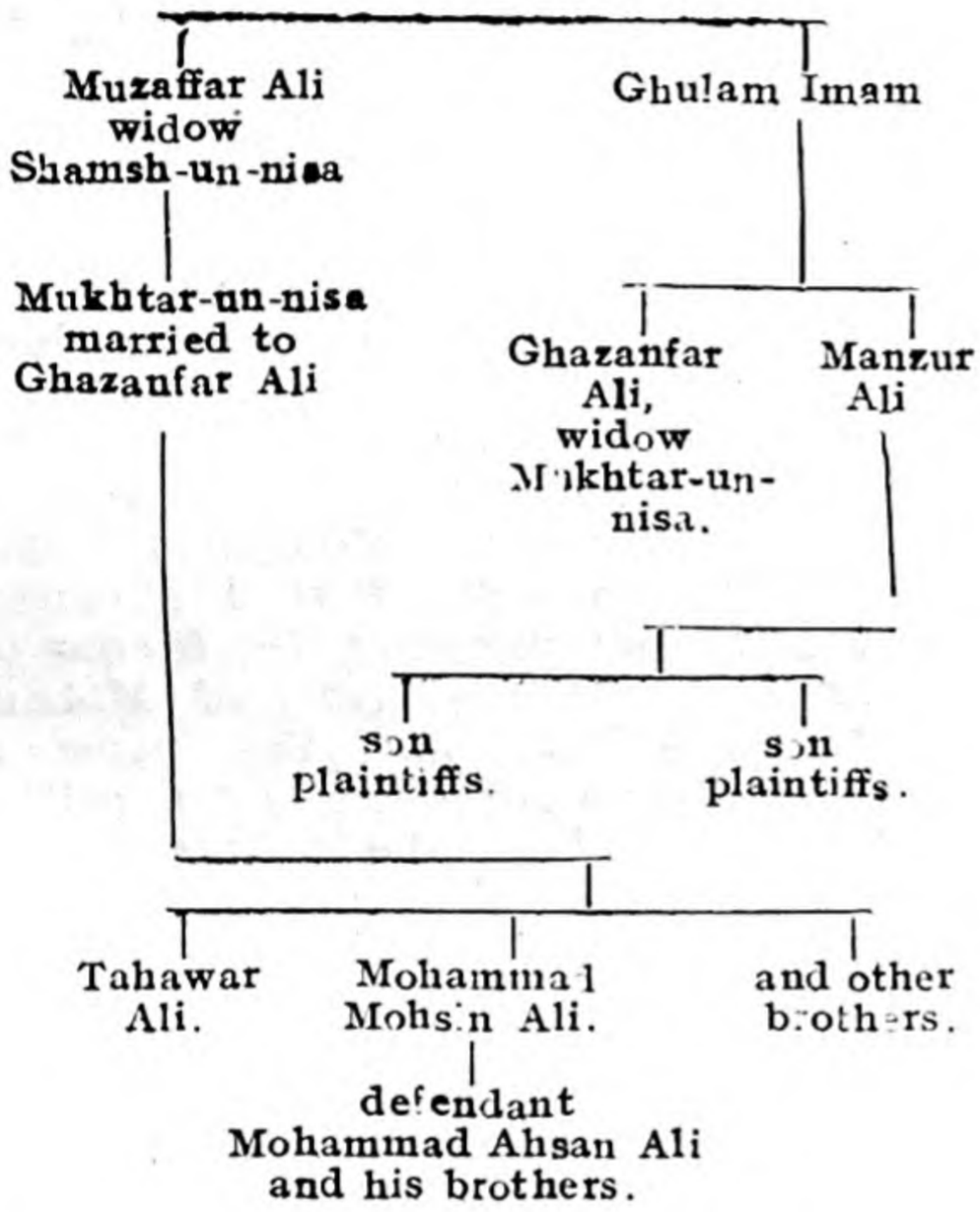
Messrs. *Niamat Ullah* and *E. R. Qidwai*, for the Respondent.

JUDGMENT.—The plaintiffs, Masud Ali and others, applied under section 107 of the Land Revenue Act for partition of certain *mahals* in which they alleged that they owned a specific share. Mohammad Ahsan Ali, who was arrayed on the opposite side, objected on the ground that the plaintiffs had no proprietary interest in the *mahals*. This objection raised a question of proprietary title, and the Assistart Collector proceeded to inquire into the merits thereof under section 111 (*c*). He held that the plaintiffs were owners of a 4 annas share and directed partition proceedings to continue. These proceedings took place in the Lucknow District with respect to *mahals* situated within the limits of that district and held binding in subsequent proceedings before an Assistant Collector of the Bara Banki district in partition proceedings relating to *mahals* situated in that district. The defendant Sheikh Mohammad Ahsan Ali has appealed from both the decisions. This is an appeal from the decision of the Lucknow Court.

Another objection of the defendant was that the *mahals* were *taluqdari mahals* of which the partition could not take place without the sanction of the Local

Government under section 138 (5) previously obtained. The Assistant Collector has held that no sanction was necessary in these two cases. The questions which arise in appeal, therefore, are (1) whether the plaintiffs owned any share in the *mahals* or not, and (2) whether the sanction of the Local Government was necessary before the commencement of partition proceedings.

The following is the relevant portion of a long pedigree:—



At the time of the second Summary Settlement in 1858 Muzaffar Ali was dead and settlement was made with his widow *Musammat* Shamsh un-nisa, who was declared to be the *taluqdar* and given a primogeniture *sanad*. In 1860 when inquiry was made from *taluqdars* as to their intention regarding succession to the property the lady replied on 15th August 1860. "I desire and file this petition that after my death my estate should remain intact in my family without division according to the custom of *Raj* or *Gaddi* and that *Musammat* Mukhtar-un-nisa, my daughter, who is married to Ghazanfar Ali, a nephew of my husband, should be the owner" (Exhibit B, page 21, Part III). It is noticeable that in the statements prepared in pursuance of this declaration (Exhibits B-2 and B-3) it was noted that the *gaddinashini* was to be in favour of *Musammat* Mukhtar-un-nisa while the members of the family who were entitled to inheritance were one daughter and two nephews. On the 26th September 1875 the lady made a Will (Exhibit A-2, page 56, Part III). This is the bequest on which both parties base their title and must be considered in detail. In the first paragraph she mentions the villages in her *taluqa*, distinguishing two villages Shahpur and Jithauli from the rest because in those villages the names of her husband's nephews were also entered in the *khewat*. In spite of this entry she declares that over all the villages she as *taluqdar* had always remained in possession. In paragraph 2 she declares that *Musammat* Mukhtar-un-nisa shall become *taluqdar* after her death and in paragraph 3 she gives her power to arrange with her male issues as to succession to the property. In paragraph 3 she also bequeathes her entire moveable property of *Musammat* Mukhtar-un-nisa. Paragraph 4 is of importance as ths basis of the claim of the plaintffs to partition and may be quoted in full:—"But out of the entire property owned by me and specified in paragraph 1 of this Will my daughter shall be deemed to be the permanent owner of an 8 annas share....and the remaining 8 annas share shall be permanently owned by Sheikh Ghazanfar Ali and Sheikh Manzur Ali under the subordination (*ba mataheti*) of my daughter and the profits thereof according to the share of every person shall be appropriated by these legatees." In paragraph 5 she directs that the management of the Court of Wards as it existed at the time of the Will was to continue after her death and all the three legatees were to be liable to pay the debts due from the estate. In pargraph 6 she makes a bequest of property acquired out of profits of the ancestral estate in the same manner as that of the ancestral estate.

The lady died on the 6th September 1885 and in the Lucknow District mutations of names were made in favour of all the three legatees as propietors:

Musammat Mukhtar-un-nisa to the extent of one-half and Ghazanfar Ali and Manzur Ali to the extent of the other half. In the Bara Banki District, however, Ghazanfar Ali and Manzur Ali were shown as under-proprietors of 8 annas share of the property. There are copies on this file of certain statements of *Musammat* Mukhtar-un-nisa dated 11th January 1886, which were accepted by Manzur Ali. It is not clear how in the same mutation proceedings in Lucknow on the same date different statements came to be recorded. The statement (Exhibit A-3) is to the effect that Ghazanfar Ali and Manzur Ali were to be proprietors of half while in the statement (copy A-5) the words used are that names may be entered in the column of under-proprietor and co-sharer (*malahli wo hissadari.*) A few months later inquiry was made from the lady and her cousin, how the *taluqdari* rights were to be arranged and the reply given by both parties was that the *taluqdar* will deduct from the profits due to the others their share of the expenses (Exhibits B-4 and B-5). In 1878 the Court of Wards released the property and discharge was given by Mukhtar-un-nisa alone as *taluqdar* of *taluqa* Jasmanda (Exhibit B-30).

On 15th October 1889 *Musammat* Mukhtar-un-nisa made a Will of her 8 annas share of the property in favour of her second son Mohammad Mohsin Ali, father of the defendant-appellant and bequeathed to her other three sons a share of the profits specifically directing that these sons shall not be entitled to proprietary interest in the estate. *Musammat* Mukhtar-un-nisa died on 22nd June 1890. After her death Mohammad Mohsin Ali took steps in the Lucknow District to have the names of Ghazanfar Ali and Manzur Ali removed from the *khewat*, but his application was dismissed by all the Revenue Courts. The judgment of the Board of Revenue (Exhibit A-47 dated 25th May 1893, page 11, Part III) was delivered by an officer who enjoyed at the time considerable reputation for his knowledge of revenue tenures in the Provinces of Oudh and Agra. It was as follows:—"The names of the 8 annas co-sharers in the *mahal* were rightly entered in register No. 3 (that is the *khewat*). If the Bara Banki register No. 3 has been differently prepared..it was wrongly prepared. All that the Will said in respect of these Lucknow villages was that the daughter of the testator was to be *taluqdar* in succession to the testator that 8 annas of the villages were to be her daughter's in sole right and 8 annas were to be her nephews' in sole right in subordination to the *taluqdar*. That meant merely that the daughter was to be the *lambardar* of the whole estate being the *taluqdar* but the proprietary right of her nephews was the same in the 8 annas devised to them as was the daughter's in the 8 annas devised to her."

After the death of Ghazanfar Ali his eldest son Tahawar Ali desired to have a share in the property and the dispute was referred to the arbitration of the *taluqdar* of Gadya. His award was delivered on the 23rd November 1913 (Exhibit B-7, page 82, Part III), and it decreed a money payment in favour of Tahawar Ali. On the death of Mohammad Mohsin Ali in 1920 the name of Mohammad Ahsan Ali defendant-appellant alone was entered in the village records by an order of the Revenue Court dated 12th January 1921, (Exhibit A-40, page 90, Part III).

Such is the history up to date of the property in suit. After consideration thereof the interpretation we place on the Will of *Musammat* Shamsh-un-nisa is that she bequeathed proprietary share in half of her property to her husband's nephews. The wording of the Will does not support the argument of the appellant's learned Counsel that the bequest to these two men was of a kind of *naukar* rights of the receipt of monetary payment without any interest in the property. It is obvious that the lady thought of *taluqdari* right as something distinct from proprietary right. In paragraph 1 she admitted the proprietary title of her husband's nephews in two villages Shahpur and Jithauli, but at the same time she asserted that she was *taluqdar* of those two villages as well. The subordination in which she placed the nephews to her daughter was one of respect and position and not a proprietary

title. She desired the prestige and honour of her daughter to be kept on the same level as hers without derogating from the proprietary rights of her husband's nephews. The distinction in language is very marked between her Will and that of her daughter and the daughter expressed thereby differently to convey her intention of limiting the rights of her sons other than Mohammad Mohsin Ali to money payment. Stress was laid by the appellant's learned Counsel on the lady's reply to the inquiry made by Government, but there is a gap of 15 years between the two events. By the time the Will was prepared Ghazanfar Ali and Manzur Ali had grown up and must have been able to bring pressure to bear upon her n prosecution of their own rights. It has to be remembered that the property belonged to their family and not to hers. When Mukhtar-un-nisa made a Will in 1889 she disposed of only the 8 annas share and made no mention of the share of her father and uncle(?). If she had understood that her father and uncle(?) were entitled only to a money payment under her mother's Will she would have made mention of their right to recover that payment from Mohammad Mohsin Ali. It is true that the estate is detailed in the Will as consisting of 10 entire villages but the whole tenor of the Will and the absence of any mention of the rights of her father and uncle(?) from the document clearly establish that she was dealing only with an 8 annas share of the property. The learned Counsel for the appellant sought support for his contention of only *nankar* rights being bequeathed to Ghazanfar Ali and Manzur Ali from the language of the award of 1913 and from the fact that *Musammat* Mukhtar-un-nisa alone gave a discharge to the Court of Wards. The award, however, interpreted the Will of *Musammat* Mukhtar-un-nisa and not that of her mother. In it the arbitrator makes separate mention of the 4 annas share in the estate belonging to Ghazanfar Ali. It cannot be taken from the result of a decree for an annual money payment that in the opinion of the arbitrator Tahawar Ali was not entitled to any share in one-fourth of the property belonging to his father. The words of the arbitrator with respect to this quarter share are "In addition to this, a 4 annas share in this estate belonged to the father of Sheikh Monhsin Ali and others in subordination to their mother." These words do not indicate that Ghazanfar Ali was merely an under proprietor of the 4 annas share in the property. *Musammat* Mukhtar-un-nisa was the person appointed by her mother's Will to manage the estate, so the Court of Wards may have considered a receipt by her to be a sufficient discharge. This dealing between her and the Court of Wards is not an indication of the extent of her proprietary rights. Mohsin Ali alone appears to have taken possesion of the 4 annas share of his father; but that fact is no indication of the rights of his father in the property. When he failed to have the names of his father and uncle removed from the *khewat* he did not bring a declaratory suit in the Civil Court. It will be conceded that the failure to bring a suit did not in any way affect his proprietary title so long as parties remained on the original footing. But his forbearance is an indication that he did not expect success in disputing his father's and uncle's proprietary title in the Civil Court.

Even if we accept the appellant's contention that the bequest to Ghazanfar Ali and Manzur Ali was of the receipt of profits in perpetuity, the result will be the same. There are no words in the Will to indicate that they were specifically debarred from claiming proprietary interest. In answer to an argument like the present their Lordships of the Privy Council observed in *Faiz Muhammad Khan* v. *Muhammad Said Khan* (1). "Their Lordships have heard no reason founded on the language of the Will of 1873 for confining the interest of Sultan to a life estate except that the gift is only of profits. But in order to show that an unlimited gift of profits is less than a gift of the *corpus* some evidence should be found in the context or in the circumstances affecting the property." (Page 822 of the report). The context of the Will of

(1) 25 C. 816; 25 I. A. 77; 2 C. W. 385; 7 Sar. P. C. J. 320 (P. C.).

Musammat Shamsh-un-nisa points the other way. In our opinion its wording and the conduct of the legatees of the Will all point one way and we held that the plaintiffs are owners of 4 annas share in the *mahals*.

As the defendant-appellant's brothers, uncles and cousins, that is male descendants of Mukhtar-un-nisa, other than the defendant-appellant, are not parties to this appeal we feel disinclined to deal with the question whether the 8 annas share of property held by Mohammad Ahsan Ali is a *taluqa* or not. We are of opinion that for two reasons it is not necessry to decide it. An appeal lies to this Court under section 112 of the Land Revenue Act from a decree of the Revenue Court in so far as that Court decides a question of title under section 101 (3). A discussion as to the power or willingness of Revenue Court to partition a *mahal* is beyond the jurisdiction of this Court. This Court has authority to decide that a particular person is owner of a certain share in a *mahal* but cannot direct a Revenue Court to separate that share by partition. Similarly we are of opinion that this Court cannot prevent partition of a share even if the proceedings of the Revenue Court be contrary to the rules and regulations laid down for its guidance. The question of stay of partition proceedings for want of the sanction of the Local Government can, in our opinion, be agitated only in a Revenue Court. Secondly, even granting that the property held by the defendant-appellant is *taluqdari* property the rest of the *mahal* which is sought to be separated by the plaintiffs is not a *taluqa* and cannot be called a *taluqdari mahal*. The separation of the plaintiffs' property will not affect the existing property of the defendant-appellant, even though to be a *taluqdari mahal*.

In the result we dismiss the appeal with costs.

Appeal dismissed.

Z. K.

RANGOON HIGH COURT.

SECOND CIVIL APPEAL NO. 338 OF 1922.

June 22, 1923.

Present:—Mr. Justice Duckworth.

AUNG RHI—APPELLANT

versus

MA AUNG KRWA PRU AND ANOTHER—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 123—Gift—Attestation—Scribe, whether can attest—Evidence Act (I of 1872), s. 70—Admission of execution—Attestation, proof of, whether necessary.

A gift deed in order to be valid requires attestation just in the same manner as a mortgage. [p. 363, col. 2.]

The writer of a deed may also be an attesting witness provided he attests the execution of it. [p. 363, col. 1.]

S. V. S. T. Chetty v. *Po Mya*, 56 Ind. Cas. 945; 12 Bur. L. T. 261; *Dinamoyee Debi* v. *Bon Behari Kapur*, 7 C. W. N. 160 and *Govind Baikhji* v. *Bhau Gopal*, 39 Ind. Cas. 61; 41 B. 384; 19 Bom. L. R. 147, relied on.

An attesting witness must see the executant sign the deed and must subsequently sign his own name as witness in token thereof. [p. 363, col. 1.]

C. M. R. M. A. R. Perianan Chetty v. *Maung Ba Thaw*, 43 Ind. Cas. 916; 9 L. B. R. 159; 11 Bur. L. T. 114, relied on.

Where the executant of a deed admits execution of the deed it is not necessary to prove attestation, and the admission need not be made during the suit but may be an admission made antecedent to the institution of the suit. [p. 364, col. 1.]

Satish Chandra Mitra v. *Jogendra Nath Mahalanobis*, 34 Ind. Cas. 862; 44 C. 345; 20 C. W. N. 1044; 24 C. L. J. 175, *Nageshwar Prasad* v. *Rachu Singh*, 53 Ind. Cas. 70; 4 P. L. J. 511 and *Hira Biti* v. *Ramdhan Lal*, 62 Ind. Cas. 540; 6 P. L. J. 465; 2 P. L. T. 752; (1922) Pat. 42; 4 U. P. L. R. (Pat.) 3; (1922) A. I. R. (Pat.) 70, relied on.

Second appeal against a decree of the Divisional Court, Arakan, in Civil Appeal No. 20 of 1922.

Mr. *Lambert* (Senior), for the Appellant.

Mr. *Halker*, for the Respondents.

JUDGMENT.—The only question argued in this second appeal is whether the deed of gift by Ma Hnin Zi U was valid under section 123, Transfer of Property Act. It is is not now urged that she did not execute the deed, or that the gift was invalid, as having been made *in extremis*, or that the property was not hers to give. The sole ground taken is that the evidence given has not proved that the deed of gift was attested by "at least two witnesses," as required by section 123 of the Transfer of Property Act, and that it cannot, therefore, operate as a valid gift.

It appears that Ma Hnin Zi U put her cross mark to the deed, and thereby executed it. The writer of the deed, Maung Kyaw U, attested her mark, after writing her name followed by the words "Cross mark," by writing 'Attested by Maung Kyaw U." Below that he wrote the date 6th January 1922, and below that again he wrote "writer of the deed Maung Kyaw U." From this it is clear that he "attested" the deed, and did not only sign as scribe. That he was an attesting witness is shown by the cases of *S. V. S. T. Chetty* v. *Po Mya* (1). *Dinamoyee Debi* v. *Bon Behari Kapur* (2) and *Govind Bhikaji* v. *Bhau Gopal* (3). The question then arises as to whether any of the other four persons, Kyaw Hla Aung, U Saw, Kyaw Tun and Abdul Rahman, were "attesting witnesses," *i.e.*, witnesses who Saw Ma Hnin Zi U execute the deed of gift, and subsequently signed their names as witnesses in token thereof, as is laid down in the case of *C. M. R. M. A. R. Perianan Chetty* v. *Maung Ba Thaw* (4). Abdul Rahman admits that he was not an attesting witness. Maung Kyaw Hla Aung was not called as a witness: nor was U Saw: and Kyaw Tun's evidence shows that he is doubtful, as to when, or if, Ma Hnin Zi U executed the deed of gift at all.

Kyaw U, the writer, is very clear and precise in his evidence, and he has been believed by both the lower Courts. He says that Ma Hnin Zi U executed the deed before witnesses, signed it, and that Kyaw Hla Aung and Kyaw Tun saw that she executed it. He adds that the other two witnesses (U Saw and Abdul Rahman) did not see her sign, but that they read the deed afterwards, and then signed the same. This is corroborated by what the headman, Abdul Rahman, testifies in his evidence as regards his own part in the affair.

There was no object in calling U Saw as a witness, in view of this evidence. It appears that Kyaw Hla Aung was not cited, on account of his illness, but at the end of the case, when it was pending for judgment, plaintiff applied to have him called and examined, but this application was refused.

The evidence of Kyaw Tun now requires close attention. He commences by saying that he "attested" the deed of gift, Exhibit A. But, in cross-examination, his statement was to this effect: "Maung Kyaw U read over the deed of gift. First Kyaw Hla Aung signed. Then I signed. Hnin Zi U signed it after all of us signed it. I don't know if Hnin Zi U executed the deed of gift or not. The headman went away first. I went away after all others had gone." Then, when re-examined, he stated: "I did not notice if Hnin Zi U executed the deed." It thus appears that his memory was defective, or else that he has given false evidence. He began by stating that he was an attesting witness as indeed Kyaw U, the writer, swears that he was. Abdul Rahman's evidence shows that Kyaw Tun's statement must be inaccurate, for Abdul Rahman states that, when arrived the deed had been duly executed, and the other three witnesses had all signed on it as witnesses. It is significant also that his signature comes last on the list. Further Kyaw Tun says that this headman went away before he did: in fact, before any of the others. I consider, therefore, that the reliable evidence of Kyaw U is enough to prove that Kyaw Tun did legally attest the deed, and that it is valid under section 123 of the Transfer of Property Act. Had I not done so, I might, apart from reasons to be stated later, have remanded it, on terms, in order to have Kyaw Hla Aung's evidence taken. I have not dealt with the point that the law relied on relates, not to gifts, but to mortgages, because it is obvious that a gift requires attestation just in the same manner as a mortgage in order to be valid.

There is one more very important point. I have no doubt, from the evi-

(1) 36 Ind. Cas. 945; 12 Bur. L. T. 261.
(2) 7 C. W. N. 160.
(3) 39 Ind. Cas. 61; 41 B. 384; 19 Bom. L. R. 147.
(4) 43 Ind. Cas. 916; 9 L. B. R. 159; 11 Bur. L. T. 114.

dence, that Ma Hnin Zi U admitted execution of this deed of gift before her death. That being so and being proved, it was not really necessary to prove attestation. This is quite clear from the case of *Satish Chandra Mitra* v. *Jogendra Nath Mahalanobis* (5) which was followed by the Patna High Court in the cases of *Nageshwar Prasad* v. *Bachu Singh* (6) and *Hira Bibi* v. *Ramdhan Lal* (7). In these two cases Woodroffe, J.'s views in *Satish Chandra's case* (5) that under section 70 of the Evidence Act, when a party has admitted execution, it is sufficient proof, even though it be a document required by law to be attested were followed. In his and Mr. Ameer Ali's Law of Evidence he had previously disagreed with the *obiter dicta* to the contrary in *Jogendra Nath* v. *Nilal Churn* (8), and his reasons are most convincing. He said "If the admission of the executant has not the effect of dispensing with proof of attestation, there was no necessity for the section at all, as recourse may be had to the general provisions of the Act relating to admissions if the admission of execution is to be used only in the sense of an admission of signing only. Attestation is only a form of solemn proof required in certain cases by special Legislative enactment, and it is difficult to understand why witnesses should be called to prove a document against a party who has admitted that it is a valid document against him." In this I concur. In the case of *Nageshwar Prasad* v. *Bachu Singh* (6) it is shown that the executant's admission need not have been made during the civil proceedings, but may be an admission made antecedent to the institution of legal proceedings.

I dismiss the appeal with costs.

Appeal dismissed.

Z. K.

(5) 34 Ind. Cas. 862; 44 C. 345; 20 C. W. N. 1044; 24 C. L. J. 175.
(6) 53 Ind. Cas. 794 P. L. J. 511.
(7) 62 Ind. Cas. 540; 6 P. L. J. 465; 2 P. L. T. 752; (1922) Pat. 42; 1 U. P. L. R. (Pat.) 3; (1922) A. I. R. (Pat.) 70.
(8) 7 C. W. N. 284.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2677 OF 1920.

January 26, 1923.

Present:—Justice Sir N. R. Chatterjee, Kt., and Mr. Justice Cuming.

MOHENDRANATH BOSE AND OTHERS —DEFENDANTS—APPELLANTS

versus

ABINASH CHANDRA BOSE—PLAINTIFF —RESPONDENT.

Contract Act (IX of 1872), s. 43—Joint tenants —Liability, nature of—Heirs, position of.

As the liability of joint tenants is both joint and several, in view of the provisions of section 43 of the Contract Act, a suit for rent can be maintained against any or some of the joint tenants, the original contracting parties. Similarly, (assuming the liability of the heirs of each tenant to be a joint one), the whole rent can be recovered from *all* the heirs of any one of the original joint tenants, and there is no reason why on the death of all original joint tenants, the liability to pay the rent should devolve upon *all* their heirs (taken together) jointly. [p. 367, col. 2.]

Quaere.—Whether upon the death of the only tenant or one or more original joint tenants, a suit for rent can be maintained against some only of his or their heirs.

(Case-law reviewed.)

Appeal against a decree of the District Judge Nadia, dated the 6th of August 1920, modifying that of the Munsif, Meherpur, dated the 21st of July 1919.

Babu *Pyari Mohan Chatterji*, for the Appellants.

Babu *Mrityounjoy Chattopadhya*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for recovery of cesses, in respect of a *mourashi mokurari* tenure, upon a *kabuliyat*.

It appears that one Khanta Kali Dasi who had inherited certain property from her son, together with the presumptive reversioners Brojo Gopal and Aghorenath, granted a *mourashi mokarari* lease of the property to three persons, Bidhu Bhusan Bose, Ram Lal Bose and Mati Lal Bose on the 13th *Jeyth* 1276 B. S. The lessees were to pay the Government revenue on behalf of the lessors and credit a portion of the rent in re-payment of the debt due to them by Khantakali under a *kistbandi*, and pay the net profit, *viz.*, Rs. 300 to Khantakali for her life, and after her death to the reversionary heirs

Brojo Gopal and Aghorenath. The lessees undertook to pay the Dak peon's salary and agreed that if in future any *anka* (cesses) like Dak peon's slary be imposed the lessees world pay the same and the lessors would have no connection therewith.

Brojo Gopal predeceased Khantakali and after her death the property devolved upon Aghorenath. The lessees failed to pay the cesses, and the Collector realised the same from Aghorenath (the original plaintiff) who thereupon brought the suit out of which this appeal arises to recover the cesses from the defendants who are the heirs of the original lessees. Three of them, however, were not properly served with summons.

The defence was that the heir of Brojo Bose was a necessary party to the suit, that the defendants were not liable under the lease to pay cesses to the Collector nor to the plaintiff under the Cess Act, and that the suit was barred under O. II, r. 2 of the Civil Procedure Code.

The Court of first instance overruled the contentions of the defendants, and dedreed the suit. On appeal that decree was set aside with respect to some of the defendants only *viz.*, Kashupati, Probodn and Nanigopal. The remaining defendants have appealed to this Court.

The first contention in the appeal is that the present suit by Aghore (and on his death by his son) alone is not maintainable in the absence of the heir of Brojo Gopal. It is urged that although Brojo Gopal predeceased Khantakali; he had a vested intereet in the property which devolved upon his heir. This contention was not raised in the lower Appellate Court. It is contended that the question arises upon the lease itself and was raised in the Court of first instance. But although Brojo Gopal as a presumptive reversionary heir joined in the lease, he had merely a contingent interest. His right was contingent upon his surviving Khantakali, and as he predeceased the lady, he had no right at the time of his death which could devolve upon his heir. Aghore Bose survived the lady, and the suit, therefore, was properly instituted by him alone.

The next contention is that the suit cannot be maintained against only some of the heirs of the original tenants. The original lessees, Bidhu Bhusan, Ramlal and Motilal are all dead. All the heirs of Bidhu Bhusan are parties, but some of the heirs of Ramlal and Mati Lal are not made parties or not properly served with summons, and the question is whether it is necessary to have all the heirs of the original lessees parties to a suit for rent.

So far as the original lessees were concerned their liability for rent was, in the absence of a contract to the contrary joint and several, having regard to the provisions of section 43 of the Contract Act. It has been held in several cases that a landlord may bring a suit for the rent of the holding against some of the several joint tenants, see *Jogendra Nath Roy* v. *Nogendra Narain Nandi* (1); *Rameswar Singh* v. *Jaideb Jha* (2); *Krishna Dos Roy* v. *Kali Tara Chowdhurani* (3) and *Beradar Singh* v. *Bacha Mahto* (4). In all these cases the suit was against some of the original tenants who enter into the contract of tenancy. In the case of *Kashi Kinnar Sen* v. *Satyendra Nath Bhadro* (5) an opinion was expressed that whether a promise is joint, or joint and several, is a question of construction depending upon the intention of the parties to a contract, and that it is not an inflexible rule of law that in every case of a lease to two or more persons jointly, there is a promise that each of them will be responsible for the entire rent, so that the landlord may recover the rent against any one of them. The observations, however, were *obiter* as in that case the persons who were sued, were not the original contracting parties, but the heirs of the original tenants. So far as the original contracting parties are concerned, the cases cited aboveshow that any one of them may be sued for the entire rent.

There is divergence of opinion, however upon the question whether upon the death of the original contracting party,

(1) 11 C. W. N. 1026.
(2) 6 Ind. Cas. 387; 12 C. L. J. 591.
(3) 44 Ind. Cas. 80; 22 C. W. N. 289.
(4) 54 Ind. Cas. 39; 5 P. L. J. 32; (1920) Pat. 91 P. L. T. 55; 2 U. P. L. R. (Pat.) 4.
(5) 7 Ind. Cas. 840; 15 C. W. N. 191; 12 C. L. J. 642.

a suit can be maintained against some only of the heirs. In the case of *Kashi Kinnar Sen* v. *Satyendra Nath Bhadro* (5) cited above it was held [following the principle stated in the case of *Ahinsa Bibi* v. *Abdul Kader* (6)] that the heirs really constitute one body, and cannot be treated necessarily as persons who have made joint and several promises, and the suit was accordingly held not to be maintainable. *Kashi Kinkar's case* (5) was followed in *Shaikh Sahed* v. *Krishna Mohan Basak* (7). In *Siba Krishna Sinha* v. *Jagat Chandra Talukdar* (8) it was held by Woodroffe and Smither, JJ., that a landlord cannot maintain a suit for arrears of rent against one of several heirs of a deceased tenant without joining the others as defendants, and that section 43 of the Contract Act has no applicability to such a case. In the case of *Krishna Das Roy* v. *Kali Tara Chowdhurani* (3) of the Judges (one of the members of this Bench) expressed a similar view. The observation, however, was *obiter* as it was not a case of *heirs* of the original tenant, and the other learned Judge (Richardson, J.,) reserved his opinion on the point.

On the other hand in three cases a contrary view has been taken. In *Lalit Mohan Sinha Roy* v. *Haran Chand Khamrui* (9) it was held that a suit against the heirs of a deceased tenant for arrears of rent which did not accrue due during the lifetime of the deceased is maintainable even though all the heirs are not made parties to the suit. The case of *Kashi Kinkar Sen* v. *Satyendra Nath Bhadro* (5) was distinguished on the ground that the rent sued for in that case became due in the lifetime of the father, and some of the heirs only were sued for the arrears. The learned Judges Fletcher and Teunon, JJ., followed the case of *Chamatkarini Dasi* v. *Triguna Nath Sardar* (10) and referred to the observations of Jenkins, C. J., in that case *viz.*, that the liability of the tenants to pay the rent was contractual and that applying the provisions of section 43 of the Indian Contract Act, any one or more of the promisors could be compelled to fulfil the promise. The case of *Lalit Mohan Sinha Roy* v. *Haran Chand Khamrui* (9) again was followed by Fletcher and Walmsley, JJ. in *Subashi Dassi* v. *Raj Krishna Roy* (11).

In the case of *Chamatkarini Dasi* v. *Triguna Nath Sardar* (10) one Biswanath was the original tenant, and he was succeeded by his sons Narendra and Gouri, and two grandsons by two predeceased sons. The suit for rent was instituted against Narendra alone; the holding was purchased by his wife Chamatkarini, and the question arose whether the sale at which she purchased was a sale for arrears of rent under Chapter XIV of the Bengal Tenancy Act so as to pass the entire holding, when all the tenants of the holding had not been joined as parties to the suit for rent. It was held that all the tenants should be made parties (except where one of a number of tenants is put forward by the rest as their representative) in order that the decree and sale in execution of it may have the important consequences described in Chapter XIV of the Bengal Tenency Act. That was the actual decision in the case, but the learned Chief Justice (Jenkins, C. J.,) observed that the liability of the tenants was contractual and under section 43 of the Contract Act a landlord may bring a suit for the whole rent of the holding against one of several *raiyats* for the purposes of a mere money-decree. It is to be observed that the defendant to the suit himself did not enter into the contract but was one of the heirs of the original tenant. This evidently was not noticed and it was unnecessary to do so, because the question was whether the decree having been obtained against one of the tenants, the entire holding passed at the sale. It was immaterial, therefore, whether the defendant was one of the original tenants or was one of the heirs of the original tenants.

In the case of *Meajan Mondal* v. *Jogendra Nath De* (12) the suit for rent was brought against some of the heirs of the sole original tenant and the learned Judges

(6) 25 M. 26 at p. 35.
(7) 35 Ind. Cas. 563; 24 C. L. J. 371.
(8) 45 Ind. Cas. 732.
(9) 36 Ind. Cas. 243.
(10) 19 Ind. Cas. 989; 17 C. W. N. 833.

(11) 23 C. W. N. xxvii (27) notes.
(12) 63 Ind. Cas. 949; 48 C. 518.

Teunon and Newbould, JJ., held that the cases of *Kashi Kinkar Sen* v. *Satyendra Nath Bhadro* (5), *Krishna Das Roy* v. *Kali Tara Chowdhurani* (3), *Siba Krishna Sinha* v. *Jagat Chandra Talukdar* (8), and *Shaikh Sahed* v. *Krishna Mohan Basak* (7) were distinguishable (through the grounds of distinction were not stated) and followed the decisions in the cases of *Lalit Mohan Sinha Roy* v. *Haran Chand Khamru* (9), *Subashi Dass* v. *Raj Krishna Roy* (11), and *Chamatkarini Dasi* v. *Triguna Nath Sardar* (10). The learned Judges observed that they did so more readily as the defendants in that case were the tenants in actual occupation of the land; and the rent for which the suit was brought accrued due not in the time of the original tenant but in the time of the defendants, and also because a decree for rent was obtained against the defendants for a previous period.

It appears, therefore, that so far as the heirs of the original tenant are concerned the view taken in the cases of *Kashi Kinkar Sen* v. *Satyendra Nath Bhadro* (5), *Shaikh Sahed* v. *Krishna Mohan Basak* (7) and *Siba Krishna Sinha* v. *Jagat Chandra Talukdar* (8) is in conflict with that taken in *Lalit Mohan Sinha Roy* v. *Haran Chand Khamrui* (9) *Subashi Dassi* v. *Raj Krishna Roy* (11) and *Meajan Mondal* v. *Jogendra Nath De* (12).

The observations in the case of *Chamatkarini Dasi* v. *Triguna Nath Sardar* (10), and those of one of the Judges in *Krishna Das Roy* v. *Kali Tara Chowdhurani* (3) are *obiter*, because as stated above, in the first case, the question for consideration was whether a sale in execution of a decree for rent obtained against some only of the tenants passed the entire holding, and in the second the suit was brought against some of the original tenants, and was not a case of a suit against some of the heirs of the tenant.

But the principle upon which the observation was based by Jenkins, C. J., in the case of *Chamatkarini Dasi* v. *Triguna Nath Sardar* (10) *viz.*, that the liability of the tenants was contractual and that under section 43 of the Contract Act, a landlord may bring a suit for the whole rent of the holding against one of several *raiyats* for the purposes of a mere money-decree a principle applicable to the original contracting parties was applied by Fletcher and Teunon, JJ., to the case of heirs of the original contracting party in *Lalit Mohan Sinha Roy* v. *Haran Chand Khamrui* (9) while in the case of *Siba Krishna Sinha* v. *Jagat Chandra Talukdar* (8) Woodroffe and Smither, JJ., held that section 43 was not applicable to the case of heirs.

The authorities on the point appear to be in an unsettled state, and if it were necessary to decide the question we would have referred the matter to the Full Bench because the questions arise very frequently in rent-suits. We think, however, that in the present case it is unnecessary to do so because even assuming that in the case of the heirs of the original tenant, the liability is a joint liability, and not a joint and several one, in the present case all the heirs of one of the original tenants, *viz.*, Bidhu Bhusan are parties to the suit and have been properly served. So far as the original tenants are concerned the decisions are practically agreed (except the *obiter dictum* in *Kashi Kinkar Sen* v. *Satyendra Nath Bhadro* (5) that a suit for rent can be maintained against any or some of the tenants having regard to the provisions of section 43 of the Contract Act. That being so, Bidhu Bhusan alone as one of the original tenants could have been sued for the entire rent, and all his heirs (assuming that the liability descended to them jointly) can be similarly sued for the entire rent. In other words assuming that the liability of the heirs of each tenant is a joint one, a suit for the entire rent can be maintained if all the heirs of one of several tenants are made parties. For instance if *A*, *B* and *C* jointly take a lease, the liability of each of them for the rent is a joint and several liability, and assuming that on the death of *A* the liability of all his heirs is a joint one, a suit can be maintained against his heirs provided all the heirs are joined in the same manner as *A* alone could be sued for the entire rent in his lifetime. Similarly on the death of *B* and *C* the liability of each of them would devolve upon all the heirs of each, but we do not see why upon the death of *A*, *B*, and *C*, the liability should devolve upon all

the heirs of *A*, *B* and *C* (taken together) jointly.

It may be said that although where *A*, *B* and *C* jointly take a lease, *A* alone may be sued for the entire rent having regard to the provisions of section 43 of the Contract Act, it would be hard that the heirs of *A* alone, who were no parties to the contract, should be made liable for the entire rent. But the right of *A* in the tenure devolved upon his heirs together with the liability for rent, and as *A* alone could be sued for the entire rent, his heirs who succeed to his rights in the tenure may be sued for the entire rent.

The defendants relied upon a judgment of the High Court in another suit for rent between the same parties relating to the same tenure, where it was held that all the heirs of the deceased tenant (in singular) should be made parties and the rent suit was dismissed because that was not done. The fact, however, that there was not one, but several joint contractors originally does not appear to have been brought to the notice of the learned Judges who decided that case. That judgment, therefore, is not binding upon the question now raised before us.

As stated above all the heirs of Bidhu Bhusan one of the original tenants who alone could have been sued for the entire rent in his lifetime are parties to the suit. It is not denied that they are in possession, and there is no suggestion that the arrears of rent accrued due in the lifetime of the original tenants. The plaintiff who is the respondent before us is willing to take a decree against the heirs of Bidhu Bhusan alone which of course will be a mere money-decree. In these circumstances we think that the suit cannot be dismissed as against them.

The next contention is that the suit is barred by the provisions of O. II, r. 2 of the Civil Procedure Code. It appears that a suit for rent was previously brought against the defendants and the claim for cesses was not included in it. But under the contract the lessees agreed to pay cesses into the Collectorate, and it was because the defendants did not pay the same to the Collector and the Collector realised the cesses from the plaintiff, that the latter became entitled to claim the same as damages against the defendants. The claim for cesses, therefore, is not barred under O. II, r. 2 of the Civil Procedure Code.

The last contention is that the plaintiffs' name was registered only with respect to four annas and odd share, he is not, therefore, entitled to recover the entire amount claimed. This objection however was not raised in the Courts below, and we decline to entertain it for the first time in second appeal.

The result is that the decree of the Court of Appeal below will be confirmed so far as the heirs of Bidhu Bhusan Bose are concerned, and the suit will be dismissed as against the other defendants. These other defendants will however pay their own costs in all the Courts. As against the defendants who are the heirs of Bidhu Bhusan Bose, the plaintiff will get costs in all Courts.

S. D. *Decree partly confirmed.*

RANGOON HIGH COURT.

SECOND CIVIL APPEAL NO. 192 OF 1921.

January 22, 1923.

Present:—Mr. Justice Lentaigne.

MA PWA—APPELLANT

versus

MUHAMMAD TAMBI AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 90—Limitation Act (IX of 1908), Sch. I, Art. 166—Execution of decree—Sale, application to set aside, on ground of absence of attachment—Appeal, second, whether lies—Limitation—Sale, whether nullity.

Where a judgment-debtor seeks to set aside an execution sale on the ground that there was no valid attachment of the property, the application falls under section 47 and not under O. XXI, r. 90, of the Civil Procedure Code and there is a right of second appeal in the case. [p. 369, col. 2.]

Sheodhyan v. *Bholanath*, 21 A. 311; A.W.N. (1899) 84; 9 Ind. Dec. (N. S.) 907, dissented from.

Rasaraj Kunai v. *Prasanna Kumar Roy*, 15 Ind. Cas. 506; 40 C. 45, relied on.

Article 166 of Schedule I to the Limitation Act applies to every application filed under the

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Code of Civil Procedure to set aside a sale made in execution of a decree, irrespective of the specific section or Order and rule of that Code applicable to such application. [p. 370, col. 2.]

Satish Chandra Kanungoe v. *Nishi Chandra Dutta*, 54 Ind. Cas. 431; 46 C. 975, relied on.

An execution sale held without a previous attachment is not a nullity. [p. 370, col. 2.]

Sorabji Coovarji v. *Kala Raghunath* 12, Ind. Cas. 911; 36 B. 156; 13 Bom. L. R. 193, distinguished.

Kishory Mohun Roy v. *Mahomed Mujaffar Hossain*, 18 C. 188; 9 Ind. Dec. (N.S.) 126; *Tincouri Debya* v. *Shib Chandra Pal*, 21 C. 639; 10 Ind. Dec. (N.S.) 1057 *Sasirama* v. *Meherban Khan*, 9 Ind. Cas. 918, 13 C. L. J. 243 and *Tarak Nath Roy Chowdhury* v. *Syama Charan Chowdhury*, 36 Ind. Cas. 292 at 295, relied on.

Second appeal.

Mr. *Mya Bu*, for the Appellant.

Mr. *Iyer*, for Respondent No. 1.

Mr. *Banerjee*, for Respondent No. 2.

JUDGMENT.—The first question which I have to decide is whether there is a right of second appeal. If the case is one under O. XXI, rr. 90 and 92, there is no right of second appeal; whilst there would be such a right if the case comes under section 47. In so far the petition filed by the judgment-debtor contained an allegation that there were material irregularities in the publishing and conducting the sale, the application must be treated as being in part an application under O. XXI, r. 90. Such irregularities, however, were not specified, and the real ground of attack was based on the absence of any attachment of the greater portion of area. In the case of *Sheodhyan* v. *Bholanath* (1) a Bench of the High Court at Allahabad held that the object of an attachment is to bring the property under the control of the Court with a view to prevent the judgment-debtor from alienating it and thereby preventing the sale of such property in execution of the decree, that the publication of the attachment is thus a step leading up to the publication of the sale, the actual proclamation of the sale being a notice to the public that the sale is to take place on a particular day and that, consequently, the absence of an attachment may be a material irregularity in the publishing of the sale. I notice, however, that other High Courts have hesitated to take the same view which appears to be an extension of the application of r. 90 to the more remote preceding conditions. Assuming, however, that the reasoning of that decision is correct as far as it goes, it does not cover every aspect of the question because an attachment and the application therefor is also the prescribed procedure for giving the judgment-debtor formal notice as to what property is being brought under the jurisdiction of the Court executing the decree. In *Rasraj Kunai* v. *Prosonna Kumar Roy* (2) the High Court at Calcutta held that section 47 of the Code of Civil Procedure is the section applicable where the sale is sought to be set aside on the ground of the failure to give notice to the judgment-debtor. A defective notice specifying the wrong property or portion of a property, such as we find in this case, may be so misleading as to amount to an absence of notice. I, therefore, hold that the objection as to defect or absence of the necessary attachment in this case involves a substantial question as to the absence of proper notice to the judgment-debtor as to the property attached, which does not come within O. XXI, r. 90, but which does come within the provisions of section 47 of the Code of Civil Procedure, and that consequently there is a right of second appeal in this case.

The next question is the Article of the First Schedule of the Indian Limitation Act, 1908, applicable to the case. There were various decisions under the previous Indian Limitation Act, 1877, to the effect that the Arts. 166 and 172 of that Act (corresponding to Art. 166 of the Act of 1908) did not apply to an application to set aside an execution sale filed under section 244 of the Code of Civil Procedure 1882, (which corresponds to section 47 of the Code of 1908); and that the proper Article applicable to such an application was the Art. 178 of that Act (corresponding to Art. 181 of the Indian Limitation Act, 1908) which prescribes a period of three years as the period of limitation for applications for which no period is provided elsewhere in that Schedule of

(1) 21 A. 311; A. W. N. (1899) 84; 9 Ind. Dec. (N.S.) 907.

(2) 15 Ind. Cas. 506; 40 C. 45.

the Act or by the Code of Civil Procedure, section 230 (see section 48 of the Code of 1908). The Indian Limitation Act, 1908, however, effected certain very important alterations in the wording of the Art. 166 which was substituted for Arts. 166 and 172 of the previous Act.

Arts. 166 and 172 of the Act of 1877 were worded as follows:—

Description of application.	Period of limitation.	Time from which period begins to run.
166. To set aside a sale in execution of a decree, *on the ground of irregularity in publishing or conducting the sale.*	Thirty days	The date of the sale.
172. By a purchaser at an execution sale, to set aside the sale *on the ground that the person whose interest in the property purported to be sold had no saleable interest therein.*	Sixty days	The date of the sale.

I have italicised certain words in the above Articles for the purpose of emphasising the point that such Articles were very limited in their operation, and that consequently the Courts were justified in holding that such Articles did not apply to many applications filed under section 244 of the Code of 1882 to set aside execution sales. The corresponding Art. 166 of the Act of 1908 is as follows:—

Description of application.	Period of limitation.	Time from which period begins to run.
166. Under the same Code to set aside a sale in execution of a decree.	Thirty days	The date of the sale.

I am of opinion that the Legislature in making this alteration of the wording of these Articles had very materially widened the operation of Art. 166 of the Act of 1908, and that Art. 166, when couched in such wide terms, must be given its plain meaning and applied to applications like the one now before me filed under the Code of Civil Procedure to set aside a sale made in execution of a decree, irrespective of the specific section or Order and rule of that Code applicable to such application. This modification of the law appears to have escaped the attention of various Courts in certain decisions published in some unofficial reports cited before me, and as I am not bound to consider any unofficial report of a decision it is unnecessary for me to discuss such decisions. I find, however, that the High Court at Calcutta in 1919 has taken the same view as I do of the operation of Art. 166 in *Satish Chandra Kanungoe* v. *Nishi Chandra Dutta* (3), and certain unofficial reports also indicate that the High Courts of Bombay, Patna and Madras have adopted the same construction which I regard as the plain meaning of the Article.

For the above reasons I am bound to hold that Art. 166 of the Indian Limitation Act, 1908, applied to the application in question, and that as the application was not filed within thirty days after the sale, it is barred by limitation.

On behalf of the appellant great stress was laid on a passage in Mr. D. F. Mulla's recent Edition of the Code of Civil Procedure to the effect that an execution-sale held without a previous attachment is void and a nullity; and as a finding of law to that effect might open out new avenues for attacking the sale and raise the question whether there would be any necessity to formally set such sale aside, I have endeavoured to ascertain if there is any force in the argument. The decision quoted as the basis of the passage is *Sorabji Coovarji* v. *Kala Raghunath* (4). That decision, however, when closely examined, is really a decision on the point which I have

(3) 54 Ind. Cas. 431; 46 C. 975.
(4) 12 Ind. Cas. 911; 36 B. 156; 13 Bom. L. R. 1195.

discussed above, whether a second appeal lies by reason of the case coming under the provisions of section 47 and not under O. XXI, r. 19. Though the Advocate for the appellant in that case used the words "void" and "nullity" in his address to the Court, the judgment is much more guarded and when setting the sale aside, does not go into the question whether the absence of the attachment constitutes an absolute defect of jurisdiction or is merely a material irregularity. The Court had power in that case to set the sale aside on the ground of material irregularity and was right in doing so. I have failed to find any authority which would justify me in holding that the absence of an attachment would justify a finding that the execution sale was void *ab initio* and a nullity, but I have found authorities to the contrary. In *Kishory Mohun Roy* v. *Mahomed Mujaffar Hossein* (5) the Calcutta Court held that it could see no sufficient reason why the absence of an attachment should render a sale void after it had been duly confirmed and a sale certificate granted to the purchaser. In *Tincauri Debya* v. *Shib Chandra Pal* (6) the same point was similarly decided but in this case in respect of a sale held without an attachment under a mortgage decree. In *Sheodhyan* v. *Bholanath* (1) the High Court at Allahabad held that the absence of an attachment was merely a material irregularity in the publishing and conducting of the sale. In 1911 a Bench of the Calcutta High Court held in *Sasirama* v. *Meherban Khan* (7) that the absence of an attachment does not vitiate the sale unless the objection is taken before the sale has taken place and as the objection in that case had been before the sale, the sale was set aside. In 1916 the Calcutta High Court again considered the question in *Tara Nath Roy Chowdhury* v. *Syama Charan Chowdhury* (8) and appear to have come to the same conclusion that the absence of an attachment, though an irregularity, does not render the sale absolutely void. In the present case there was a previous attachment of small portion of the holding and of less than one-sixteenth of the area sold, and that attachment, which applied at first to 9 acres and subsisted after the removal of attachment as regards half of that area, should have put the judgment-debtor on her guard and made her watch the proceedings. She had notice of the proceedings to that extent and if she had been vigilant, that notice would have given her ample opportunity to protect her rights. For the above reasons it is clear that the contention that the sale is a nullity is not supported by authority, and the defective attachment cannot justify me in granting her relief at this late stage of the proceedings.

An objection was also taken on behalf of the respondent to the effect that appellant is now estopped from claiming the relief prayed for by reason of the provisions of sub-rule (2) of r. 89 of O. XXI. There is possibly some force in this objection, especially as the arrangement to pay the money into Court was a consent one and permitted the appellant to pay the money into Court after the thirty days, but it is unnecessary to discuss the point. It is no doubt probable that if the judgment-debtor had appealed against the finding that she had paid the money into Court too late, she might have succeeded in such appeal. Her present misfortune is due to the fact that she was grossly negligent in not looking after her interests and in omitting to appeal against that order in the previous proceeding when there was still time to appeal and when there was no provision of limitation barring her right to relief. The Court is, however, now bound to administer the statutory law of limitation, as she has allowed the period to elapse; and her appeal must be dismissed, as this later proceeding is also barred by limitation.

As regards the question of costs, it is unfortunate that the appellant should have had her suit dismissed by the Township Court because the Judge regarded the suit as one governed by section 47 of the Code. The Court had an alter-

(5) 18 C. 188; 9 Ind. Dec. (N. S.) 126.
(6) 21 C. 639; 10 Ind. Dec. (N. S.) 1057.
(7) 9 Ind. Cas. 918; 13 C. L. J. 243.
(8) 35 Ind. Cas. 292 at p. 295.

native power conferred by sub-section (2) of section 47, and cou'd more properly have directed that the suit be treated as an application under that section. I cannot set aside the order as to costs made in that suit against the appellant, but as the proceeding now under appeal was a repetition of that suit in the form of an application which could have been decided in the previous suit, I am of opinion that I should set aside the order of the lower Appellate Court directing her to pay the costs of the application in the Township Court as she should not be compelled to pay double costs. Likewise, the Judge of the lower Appellate Court was wrong in refusing to decide the case on the merits because he thought that the application should have been in the form of a separate suit. Section 47 would have permitted the Judge to treat the application as a suit and to call upon the applicant to pay the necessary Court-fee for that purpose, if he considered that the questions involved were questions which should be decided in a separate suit. If the appellant had established a case of fraud, this question might have assumed more importance, but on either aspect of the question the appellant was entitled under section 47 of the Code to have the case decided in the proceeding instituted under that section. As the lower Appellate Court erroneously refused to give the appellant a decision on the merits, I do not think that she should be compelled to pay costs for that infructuous proceeding.

For the above reasons I think that the fair balance will be attained by directing that each party should bear his or her own costs in the present proceeding in both the lower Courts and that respondents should be allowed only costs of this second appeal. I, therefore, dismiss the appeal on the merits except as to costs, and I set aside so much of the decree of the lower Appellate Court as awards costs to respondents, representatives of the decree-holder and auction-purchaser. The respondents shall have their costs in this Court only. Advocate's fee two gold *mohurs*.

Appeal dismissed.

Z. K.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 78 OF 1922.

July 9, 1923.

Present:—Mr. Justice Duckworth and Mr. Justice Po Han.

U PE GYI—PLAINTIFF—APPELLANT

versus

MAUNG THEIN SHIN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 23—Public policy, agreement opposed to—Champertous agreement, validity of—Test—Compensation.

While the specific English Law of maintenance and champerty has not been introduced into India and while fair agreements to supply funds to carry on litigation in consideration of having a share of the property if recovered should not be regarded as *per se* opposed to public policy, yet such agreements should be carefully watched, and if extortionate and unconscionable, or made not with the *bona fide* object of assisting, for a reasonable recompense, a claim believed to be just, but for the purpose of gambling in litigation or of injuring or oppressing others by encouraging unrighteous suits, should be held contrary to public policy, and not enforced. At the same time, reasonable compensation for the expenses properly incurred by the financier and for work done may be awarded. [p. 377, cols. 1 & 2.]

One of the tests to be applied in determining whether such a contract ought or ought not to be enforced is the comparison between the liability which the financier incurs under the contract and the amount of the award which he is to obtain in the event of the defendant's success. [p. 377, col. 2.]

Case-law discussed.

Appeal against the judgment and decree of the District Court, Myaungmya, in Civil Regular Suit No. 20 of 1920.

Mr. *Villa*, for the Appellant.

Mr. *J. R. Das*, for Respondent No. 1.

JUDGMENT.—After the death of a certain Daw O, there were disputes and trouble about the estate left by her and her previously deceased husband, U Maung.

Some time in November 1916 Ma E Mya, the deceased first defendant in this case, was claiming that she was the sole adopted daughter of these persons, and in consequence that she was desirous of filing a suit for a declaration of her status, and for administration and possession of the estate.

On the 20th November 1916 it appears that a registered agreement, Exhibit 1, was entered into between the said Ma E Mya and U Pe Gyi, the present appellant-plaintiff, whereby he agreed to finance her

during her litigation, on condition that all his expenses incurred on her behalf should be deducted from the sum total of all the properties which she might acquire by means of a suit, and that he should also obtain a half share in the nett balance. This agreement, however, was cancelled by mutual consent on the 1st February 1917.

On the 26th February 1917 Ma E Mya applied for permission to file her suit *in forma pauperis*. Permission having been given, her suit started as from the 12th June 1917. Her suit was contested, but Ma E Mya was successful in the District Court of Myaungmya, acquiring, by means of that decree, properties to the value of Rs. 27,602-14. It may be said incidentally that in her pauper suit she valued her relief at approximately half a lakh of rupees.

The defendants in that case, Ma Hla and Maung Nyi Bu, appealed to the Chief Court of Lower Burma. Ma E Mya contested this appeal; and the appeal was dismissed with costs. The judgment is dated the 16th March 1920. It should here be stated that the judgment of the District Court of Myaungmya is dated the 17th January 1919.

It appears that after Ma E Mya had been successful in the District Court, another agreement, Exhibit A, the subject of the present suit, was drawn up during June 1919, while the appeal of Ma Hla and Maung Nyi Bu was pending in the Chief Court. This agreement, Exhibit A, is almost identical with the previous agreement, dated the 20th November 1916, which was cancelled in February 1917, with this difference that this later agreement, Exhibit A, contains conditions whereby the appellant was not only to finance Ma E Mya for her legal expenses, but was also to advance, money for her maintenance. Moreover, this agreement, Exhibit A, though it does not expressly refer back to the prior or cancelled agreement, Exhibit 1, yet it purports to have retrospective effect, and cover advances made to Ma E Mya by the appellant during the pendency of her suit before the District Court of Myaungmya, as well as such further advances as might be necessary for successful resistance to Ma Hla and Maung Nyi Bu's appeal. By this agreement Ma E Mya was to allow the appellant to deduct all his expenses and moneys advanced by him on her account from whatever properties were realised, and he was then to take half the nett proceeds of the decree

Though this agreement was drawn up in June 1919, it does not appear that it was either executed or registered until the 28th August 1919. Though it was drawn up in the office of Mr. J. A. Maung Gyi in Rangoon, it was not executed there or in Rangoon. It was not executed or registered at Wakema where the appellant lives and near which Ma E Mya resided; nor was it executed or registered at Myaungmya, the headquarters of the district in which they lived. But it purports to have been executed and registered at Bassein during the temporary visit of U Pe Gyi, the present appellant, accompanied by Ma E Mya, to Bassein on the 28th day of August 1919.

After the successful resistance to the appeal made by Ma Hla and Maung Nyi Bu, it appears that Ma E Mya was not ready to carry out her side of the bargain. On the 26th July 1920 the present appellant filed a suit on this agreement, Exhibit A, against Ma E Mya, whereby he stated that the total realizations made by her in the suit consisted of properties to the value of Rs. 27,602-14; and that his advances and expenses on Ma E Mya's behalf amounted to Rs. 5,586, deducting which left a balance of Rs. 22,016-14. In this suit he claimed half this nett value; in other words, property valued at Rs. 11,008-7 and, of course, the sum of Rs. 5,586 as well, or a total of Rs. 16,594-7. Two other parties were added, namely. U Po Thet and his wife, Ma Kyi Nyo. Ma Kyi Nyo died during the suit; but U Po Thet remained as representing himself and his deceased wife. They were made parties, because they were alleged to have taken a mortgage on certain properties, which by the suit belonged to Ma E Mya, from Ma Hla and Maung Nyi Bu as mortgagors, and because it was alleged that the said mortgage was made after Ma E Mya had legally attached the properties, the mortgage, therefore, being void under the provisions of the Code of Civil Pro-

cedure. During the suit Ma E Mya herself died also, and her son, Maung Thein Shin, the present first respondent, was added as her legal representative.

Ma E Mya's defence was that, although she signed the agreement, Exhibit A, and the power-of-attorney, Exhibit B, which was drawn up in terms of the agreement, Exhibit A, in favour of the appellant, she was persuaded to such execution by misrepresentation, coercion and undue influence. She contended that the appellant was a very influential man in Wakema, and that he had threatened and treated her in such a manner that, on a previous visit to Bassein, she had refused to sign anything, and had returned of Myaungmya. Eventually, she did sign two papers in Bassein, she being under the impression that they were documents relating to the proceedings taken against Ma Hla and Nyi Bu in connection with the mortgage to Po Thet and Ma Kyi Nyo. Further, she contended that, even if it was held that there was this agreement between the appellant and herself, it was hard, unconscionable, champertous and opposed to public policy, and should not be enforced under section 23 of the Contract Act. She urged that all that the appellant had done was to advance her moneys on loan without interest towards her expenses in the litigation; and that he had not rendered her any particular personal services, but occasionally gave her advice and guidance. She stated that the total amount advanced by the appellant would amount to a sum of Rs. 3,400, which amount she was ready and willing to pay to the appellant, if it was so found due. She also contended that, in addition to the amounts realised by her litigation, the appellant obtained a sum of Rs. 250 as land rent, and Rs. 65 as house rent and that these should be deducted from whatever amount was found due to him by her.

The other defendants also contested the suit but inasmuch as they have not been represented in this appeal, although the survivor, Maung Po Thet, was duly served, it is really not necessary to set out their defence.

The learned Judge of the District Court of Myaungmya held that the agreement was bad on the ground that its terms were extortionate and out of all proportion to the amounts advanced by the plaintiff and the risk, if any, incurred by him; in other words that the agreement was unfair and unconscionable. He held that it was conceivable that Ma E Mya understood the terms of the agreement Exhibit A; but he felt constrained to hold that, when she executed it, there was no free consent. In other words, that she executed the agreement under undue influence. The learned Judge gave the appellant a decree for the amounts which he held to have been proved to have been advanced by him, namely, a sum of Rs. 3,660-8, with interest at Rs. 12 per cent. per annum. With reference to the mortgage of the second defendant, Maung Po Thet, he held that it was void, having been made after the legal attachment; and, with these exceptions, the balance of the claim was dismissed.

Against this decree U Pe Gyi has appealed to this Court. His principal grounds are that there is no evidence of undue influence or coercion, or that Ma E Mya had acted without free consent; that the agreement was not unconscionable and inequitable or opposed to public policy; and that the inadequacy of the consideration was not of itself sufficient to render the contract champertous. It was further urged that the District Court was wrong in finding that the appellant was entitled only to Rs. 3,660-8; and that the lower Court, having found in favour of the appellant on the issues in regard to the mortgage made to Maung Po Thet, was in error in awarding the latter his costs when dismissing the appellant's claim against him.

Now, the principal point in this case is that, when this agreement was made, Ma E Mya had already obtained a decree in the District Court; and that the original agreement, Exhibit 1, had been cancelled by mutual consent in February 1917.

From the proximity of the date of the cancellation of that agreement, Exhibit 1, and the date of Ma E Mya's application to sue as a pauper, there can be little doubt that one, at least, of the reasons for the cancellation of that agreement was to enable Ma E Mya to secure leave to sue as a

pauper. It is quite clear that the other side had knowledge of this agreement; and it appears that it was actually pleaded. But, when it was found that the agreement had been properly cancelled, that objection was not permitted to prevail. Other reasons for the cancellation of agreement, Exhibit 1, are given on page 73 of the trial record, where the appellant stated that he considered that the costs were somewhat heavy; that he wanted further time to consider; and that he did not approve of the terms thereof in their entirety. It is, therefore, probable that at that period before her suit had been launched he was under the impression that he was in for a bad bargain; and that this was the other and chief reason for the cancellation of that agreement. It is important to bear this in mind, because it has been urged by Mr. Villa for the appellant that, although that agreement was cancelled, it was really acted upon by both parties from the very first; and that, inasmuch as the present agreement, Exhibit A, is in almost exactly the same form, it must be held that it was nothing more than a legal re-establishment of the previously cancelled agreement, stress being laid upon the fact that the present agreement shows that it was to have retrospective effect as regards the previous advances made by the appellant to Ma E Mya. In this connection, however, it must be borne in mind that, under the terms of the cancelled agreement, the advances were to be made without interest; whereas it is clear that after that date and, indeed, until the present agreement, Exhibit A, had been drawn up, advances were made at interest at Re. 1 per cent. per month. It cannot, therefore, be held that the agreement, Exhibit 1, subsisted after its cancellation; and the most that can be stated is that until the drawing up of the present agreement, Exhibit A, not long before the decision of the appeal, the appellant was advancing money either as an agent or as a money-lender in the hope of some substantial profit in the case of Ma E Mya's final success.

At the time at which the agreement, Exhibit A, was drawn up in Rangoon, the appellant had actually advanced to Ma E Mya, according to the promissory-notes filed in the case, Exhibits D-1, D-6, dated from the 25th January 1918 to the 23rd March 1919, a sum of Rs. 2,379-3. The appeal having been filed by her opponents, the sole probable future cost to her would be her Advocate's fees and, possibly, the costs of certain copies. At the most it should not have been more than a sum of some Rs. 800 to Rs. 1,000. As a matter of fact, her lawyer's fees were arranged to be the taxed costs plus a sum of Rs. 200. The taxed costs actually amounted to a sum of Rs. 653-12.

After the agreement, Exhibit A, had been drawn up and before its execution, Rs. 370 was advanced to her; and, after the execution and registration thereof, three sums of Rs. 130, Rs. 532-13 and Rs. 248-8 were advanced to her. The total advances, which, by the way, were in terms of the agreement without interest after the agreement, Exhibit A, had been drawn up, amounted to a sum of Rs. 1,281-5.

The appellant has not proved any other advances or expenditure on Ma E Mya's behalf. The Court-fee, which she had to pay after her success in her pauper suit, amounting to Rs. 1,155, the balance lawyer's fee to Mr. J. A. Maung Gyi, and the balance fee paid to Mr. Tajudin Khan are the principal items which the appellant claims in addition. But there can be no doubt that the learned Judge of the District Court was quite right in his decision that these extra items were not proved, the figures in the remarks column of Schedule E filed with the plaint which were realised by the appellant from the estate, having a remarkable and most significant similarity to the figures of the amounts of Court-fees, and the balance fees to Mr. J. A. Maung Gyi.

Mr. Maung Gyi was not examined on the point in regard to his fees. Mr. Tajudin Khan was not called as a witness; and the Government *chalan*, showing the payment of Rs. 1,155, indicates that that amount was paid in by Mr. Tajudin Khan as Advocate for Ma E Mya. These amounts, therefore, were not proved, and were rightly disallowed.

It may, therefore, be taken that the total advances made by the appellant to Ma E Mya for the purposes of her litigation amounted to the total sum as found by the District Court, namely, Rs. 3,660-8.

It is admitted that advances were made from time to time, and that periodically there was a settlement of account, on which the promissory-notes were executed by Ma E Mya. These pro-notes and some vouchers were produced by the appellant, Exhibits D-1, D-10, and were admitted by Ma E Mya before her decease. There is a very strong presumption that, if there had been any other amounts advanced to Ma E Mya by the appellant, or expended by him on her behalf, they would have been included in a settlement of account. Therefore, the District Court was obviously correct in holding that all amounts expended were included in the promissory-notes and vouchers filed in the suit.

From this it will be seen that at the time when the agreement, Exhibit A, was drawn up, the appellant was aware that Ma E Mya had succeeded in her case in the District Court, and that, though at that time he had only advanced to her a sum of Rs. 2,379. he stood to gain in case of her very likely success in the Appellate Court, a sum of some Rs. 16,000, and that his probable future advances would not much exceed a sum of Rs. 1,000. It is true that Ma E Mya was technically a pauper, and that she might not have been able to have prosecuted her suit successfully, or to have engaged a lawyer of standing to represent her in the appeal, unless the appellant or somebody else had stood behind her. But there can be no doubt that, in the particular circumstances stated, the agreement, Exhibit A, was unfair; that the bargain was unconscionable; and that his very probable gains were far in excess of any expenditure or likely expenditure on his part.

A further point is that the circumstances in which this agreement was drawn up in Rangoon, but was not executed there, and was eventually executed and registered on the same day at Bassein, that is to say, the headquarters of a district to which neither the appellant nor Ma E Mya belonged, are sufficient to cause any Court to study with great caution the question of due execution.

We have the evidence of Mr. J. A. Maung Gyi (now the Hon'ble Mr. J. A. Maung Gyi, one of the Ministers of the Government of Burma), that, while he was in his office, Ma E Mya agreed to the terms of the agreement; but, when he was asked as to why it had not been executed in his office, he stated that his impression was that they wanted to consult others before they decided to execute the documents, the documents being this agreement, Exhibit A, and a power-of-attorney consequent thereon, Exhibit B. In other words, his evidence seems to show that he did not think that Ma E Mya was entirely satisfied. Then we have the significant facts, referred to already, that the documents were not executed at Wakema or at Myaungmya, but were executed and registered at Bassein, when the appellant had taken Ma E Mya thither, and they were staying at the house of his influential brother, U Po Maung.

The appellant has given the most prevaricating answers as to why the documents were executed and registered at Bassein; but the evidence of his own witnesses shows that the real object of his visit to Bassein was the execution of these documents. In view of what those witnesses said, it is impossible to believe that the appellant, U Pe Gyi, has told the Court the truth with reference to his visit to Bassein.

Though it is clear from what the attesting witnesses stated in their evidence that Ma E Mya executed these documents, and stated that she understood and agreed to them, it is open to grave doubt as to whether her consent was free, because at the time she was indebted to U Pe Gyi to the extent of a sum of Rs. 2,749-3, and must have felt that she was considerably under his influence.

There is evidence that the appellant is a man of wide-reaching influence and importance, and it is very significant that in his evidence he stated that he has given similar help to another woman at Pyapon under a similar agreement

and that he appears to consider it an easy method for acquiring considerable riches. There is, indeed, evidence that, after the execution and registration of the documents, Ma E Mya referred to them in the presence of respectable persons; but this does not necessarily denote that her consent to the documents was free, or that she had not been subject to considerable influence and pressure in the execution and registration thereof. At that time the appellant, U Pe Gyi, must have been deeply regretting his cancellation of his previous agreement, and must have been extremely anxious to obtain some security for what he hoped to obtain by Ma E Mya's success. He admits in his evidence that he was somewhat in a hurry, because he thought that Ma E Mya was in process of approaching Ma Hla and Maung Nyi Bu with a view to compromising her claim. It, therefore, seems clear that the execution and registration of these documents must be treated with the gravest suspicion. It is not as though Ma E Mya had admitted that this agreement was executed with her free consent, in which case the Courts might have been inclined to treat it differently; for, here, before her death, she deliberately set out that coercion and undue influence had been used by the appellant in order to induce her to make the bargain in question.

The law on the subject of such agreements as administered in India, is perfectly clear; and it has been laid down by their Lordships of the Privy Council in several cases. It is that while the specific English Law of maintenance and champerty has not been introduced into India, and while fair agreements to supply funds to carry on litigation in consideration of having a share of the property if recovered should not be regarded as *per se* opposed to public policy, yet such agreements should be carefully watched, and if extortionate and unconscionable, or made not with the *bona fide* object of assisting, for a reasonable recompense, a claim believed to be just, but for the purpose of gambling in litigation, or of injuring or oppressing others by encouraging unrighteous suits, should be held contrary to public policy, and not enforced.

The case in point is that of *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (1), which was referred to in the case of *Chunni Kuar* v. *Rup Singh* (2). Another case, in which the law on the subject was discussed, is that of *Loke Indar Singh* v. *Rup Singh* (3). A still further case in that of *Hussain Bakhsh* v. *Rahmat Husain* (4). A somewhat similar case to the present was discussed by their Lordships of the Privy Council in the case of *Raja Mohkam Singh* v. *Raja Rup Singh* (5). It was there held that, judging by the disproportion between the liability, which the financier incurred under the contract, and the amount of the reward, which he was to obtain in the event of the defendant's success, the reward was excessive and unconscionable; and the claim under the agreement was, therefore, disallowed. In the case of *Raghunath* v. *Nil Kanth* (6) their Lordships decided that a nine anna share in the property in consideration of the expenses to be incurred by plaintiff in the prosecution of the case was extortionate and inequitable, and that the agreement should not be given effect to. At the same time it was held that reasonable compensation for the expenses properly incurred and for work done could be awarded.

Much reliance has been placed by Mr. Villa on behalf of the appellant on the case of *Achal Ram* v. *Kazim Husain Khan* (7), in which their Lordships of the Privy Council held that a transfer of a moiety of a person's interest in a property in consideration of the vendee assisting him in litigation for the pur-

(1) 4 I. A. 23; 2 C. 233; 1 Ind. Dec. (N. S.) 442 (P. C.).

(2) 11 A. 57; A. W. N. (1888) 296; 6 Ind. Dec. (N. S.) 465.

(3) 11 A. 118; A. W. N. (1889) 72; 6 Ind. Dec. (N S.) 504.

(4) 11 A. 128; A. W. N. (1888) 273; 6 Ind. Dec. (N. S.) 510.

(5) 15 A. 352; 20 I. A. 127; 6 Sar. P. C. J. 327; 17 Ind. Jur. 376; 7 Ind. Dec. (N. S.) 943 (P. C.).

(6) 20 C. 843; 20 I. A. 112; 6 Sar. P. C. J. 302; 17 Ind. Jur. 374; Rafique and Jackson's P. C. No. 129; 10 Ind. Dec. (N. S.) 567 (P. C.).

(7) 27 A. 271; 15 M. L. J. 197; 8 Sar. P. C. J. 772; 9 C. W. N. 477; 8 O. C. 155; 32 I. A. 113 (P. C.).

pose of recovering that property was not extortionate or unreasonable, and was enforceable. But, though that was undoubtedly the decison in that case, it is easily distinguishable, because, when the matter came to be decided, the vendor was no longer a party to the suit, which was prosecuted by the vendee alone. In other words, it was not a question between the vendor and the vendee.

Reliance has also been placed on the case of *Bhagwat Dayal Singh* v. *Debi Dayal Sahu* (8), in which their Lordships of the Privy Council, in dealing with a similar kind of transfer, held that it was not contrary to public policy or void. But in that case also it is expressly stated that the question whether the bargain was inequitable and unconscionable was a question between the assignors and the assignee, which it was unnecessary to decide in a suit in which the assignors did not repudiate the transaction, but asked that effect be given to it, and for that purpose joined the assignee as plaintiff in the suit. This case also, as pointed out by Mr. Das for the first respondent, is distinguishable, and it cannot be urged that their Lordships of the Privy Council have intended, by their pronouncements in these two cases, to alter the general law as already stated, or to lay down such a proposition as that a transfer of a moiety and, even more, of a property, in consideration of assistance in legal expenses is, in no case, a hard or unconscionable bargain.

It is urged by Mr. Villa that, in any case, under the rulings quoted, the appellant is entitled to compensation for his persona services. The learned Judge of the District Court has found that these services were insignificant. After studying the evidence with care, it is impossible to hold that they were very great, and it is difficult to see on what basis such compensation should be based. The learned Judge of the District Court was, therefore, right in disallowing any such compensation.

As regards the claim made by Ma E Mya in her written statement that a sum of Rs. 315 should be set off against anything payable to the appellant it does not appear from the record that there was any proof of this amount as against the appellant. It must, therefore, be disallowed.

* * * * *

As regards the contention of the appellant that costs should not have been awarded by the decree to Maung Po That as representing himself and his deceased wife, it would appear that the District Court was perfectly right. By its findings it decided, in effect, that by means of the agreement in suit the appellant had no claim to the land, whether the subject of the mortgage or not, and it is, therefore, obvious that Maung Po That must have, in any case, been allowed his costs.

In conclusion there can be no doubt that on the evidence before it and in the circumstances and probabilities of the case, the decision of the learned Judge below was correct. As Maung Po That has not appeared in this appeal as second respondent, it is not necessary to deal with his case, or to come to a definite finding as to whether the mortgage in his favour is valid or void.

The appeal will stand dismissed with costs in favour of the first respondent.

Appeal dismissed.

Z. K.

(8) 35 C. 420; 10 Bom. L. R. 230; 12 C. W. N. 393; 7 C. L. J. 335; 5 A. L. J. 184; 18 M. L. J. 100; 3 M. L. T. 344; 14 Bur. L. R. 49; 35 I. A. 48 (P. C.).

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 846 OF 1921.

July 2, 1923.

Present:—Mr. Justice Macpherson and Mr. Justice Das.

Musammat RAMDULARI KUER—DEFENDANT—APPELLANT

versus

JANG BAHADUR SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Vendor and purchaser—Hindu joint family—Agreement to purchase by father in personal

capacity— Sons, liability of—Contract Act (IX of 1872), s. 37.

Where the father of a Hindu joint family enters into an agreement for purchase in his personal capacity, on his death, his sons, as the surviving members of the family (as distinguished from his heirs and representatives within the meaning of section 37 of the Contract Act) are not bound by the same, and are entitled to a refund of any earnest money paid by the deceased together with interest.

Appeal from a decision of the District Judge, Gaya, dated the 4th February 1921, reversing that of the Subordinate Judge, Third Court, Gaya, dated the 13th September 1919.

Mr. *N.K. Prasad, II*, for the Appellants.

Mr. *S. N. Roy*, for the Respondents.

JUDGMENT.

Macpherson, J.—This appeal is preferred by the widow and legal representative of the defendant, the suit against whom was dismissed by the Trial Court but decreed in part by the District Judge on appeal.

The case for the plaintiffs was that Rai Bindheshwari Prasad on or before the 4th December 1916, in anticipation of a decree on compromise which he eventually obtained on 15th December against Mathura Prasad for Rs. 19,145-9-1 contracted to sell the decree to the plaintiffs and their father, Ramphal Singh, for Rs. 18,000 and took Rs. 3,000 at once out of the stipulated consideration and on the 11th January 1917 executed an agreement (Exhibit 1) in favour of Ramphal Singh to sell the aforesaid decree to him, mentioning therein that Rs. 2,000 had been paid, though in fact Rs. 3,000 had been paid. The plaintiffs *inter alia* alleged as follows:—

"4. That Babu Ramphal Singh, the plaintiffs' father lived jointly with them and they were members of a joint family governed by the Mitakshara School. He died while living jointly with the plaintiffs and leaving the plaintiffs behind him. The plaintiffs entered upon possession and occupation of the entire property belonging to the joint family by right of survivorship."

The defendant failed to execute the deed of sale in spite of notice from the plaintiffs and on the other hand realised the decretal money from Mathura Prasad by execution of the decree which he had contracted to sell to plaintiffs. The plaintiffs, therefore, claimed Rs. 4,522-9-1 made up of Rs. 3,000 paid to the defendant Rs. 1,145-9-1 damages and interest.

The defences were that non-execution was due to the laches of the plaintiffs, that only Rs. 2,000 had been advanced and that the contract was void as Ramphal Singh had died before the 11th January 1917 when the contract was executed.

The Trial Court found that the contract was complete before 4th December but sustained the defence that non-execution of the sale-deed was due to the inexcusable laches of the plaintiffs in spite of notice from the defendant to execute the *kewala* and held that the plaintiffs were accordingly not entitled to recover the deposit of Rs. 2,000, even though there was no express stipulation for forfeiture in case of default. As to the death of Ramphal Singh it was found to have occurred on the 20th December 1916 but the learned Subordinate Judge held that the matter was not affected by his death inasmuch as the agreement did not appear to be a personal one in his favour.

The lower Appellate Court held that it was not proper to apply to Exhibit 1 a construction at variance with its terms which he considered were a promise to execute a sale-deed in favour of Ramphal Singh personally and that this promise became incapable of fulfilment on his death; accordingly the plaintiffs could not enforce a penalty clause against the defendants, and equally the defendants' claim was untenable that the plaintiffs forfeited the earnest money (1) since on the defendant's own showing there was uncertainty in the contract on the question in whose favour the deed should be executed, and (2) since the deed was not signed by Ramphal Singh or by any one on his behalf. As the death of Ramphal Singh had rendered the contract incapable of fulfilment and, therefore, void, or in the alternative as it is or had become void for uncertainty the defendants must refund Rs. 2,000 the earnest money with interest to the plaintiffs.

KO PO MAUNG *v.* MA MEIN GALE.

In second appeal by the widow and heir of the defendant it is submitted that the contract which was admittedly entered into on the 3rd or 4th December 1916 was capable of performance since it was entered into by the joint family and the money was advanced from the joint family funds.

In reply it is contended that there is a clear finding of fact that the contract was a personal one and the earrest money could not be forfeited except for default and Ramphal Singh was not in default.

No other contention was advanced and indeed the arguments in the appeal have hardly extended beyond a statement of these propositions.

The peculiarity of the present position is that each party relies upon the pleadings of the other. The question for decision is, therefore, whether the contract of appellant's husband was a personal one with Ramphal Singh or one with him as *karta* of the joint family of which respondents, his sons, are the surviving members. It is admitted that if it is not found to have been a contract with the joint family of which Ramphal Singh was *karta* this appeal must fail.

Now the findings of the First Court on this point are very far from confident. After deciding that the contract was complete before the 4th December 1917, he proceeds "Besides the contract does not appear to be of a purely personal nature; Ramphal Singh was a member of the plaintiffs' joint family and the plaintiffs themselves *appear* to have been paid the earnest money." He relies on the fact that such had been the case of defendant in his first written statement as well as of plaintiffs.

The learned District Judge relying upon the fact that the document itself is expressed as being in favour of Babu Ramphal Singh and not in favour of him and his heirs or of him and other members of his family, finds that the contract is of a personal nature so that it did not bind the executants to execute a sale-deed in favour of any one but Ramphal Singh. Here he accepts the case made by de endant in his second written statement and displaces the hesitating finding of the Trial Court. No copy of Exhibit I has been produced and thus this Court is restricted to the information obtainable from the paper-book. It appears, therefore, that the question whether the contract was personal or was entered into by the joint family consisting of the respondents and their father is disposed of by the finding of fact of the lower Appellate Court when he holds that the defendant did not bind himself to execute a sale-deed in favour of any person but Ramphal Singh himself. It has not been contended before us on the strength of section 37 of the Indian Contract Act, 1872, or otherwise, that the respondents as heirs and representatives of their father (as distinguished from members of the same joint family with him) are bound by his agreement to purchase.

In our opinion in the circumstances of the case the decision of the lower Appellate Court is correct. The appeal accordingly fails and is dismissed with costs.

Das, J.—I agree.

N. H. *Appeal dismissed.*

RANGOON HIGH COURT.

FIRST CIVIL APPEAL NO. 241 OF 1922.

July 2, 1923.

Present:—Mr. Justice May Oung and Mr. Justice Duckworth.

KO PO MAUNG AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MA MEIN GALE AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 35—Mortgage, proof of—Entries in supplementary Revenue Records value of.

In the absence of other evidence, entries in supplementary Revenue Records, *viz.*, Revenue Register No. 1 and Revenue Register No. 5 though relevant under section 35 of the Evidence Act are not in themselves sufficient to prove a mortgage.

Mi Se Baw v. *Me Min Ya*, 4 Ind. Cas. 1084; 2 U. B. R. (1907-09) Evidence 19, relied on.

Maung Hlaing v. *Maung Chit Su*, 76 Ind. Cas. 449; 1 R. 135; (1923) A. I. R. (R.) 196, distinguished.

KO PO MAUNG *v.* MA MEIN GALE.

Appeal against a decree of the District Court, Pyapon, in Civil Regular No. 2 of 1922.

Mr. *Higinbotham*, for the Appellants.

Mr. *Kyaw Din*, for the Respondents.

JUDGMENT.—It is clear that the appellants-defendants have been in possession since 1901. Strong evidence of the alleged mortgages is, therefore, required. From first plaintiff's own evidence it appears that the mortgage of 1900 was made in writing. If so, it was compulsorily registrable, and cannot be proved. But the transaction of 1901 which both sides admit, the one side calling it an usufructuary mortgage and the other an outright sale, is on a different footing. That may be proved by the plaintiffs. The question is whether they have proved it. It is clear that they have not done so. The plaintiffs-respondents called only two witnesses, besides Ma Mein Gale herself, namely, the ex-headman San Nyein, who was dismissed from his appointment, and was formerly Ma Mein Gale's brother-in-law, and Po Bwin, a cooly, who is alleged to have been present casually, and is the husband of Ma Mein Gale's step-daughter. They both contradict Ma Mein Gale as to whether her husband, Maung Ni, was present at the transaction at San Nyein's house. She says that he was not. They say that he was. Po Bwin's memory, for a casual witness, is extraordinary, and it is clear that not much reliance can be put on such evidence as he and San Nyein give twenty-one years later about the transaction.

As regards the map, extracts from Revenue Register No. 1 and extract from Revenue Register No. 5, which show the respondents as mortgagors and the appellants as mortgagees, these are in themselves, being but supplementary Survey Records, quite inadequate to prove the mortgage That this is the case has been held by the Courts in Burma time after time. Moreover, no effort was made to produce Register No. 9 (as it then was), in which reports of alienation are made direct, and signed by the parties. The best evidence available from the Revenue Records was thus not made use of. It was held by Shaw, J. C., (later Sir George Shaw), in the case of *Mi Se Baw* v. *Mi Min Ya* (1), that, in the absence of other *reliable* evidence, supplementary Survey Records are insufficient to prove mortgage. This is undoubtedly right, and in no way conflicts with the decision of Pratt, J., in *Maung Hlaing* v. *Maung Chit Su* (2) where entries in Register No. 7 (formerly 9) were referred to as creating a presumption that a report of an alienation in the temrs stated was made.

No doubt the Revenue Records, put in evidence in the District Court, were relevant under section 35, Evidence Act, but they are not sufficient in themselves to prove the mortgage.

The combined force of these records (which are of course in effect copies from Register No. 9), and the very weak oral evidence for the plaintiffs-respondents was inadequate to prove the mortgage. The land, moreover, in 1901, was most probably not worth more than the amount in question.

There was no *onus* of proof on the appellants, and it was immaterial whether they chose to enter the witness-box or not; but they *did* examine two witnesess whose evidence was at lest as good as that of San Nyein and Po Bwin.

The appeal must be allowed. The decree of the District Court is set aside, and the plaintiffs-respondents' suit is dismissed with costs in both Courts.

Appeal allowed.

Z. K.

(1) 4 Ind. Cas. 1084; 2 U. B. R. (1907-09), Evidence 19.

(2) 76 Ind. Cas. 449; 1 R. 135; (1923) A. I. R. (R.) 196.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1232 OF 1920.

April, 10, 1922.

Present:—Mr. Justice Ryves.

KISHORI MAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

PARSADI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (*II of* 1901), *ss.* 10, 165—*U. P. Land Revenue Act* (*III of* 1901), *s.* 36—*Purchaser of* khud kasht *land—Suit for profits—Rent suit—Assessment of rent.*

A purchaser of *khud kasht* land is not entitled to sue the co-sharer landlords for profits under section 165 of the Agra Tenancy Act. His suit is a simple one for rent against his vendor ex-proprietary tenant. As a preliminary step, however, it is necessary for him to have the rent assessed by the Collector with reference to the provisions of section 10 of the Agra Tenancy Act and section 36 of the Land Revenue Act.

Second appeal.

Mr. *Sanyal*, for the Appellants.

Mr. *P. L. Banerjee*, for the Respondents.

JUDGMENT.—The plaintiffs-appellants purchased certain specific plots of land in the village from the ancestor of the respondents. In the deed of sale the land sold is described as the *khud kasht* of the vendor.

The vendor, therefore, would automatically become the ex proprietary tenant of these plots and possession, therefore, was not given to the plaintiffs. The plaintiffs brought this suit against all the co-sharers including the *lambardar*, for profits for the three preceding years, under section 165 of the Agra Tenancy Act. Various objections were raised and the Trial Court dismissed the suit as against all the other defendants, but decreed the suit for Rs. 177-5-10 against the present respondents as representing the plaintiffs' share of profits.

On appeal, the learned First Additional District Judge of Aligarh held that the suit was misconceived, that it was not a suit under section 165 of the Agra Tenancy Act but was really a suit for rent, and as such, could not be brought until the rent had been assessed by the Collector.

The plaintiffs come here in second appeal and it is argued that the lower Court is wrong in holding that section 165 does not apply. It seems to me quite clear

that section 165 has no application whatsoever. The only claim which the plaintiffs had against the respondents was to recover rent due to them as ex-proprietary tenants. In reality this was the way in which the First Court treated the suit. It came to the conclusion that the proper rent should be something less than what appears to have been agreed upon between the parties in the sale-deed, having regard to the prevailing rates in the neighbourhood and it was on that basis that it gave the plaintiffs their decree although it described it as their share of profits. It seems to me that the suit was entirely misconceived and did not lie at all against the other co-sharers; it should have been brought simply against the respondents for rent. But having regard to section 10, clause (5), of the Agra Tenancy Act and section 36 of the Land Revenue Act, it seems to me that as a preliminary step to such a suit, it was necessary first to have the rent assessed by the Collector. In my opinion the appeal fails and is dismissed with costs, including in this Court fees on the higher scale.

N. H. *Appeal dismissed.*

RANGOON HIGH COURT.

CIVIL REFERENCE NO. 5 OF 1923.

July 23, 1923.

Present:—Sir Sydney Robinson, KT., Chief Justice, and Mr. Justice May Oung.

S. P. R. M. FIRM—PLAINTIFF—APPELLANT

versus

MAUNG PO KYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (*Act V of* 1908), *O. XII, r.* 6—*Usurious Loans Act* (*IX of* 1918), *applicability of—Admission by defendant—Court, power of, to reduce interest.*

The rule laid down in O. XII, r. 6 of the Civil Procedure Code is merely permissive, and the judgment which the Court may pass under that rule is such as the Court may think just.

The terms of the Usurious Loans Act are very wide and apply to all suits whether heard *ex parte* or otherwise.

RAZA HUSAIN KHAN *v.* GANESH PRASAD.

A Court can apply the provisions of the Usurious Laons Act for the benefit of a defendant who has confessed judgment.

Civil Reference from the District Court, Toungoo, in Civil Appeal No. 25 of 1923 of that Court.

JUDGMENT.—This is a reference under O. XLVI, r. 1, of the Code of Civil Procedure. The question referred is "can a Court apply the Usurious Loans Act for the benefit of a defendant who confesses judgment ?"

Plaintiffs brought a suit on a promissory-note against three defendants. One failed to appear, another denied execution, and the third admitted the claim and confessed judgment. It was held by the Original Court that the case was one to which the provisions of the Usurious Loans Act of 1918 should be applied. The reference is made because it is thought that under O. XII, r. 6 of the Code, had the plaintiff applied for immediate judgment, the Court would have had to pass immediate judgment. There was nothing on the record at that stage to suggest that the interest charged was exorbitant. As to O. XII, r. 6, it is to be noted that the rule is merely permissive; further upon such an application the Court may make such order or give such judgment as the Court may think just. The Court is not, therefore, bound to pass an immediate judgment, but in any case in the present instance no such application was made, and when the Court came to pass judgment the facts were fully before it. It can then pass such judgment as it thinks just. The whole of the terms of the Usurious Loans Act are extremely wide, and they apply to any suit whether heard *ex parte* or otherwise. If the judgment in the case of the defendant who did not appear, and in the case of the defendant who denied execution, is not to be for the full amount claimed by reason of the provisions of the Usurious Loans Act, it will clearly be unjust to pass a decree in favour of an honest defendant who truthfully admitted the claim for a very much larger amount. We are able to find nothing in the Act or in the Code of Civil Procedure, which could prevent the Court from taking the Act into consideration in favour of the defendant who confessed judgment, and the answer to the point referred is in the affirmative.

Order in affirmative.

Z. K.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 9 OF 1922.

February 9, 1923.

Present:—Mr. Dalal, A. J. C.

RAZA HUSAIN KHAN AND OTHERS—DEFENDANTS NOS. 2 TO 5—APPELLANTS

versus

GANESH PRASAD—PLAINTIFF, *Musammat* ZAINAB BIBI AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 16, ill. (c).— Undue influence—Burden of proof—Creditor and debtor, relationship of—Mortgage—Redemption—Post diem *interest, rate of—Intention of parties.*

The burden of proving that the rate of interest stipulated for in a mortgage-deed was agreed to by the mortgagor under undue influence lies on the mortgagor or his representatives, and the burden is not shifted on to the mortgagee by proof of the fact that at the time of the execution of the mortgage-deed the mortgagor was indebted to the mortgagee in a small sum. [p. 384, cols. 1 & 2.]

A mortgage-deed fixed the term for redemption at two years and stipulated for a heavy rate of interest. Mention was made of the payment of interest year by year but there was no stipulation that interest would be payable at the contract rate after the due date:

Held, that the parties did not intend that after the due date interest should be paid at the contract rate. [p. 384, col. 2.]

Appeal from a decree of the Subordinate Judge, Gonda, dated the 29th October 1921.

Messrs. *Haider Husain* and *M. Wasim*, for the Appellants.

Mr. *J. K. Banerji*, for Respondent No. 1.

JUDGMENT.—The plaintiff has obtained a decree for sale on foot of a simple mortgage dated 12th June 1912 executed by Tajuddin since deceased. The defendants were the heirs and a subsequent mortgagee of the mortgagor. The defendants (sons of Tajuddin) have appealed

and the argument by the learned Counsel was confined to the question of interest allowed by the Trial Court on the principal sum secured The money was payable at the end of two years and interest was to run at the rate of 22 per cent. per annum with yearly rests. The argument here was (1) that this high rate of interest was consented to by Tajuddin under undue influence and (2) that under the terms of the deed there is no contract for *post diem* interest after the expiry of two years from the date of the mortgage and that, therefore, the same rate of interest should not be allowed up to the date of suit. As an alternative it was further argued that the contract rate should run up to the date of the institution of the suit in the First Court and not subsequently up to the date of judgment as was allowed by the lower Court.

There is no force in the contention regarding undue influence. The argument was that the burden of proving want of undue influence lay on the paintiff-respondent because the mortgagor, when he entered into the mortgage in suit, was indebted to the mortgagee. Reference was made to Illustration (*c*) of section 16 of the Contract Act. That Illustration does not mention all the necessary facts and has to be supplemented. There would be a case of undue influence if the debt is of a large amount and the money-lender puts pressure on the debtor for its payment. Here it is admitted that the previous debt was of a small sum of Rs. 134 while the amount borrowed at the time of the mortgage in suit was Rs. 2,000. No witnesses suggested that the money-lender had made any demand for the payment of the small sum of money due prior to the execution o the bond in suit. When the deed was executed at Mankapur Tajuddin's son Raza Husain was present. He is a defendant but did not come forward to give evidence in the case. In his place another son Ahmad Husain gave evidence and two witnesses Asad Ali and Abdullah Khan who had no reason to be present at the time of the execution of the deed at Mankapur several miles away from their home. Ahmad Husain was not present when the deed was executed. Tajuddin was a tutor of the mortgagee and of his son. This fact does not raise any presumption that the mortgagee would be in a position to dominate the will of Tajuddin. The burden of proving want of undue influence did not lie on the mortgagee and there is an entire absence of proof on the side of the defendants.

As regards the payment of *post diem* interest the question must depend upon the interpretation of the deed. The learned Counsel for the defendants-respondents quoted a large number of cases where it was held that under the terms of particular mortgage-deeds there was a contract for the payment of *post diem* interest at the contract rate. The present case, however, is different. In the mortgage, mention is made about the payment of interest year by year but after the clause relating to the payment of principal and interest after due date there is no stipulation that interest shall be payable at the contractrate. The penalty of not paying at the end of two years is stated to be the right of the mortgagee to recover principal and interest when he liked. There is no stipulation here that if the money is not paid on due date interest at the contract rate will continue to run. When the contract rate is so onerous the deed should be read as far as possible to favour the mortgagor. There is no reason shown, such as insufficiency of security, why such an exorbitant rate of interest should be agreed upon. If money is required only for two years and the mortgagee suddenly gets his money back and is not able promptly to invest it one could understand that he would charge a high rate of interest. When, however, as is urged by the defendants, the contract was for the money to remain on interest as long as the mortgagor desired to keep it, there was no reason why the mortgagor should consent to pay such a high rate of interest. It may be observed that in less than eight years the sum due has grown to nearly five times the original amount borrowed. On the terms of the deed I am fully satisfied that the parties did not agree upon the rate of interest to be paid after the expiry of the two years fixed for payment. Under the circumstances the Court can

fix a reasonable rate and I consider 12 per cent per annum compoundable every year to be a reasonable rate. The decree of the lower Court shall, therefore, be amended accordingly. The amount will be Rs. 3,001-4 up to the end of the stipulated period 11th June 1914 and after that the office shall work out the amount calculating interest at 12 per cent. per annum adding interest into the principal sum at the end of every year. This shall be done up to six months from to-day's date. After that date interest shall run at 6 per cent. per annum. If the money so arrived at is not paid by the defendants within six months of to-day's date the property shall be sold. In preparing the decree the office shall pay attention to certain objections to the lower Court's decree made by the respondents here. Before my signature is obtained the office shall get the account tested by the Pleaders of parties, and my signature shall not be obtained before the signatures of the Pleaders are obtained. Both parties shall receive and pay costs in both Courts according to their success and failure.

Decree modified.

Z. K.

RANGOON HIGH COURT.

CIVIL REFERENCE NO. 9 OF 1923.

July 30, 1923.

Present:—Sir Sydney Robinson, KT., Chief Justice.

TIN TIN NYO AND OTHERS—APPLICANTS

versus

MAUNG BA SAING AND ANOTHER—RESPONDENTS.

Limitation Act (IX of 1908), s. 5—Appeal filed in wrong Court—Time spent in wrong Court, whether can be allowed—Bona fide mistake—Civil Procedure Code (Act V of 1908), s. 98—Letters Patent (Ran.) cl. 34, applicability of—Appeal—Difference of opinion—Procedure.

Where time has been spent in prosecuting an appeal in a wrong Court owing to a *bona fide* mistake of Counsel as to the jurisdiction of that Court, such as could be made in spite of the exercise of due care and attention, the period so spent may under section 5 of the Limitation Act be excluded in computing the period of limitation for the appeal. But this indulgence will not be granted in a case in which the mistake is such as could have been discovered by the exercise of due care and attention. [p. 390, col. 1]

Case-law discussed.

Per *Robinson, C. J.*—Clause 34 of the Letters Patent (Ran.) does not in all cases override the provisions of section 98 of the Code of Civil Procedure and where that section can properly apply it may be resorted to in spite of the provisions of clause 34. [p. 380, col. 1.]

Clause 34 of the Letters Patent (Ran.) applies only to those cases in which the appeals come before the Court by virtue of a right of appeal given by the Letters Patent. Where an appeal lies under the ordinary law of land, the Letters Patent will not override the provisions of the Civil Procedure Code applicable to the appeal. [p. 389, col. 2.]

Civil Reference arising out of Civil First Appeal No. 325 of 1922 of the High Court of Judicature sitting at Mandalay.

JUDGMENT.

Pratt, J.—The appeal against the decree of the District Court was promptly filed in the Judicial Commissioner's Court after return of the Memorandum of Appeal.

It is common ground that the appeal is time-barred unless the time occupied in presenting the appeal in the wrong forum, *i. e.*, the Divisional Court and the subsequent appeal from the Divisional Court's decree to the Judicial Commissioner's Court, be excluded.

The question for decision, therefore, is whether the delay caused by prosecution of the appeal in a wrong forum is sufficient cause for admitting the appeal after expiration of the prescribed period within the meaning of section 5 of the Limitation Act.

A large number of authorities have been cited in support of the admission of the appeal but it is only necessary to refer to some of them.

In *Ramjit Missir* v. *Ramudar Singh* (1) a Bench of the Calcutta High Court treated a Memorandum of Appeal, which had been wrongly filed in the District Court and adjudicated upon there, as though presented in that Court and held that it was a suitable case for exercise of

(1) 16 Ind. Cas. 940: 17 C. W. N. 116 at p. 117; 16 C. L. J. 77.

their discretion under section 5 of the Limitation Act.

In that case, however, the appellant had grounds for considering the District Court was the right forum and there was a divergence of judicial opinion as to the right method of valuing the suit.

The Privy Council case of *Brij Indar Singh* v. *Kanshi Ram* (2) to which reference has been made is not of great assistance as it dealt with the exclusion of the time occupied in a proper application for review of judgment.

In *Sheo Pal Singh* v. *Kripala* (3) it was held that, where a mother acting for her minor son and without legal aid presented an appeal in a wrong Court her mistake was *bona fide* and the delay in presenting the appeal to the proper Court was excusable.

The circumstances in that case are similar to the present, but the decision is important, because of its being based on the *bona fides* of the appellant.

The case of *Maung Sin* v. *Maung Po* (4) is undoubtedly in favour of admission of the appeal.

In that case [*Maung Sin* v. *Maung Po* (4)] a Bench of the Lower Burma Chief Court held that the fact that the Advocate had by oversight filed an appeal in the Divisional Court instead of the Chief Court and the Divisional Court omitted to notice the error and heard the appeal and gave judgment was sufficient cause for not presenting it within the prescription period.

The authority is not, however, a good one as the reasons for the decision are not discussed or given and the question of *bona fides* was apparently not considered.

In the later case of *Ma Mat Gale* v. *Moung Tun Win* (5) a Bench of the Chief Court held that the Divisional Court was wrong in admitting an appeal, which was *prima facie* time-barred because it had been wrongly presented by the Advocate to the Chief Court in the first instance.

It was pointed out that the mistake of the Advocate was one which must have been obvious to anyone who had taken the trouble to read the plaint. The Court after reference to authorities held that a *bona fide* mistake of a Pleader may afford sufficient cause for admitting an appeal after time, but pointed out that a *bona fide* mistake is one made in spite of exercise of due care and attention.

There is little doubt that this is the correct view. The criterion of the excusability of the delay caused by presenting the appeal in the wrong Court is the *bona fides* of the mistake, that is whether it was made after the exercise of due care and attention.

In the present instance the plaint itself disclosed that the value of the suit was about Rs. 10,000 and in filing the appeal in the Divisional Court, it seems obvious that the Advocate cannot be held to have exercised due care and attention.

Had he considered the question of the value of the appeal he must have seen that it was at least Rs. 10,000 and that, therefore, the Divisional Court was not the correct forum. It was common ground that the land in suit had been mortgaged by the first three defendants to the fourth and fifth for Rs. 8,500, so that they were perfectly well aware that the value of the property was greatly in excess of Rs. 3,011, the sum for which the decree for redemption was sought and obtained.

In spite of this in the Memorandum of Appeal in the Divisional Court the appeal was not separately valued for the purposes of jurisdiction, as it ought to have been, but there was a mere note, "value Rs. 3,011" which was the value for the Court-fees only.

I am of opinion that the mistake of the Advocate in presenting the appeal in the Divisional Court, having been made without due care and attention, cannot be considered *bona fide* and that it is not, therefore, sufficient cause for admitting the appeal under section 5.

(2) 42 Ind. Cas. 43; 45 C. 94; 33 M. L. J. 486; 22 M. L. T. 362; 6 L. W. 592; 126 P. W. R. 1917; 15 A. L. J. 777; 19 Bom. L. R. 866; 3 P. L. W. 313; 26 C. L. J. 572; 104 P. R. 1917; (1917) M. W N. 811; 22 C. W. N. 169; 127 P. L. R. 1917; 44 I. A. 218 (P. C.).

(3) 30 Ind. Cas 211; 2 O. L. J. 325.

(4) 12 Ind. Cas. 28; 4 Bur. L. T. 224.

(5) 37 Ind. Cas. 815; 8 L. B. R. 566; 10 Bur. L. T. 221.

TIN TIN HYO v. MAUNG BA SAING.

I would dismss the appeal as time-barred.

Macgregor, J.—Although section 14 of the Limitation Act, 1908, relates to suits and not to appeals, it is the recognised practice that the circumstances contemplated in section 14 should ordinarily constitute a "sufficient cause" within the meaning of section 5. *Balwant Singh* v. *Gummi Ram* (6) cited in *Karm Bakhsh* v. *Daulat Ram* (7) and in *Brij Indar Singh* v. *Kanshi Ram* (2). The question then is whether the mistaken proceedings were prosecuted in good faith, *i. e.*, whether the Advocate's belief that the appeal lay to the Divisional Court was formed with due care and attention, *Ma Mal Gale* v. *Maung Tun Win* (5).

In the last mentioned case plaintiff, and not as here the defendants, was the appellant. In his plaint he had valued the land of which he sought redemption at Rs. 4,500. The decree gave him a portion only of what he claimed. On the last day for filing an appeal, which at that time in Lower Burma, on a valuation not exceeding Rs 5,000 lay to the Divisional Court, the Pleader acting for him wrote to a Rangoon Advocate to file the appeal in the Chief Court and indicated a valuation of over Rs. 5,200 in a letter which might well have put the Rangoon Advocate on his guard. The latter did not ask for the Memorandum of Appeal to be returned to him for presentation in the Divisional Court until it came up for hearing and that was fifteen months after the records had been received in the Chief Court. There had also been other inaction on plaintiffs' part, and the Bench held, on subsequent appea from the Divisional Judge, that on grounds of unjustifiable carelessness and inattention, coupled with gross delay, he ought not to bave admitted the appeal so long out of time. They cited *Sarat Chunder Bose* v. *Saraswati Debi* (8). In that case the appeal was against an order arising out of an execution, and appellants who were the applicants were well aware that the forum of appeal depended on the value of the original suit. A week before filing their appeal in the wrong Court, *viz.*, the District Court, they had had before them the decree in the original suit showing on the face of it a value of Rs. 15,260, and another paper showing that the appeal against that decree had been preferred to the High Court. They had also been guilty of delay after becoming aware of their mistake.

In *Ram Narain Joshi* v. *Parmeswar Narain Mahta* (9) the plaintiffs brought two separate suits against different defendants in respect of the same property, valuing it at different sums over Rs. 5,000 in both for jurisdiction, at Rs. 4,514 in one for Court-fee, and at over Rs. 5,000 in the other for Court-fee. When he lost both, he filed one appeal rightly in the High Court and won it and the other wrongly in the District Court. The two suits had by consent been tried together. The High Court, in dismissing his subsequent application in the matter of the wrongly filed appeal, remarked. "They (*i. e.* the suits)" appear "to have been instituted on different dates," and that is probably the reason why the "values are put down at different figures; but the applicant, who was the plaintiff in those suits, must have known very well that the value of the suit was above Rs. 5,000 and that the appeal in this as in the other lay to the High Court." Apart from that, they held that on grounds of delay alone, and want of due diligence when the mistake became known, he was not entitled to the benefit of section 5. Their Lordships of the Privy Council declined to interfere six years afterwards.

Those are the cases cited before us against the defendants-appellants. In their favour are *Ramjit Misstr* v. *Ramudar Singh* (1) and *Sheo Pal Singh* v. *Kripala* (3) and less directly three other rulings, *viz.*, *Brij Indar Singh* v. *Kanshi Ram* (2) (exclusion of time occupied in a proper

(6) 5 A. 591; A. W. N. (1883) 142; 3 Ind. Dec. (N. S.) 515.
(7) 183 P. R. 1888.
(8) 34 C. 216; 5 C. L. J. 380.

(9) 30 C. 309; 30 I. A. 20; 8 Sar. P. C. J. 431 (P. C.).

application for review); *Balwant Singh* v. *Gumani Ram* (6) (time occupied in application for review to High Court although an appeal lay): and *Brij Mohan Das* v. *Mannu Bibi* (10) (suit presented in wrong Court owing to a *bona fide* mistake of law as to mode of valuing for jurisdiction). In the first of these cases, *Ramjit Missir's Case* (1) there had been it is true a divergence of judicial opinion as to the right method of valuing the suit, and in the second a mother acting without legal aid for her minor son presented an appeal in the wrong Court, but the material divergences between the present case and the three first examined are wider and more numerous. In those cases want of good faith appeared in the parties not only going to the wrong Court with the valuation—their own valuation in two cases—staring them in the face, but also in action and delay. In the present case the valuation is stated in the 12th paragraph of the plaint in Burmese, where it is vaguely put on the very boundary for appellate jurisdiction, and was forgotton thereafter by all concerned, and the proceedings reached the final stage without any objection from plaintiffs. Diligence is regarded as a great test of *bona fides* and defendants-appellants have throughout been prompt and diligent. Due care and attention does not mean such as will make mistake impossible. On the facts and circumstances of this case, I would hold that the appeal was presented in good faith in the Divisional Court and that the appellants are entitled in this Court to the benefit of section 5 of the Limitation Act and that the appeal is it not time-barred, and should be heard.

ORDER OF REFERENCE.

Pratt and Macgregor, JJ.—Plaintiffs sued and obtained a decree in the District Court, Sagaing, for redemption of certain lands for Rs. 3,011. It was stated in the plaint that the value of the suit lands was about Rs. 10,000 and it was common ground that there had been a second mortgage for Rs. 8,500.

The defendants nevertheless filed an appeal to the Divisional Court valuing the suit at Rs. 3,011 without any distinction between the value for the purpose of Court-fees and for jurisdiction.

The Divisional Court admitted the appeal and dismissed it after hearing.

On second appeal to the Court of the Judicial Commissioner in which the appeal was again valued at Rs. 3,011 it was pointed out after the appeal had been admitted that the value of the appeal was over Rs. 10,000 and the first appeal, therefore, did not lie to the Divisional Court, whose decree was set aside as without jurisdiction.

The Memorandum of Appeal was returned to defendants to be presented in the Judicial Commissioner's Court, if thought fit, and was promptly filed in that Court.

The appeal is barred by limitation unless the time occupied by the appeal in the District Court and the subsequent appeal to the Judicial Commissioner's Court be excluded.

The question for determination, therefore, is whether the delay caused by prosecution of the appeal in the wrong forum is under the circumstances sufficient cause for admitting the appeal after expiration of the prescribed period within the meaning of section 5 of the Limitation Act.

The decision turns upon whether Counsel for defendants can be considered to have acted *bona fide* in presenting the appeal to the Divisonal Court.

As we are not agreed on the point of law involved, the appeal must be heard by another Judge or Judges as the Chief Justice may direct on the point of law stated under section 98 of the Civil Procedure Code.

Mr. *Kyaw Din*, for the Applicants.

Mr. *Keith*, for the Respondents.

JUDGMENT.—This is a reference under section 98 of the Code of Civil Proecdure by the Division Bench of this Court sitting at Mandalay, who have differed in opinion on a point of law, namely, a question as to whether the

(10) 19 A. 348; A. W. N. (1897) 86; 9 Ind. Dec. (N. S.) 228.

appeal before them was barred by limitation. The eaxct point on which the learned Judges differ was whether there was sufficient cause shown for admitting the appeal under section 5 of the Limitation Act.

Mr. Keith has raised a preliminary objection that section 98 cannot apply, and that no reference lies. He urges that clause 34 of the Letters Patent of this Court governs the case, that the opinion of the senior Judge should prevail, and that there would then be an appeal under clause 13 of the Letters Patent.

In my opinion the objection cannot prevail. In the first place, the differing Judges are not bound to refer the point of law on which they differ and, if they decided not to do so, then the provisions of clause 34 will apply. But, had they taken that course in the present case, the result would have been that the decision of the Court would be that the appeal was barred by time, and that the Court had, therefore, no jurisdiction to hear it.

I agree with the view expressed by the Full Bench of the Allahadad High Court in the case of *Husaini Begam* v. *Collector of Muzaffarnagar* (11) that the proper procedure, when a preliminary question of limitation is raised, is to hear that question and decide it as a preliminary point and, it it is so decided, it cannot be said that the Appellate Court, which had not heard the appeal on its merits, either confirms or reverses the decree appealed from; and, that being the case, their decision cannot be "a judgment" within the meaning of clause 13 of the Letters Patent, and no appeal would, therefore, lie. I agree with the learned Judges in the authority cited that clause 34 of the Letters Patent does not in all cases override the provisions of section 98 of the Code of Civil Procedure and where that section can properly apply it may be resorted to in spite of the provisions of clause 34 when the result is such as would be the case in the present instance, it seems obviously right for the differing Judges to refer the point of law on which they differ, as has been done in the present case. Further, I am of opinion that clause 34 of the Letters Patent applies only to those cases in which the appeals come before the Court by virtue of a right of appeal given by the Letters Patent. Where an appeal lies under the ordinary law of the land, the Letters Patent will not override the provisions of the Code applicable to the appeal. For these reasons, I hold that there is no force in the objection which has been raised.

Coming to the matter of the reference, I do not think it necessary to refer to the large number of authorities that have been cited. The general rule in this matter is clearly laid down in the case of *Karm Bakhsh* v. *Daulat Ram* (7)—"We think the true guide for a Court in the exercise of this discretion, is whether the appellant has acted with reasonable diligence in presenting his appeal, and we think, further, that he ought ordinarily to be deemed to have acted with ordinary diligence, when the whole period between the date of the decree appealed against, and the date of presenting the appeal, does not, after excluding the time spent in prosecuting with due diligence a proper application for review of judgment, exceed the period prescribed by law for presenting the appeal." It is true that the time sought to be excluded in that case was spent in an application for review of judgment, and that that was a proper course to take. The same rule will apply where the time has been spent in prosecuting an appeal in a wrong Court where there was a *bona fide* mistake as to the jurisdiction of that Court. This rule was approved by their Lordships of the Privy Council in the case of *Brij Indar Singh* v. *Kanshi Ram* (2), and Their Lordships say thereafter—"There may be a general rule as to the exercise of discretion, but each case must, nevertheless, be examined as to its own circumstances to see whether they make it fall within or without the terms of the general rule." The guiding principle is again, in my opinion, correctly laid down in the case of *Ma Mat Gale* v. *Maung Tun Win* (5). The Judge had in that case admitted the first appeal, saying—"After argument, I

(11) 11 A. 176; A. W. N. (1889) 27; 13 Ind. Jur. 316; 16 Ind. Dec. (N. S.) 540.

am of opinion that the mistake in filing the appeal in the Chief Court instead of in this Court was due to an error about the value of the land on the part of the Pleader, who instructed appellant's Counsel." It is pointed out that there was no evidence as to this—either oral or by affidavit—on the record. There was no explanation as to how Maung Saw Pe came or could come to find that the land had been worth over Rs. 5,000. It is pointed out that, if he had examined the plaint, as he should have done, he could not have made the mistake, and further that, if the plaintiff had untruly told him that the land was worth over Rs. 5,000 after having valued it at Rs. 4 500 in his plaint, such untrue statement should clearly not have afforded a ground for relaxation of the law of limitation in plaintiff's favour. It is pointed out that the discretion in admitting an appeal under section 5 of the Limitation Act must be judicially exercised and must be based on materials judicially cognizable. Lastly it is pointed out that, though it has been held that a *bona fide* mistake of a Pleader affords sufficient cause for admitting an appeal after time, that mistake must have been one made in spite of due care and attention that had been exercised. There was also in that case want of due diligence, in that a month was allowed to pass before an application was made for a copy of judgment, and there was gross delay in remedying the mistake in filing the appeal in the wrong Court. Further, it is pointed out that in that case the appeal had been filed by the plaintiff, whereas in the case before me the appeal is filed by the defendant.

In the present case the plaint is headed—"Suit for redemption of lands as per attached plans, A, B, C, D, and E, measuring 87·14 acres for Rs. 3,011, the mortgage money." The plaint does not give the value for purposes of jurisdiction at all, but in paragraph 12 thereof it states that the lands in dispute are worth about Rs. 10,000, that they are situated in the Sagaing Township, and that, therefore, the suit lies within the jurisdiction of this Court. When the Advocate came to file the appeal, he ought to have read the plaint and, had he done so, he would have observed the fact that no value for purposes of jurisdiction is given and would have further learnt that the value of the lands is so near the border line between an appeal lying to the Divisional Judge and to that of the Judicial Commissioner that he must have been put on enquiry as to the true value of the lands. Apparently no enquiries were made. The Advocate merely took the figure given in the heading of the plaint as the amount due on the mortgage to be the value for purposes of jurisdiction. It is little or no excuse to say that his clients would not know because the defendant had a second mortgage on these lands for Rs. 8,500, a fact which is admitted, and they must have been in a position to instruct him had he sought instructions as to the true value of the lands. The Advocate filed an affidavit in explanation, and in that he merely says "That by an oversight I filed an appeal against the decree of the District Court in the Divisional Court of Sagaing instead of the High Court to which it lay, the value of the land in suit having exceeded Rs. 10,000 according to the plaintiff-respondent's valuation which I overlooked." In extenuation of his mistake he calls attention to the fact that the error had escaped the attention of the Counsel for the respondents and also that of the learned Divisional Judge. I cannot see that the error of the Counsel and the omission of the Divisional Judge affect the matter in the slightest degree.

The real question is whether the error was one that is in any way excusable, or whether it was one which might easily have occurred even if reasonably due care and attention had been exercised by the Advocate. In some cases no doubt such as when there is a real doubt as to the forum or the question is for some reason difficult to decide, the fact that it has not been observed by other people may tend to excuse the mistake. But, in the present case it appears to me that there was a mistake that can only be accounted for by the facts that no care at all was taken, that no consideration was given to the question as to the forum in which the appeal lay, and that the very obvious

necessity for considering the value of the lands for purposes of jurisdiction was entirely neglected. Nobody can imagine that the mistake was made with any ulterior motive. In fact, it would have been much more convenient to the Advocate to have filed the appeal in the right Court. But that does not relieve the Advocate of the necessity of exercising due care and attention.

In my opinion, therefore, there is no sufficient cause for admitting this appeal after due date, and in this I concur with my brother Pratt's view.

The reference will be returned for disposal in due course of law, the appeal being dismissed as barred by time.

Reference returned.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 7 OF 1922.

March 20, 1923.

Present:—Mr. Simpson, A. J. C.

Chaudhari JANGI SINGH—PLAINTIFF—APPELLANT

versus

Chaudhari GANGA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Partition—Member seizing portion of property, effect of.

A member of a joint Hindu family, quarrelling with his family, might seize some part of the family property in order to provide himself with a living. In such a case he would not forfeit his right to obtain a formal partition, in which he would get his proper share. [p. 392, col. 1.]

Appeal from a decree of the Subordinate Judge, Hardoi, dated the 14th November 1921.

Mr. *Salig Ram*, for the Appellant.

Mr. *Haider Husain*, for the Respondents.

JUDGMENT.—This is a first appeal by a plaintiff. The suit was for declaration of title to a 1/6th share in a certain property alleged to belong to the joint family. The following pedigree will show the real parties:—

KANHAI SINGH

Ganga Singh—*Musammat* Ram Dei,
defendant No. 1. defendant No. 6.

Jangi Singh, plaintiff (eldest son.)	Jaimal Singh, defendant No 2. (second son.)	Raja Singh, defendant No. 3.	Shambhu Nath, defendant No. 4.	Drigpal Singh, defendant No. 5.

The suit turns mainly on the plaintiff's right to certain villages which are in the possession of his mother *Musammat* Ram Dei defendant No. 6. The family has owned at various times no less than 16 villages. Of these twelve were ancestral, namely, Seoni, Daulatpur, Shankarpur, Herenkuda, Kewalpur, Ahmadpur, Gutkamau, Dawanipur, Pali, Khwajgipur, Bhagwantpur, Dariapur, four are acquired, namely, Medhipur, Khanjahanpur, Dharapur, Rampurlal. Out of these viliages Gutkamau, Dawanipur, Pali, Khwajgjpur, and Bhagwantpur were gifted to *Musammat* Ram Dei and there is practically nothing else left in the hands of the parties. The plaintiff himself got hold of a part of the family property and he has alienated most of that part. The other villages have passed out of the hands of his father and brothers. The only substantial property remaining is what was gifted to *Musammat* Ram Dei. There are two main questions for decision in this case.

The first is whether there has been a partition between the plaintiff and the rest of the family such as to destroy the plaintiff's right in the joint family property.

It is common ground that there was a quarrel, and that the plaintiff has been living separately from the family for years, and also that he obtained exclusive possession of some of the family property. In face of these facts, it is difficult to hold that there was not a partition. What appears to have happened is this. The grandfather, Kanhai

Singh, got into debt. The first mortgage on the record is Exhibit 50 dated 11th December 1888 in favour of Balmukund of 8 annas of village Shankarpur for Rs. 3,500. The second is dated 7th June 1892 in favour of Bishesharnath son of Balmukund of remaining 8 annas of Shankarpur together with 16 annas of Kewalpur, Ahmadpur and Herenkuda for Rs. 9,000. The next transaction is dated 8th August 1893. It appears to have been an attempt by Kanhai Singh to save some part at least of village Shankarpur by means of a permanent lease, in favour of Jangi Singh, plaintiff, and his brother Jaimal Singh, defendant No. 2, his grandsons, of about 2 hundred *bighas* of village Shankarpur. The rent reserved was only Rs. 40 per annum. Taking into account the relationship between the parties, the minority of the lessees, the rent, and the fact that the whole of this village was already mortgaged, it is likely that the object was to keep these 2 hundred *bighas* out of the reach of Kanhai Singh's creditors.

The next transaction is dated 26th January 1900 and it is surprising to find that it is the purchase of a village, the village Dharapur. It is purchased in the name of Ganga Singh, although his father Kanhai Singh, the head of the family, was still alive. Probably this also was done with an eye to Kanhai Singh's debts.

The next thing that happened was that in 1901 one Kanhai Sah brought a suit against Kanhai Singh for a debt and obtained a money decree for Rs. 10,000 dated 9th May 1903. This is Exhibit 56. We know of other debts paid to one Kishan Lal amounting to Rs. 11,000 and one to Maiku Lal of about Rs. 5,000. It was at this time on 8th December 1903 that Kanhai Singh gifted to *Musammat* Ram Dei 16 annas of Dawanipur, 4 annas, which was all he possessed. in Gutkamau, 1 *biswa* and 5 *biswansis* share, which was all he possessed, in Pali, a 1-12th share, which was all he possessed, in Khwajgipur and certain groves and houses. It is certainly probable that the object of the gift was to put this property out of the reach of creditors. But it does not follow that the gift was not valid,

On 13th July 1904 Bishesharnath brought a suit against Kanhai Singh, Jangi Singh and Jaimal Singh on foot of the mortgage of 1892 to recover Rs. 25,325 by the sale of the property mortgaged and he got a decree dated 7th June 1905 which is Exhibit 55. In the same year Pandit Kishan Lal obtained a decree dated 22nd January 1905 for about Rs. 10,000. This is Exhibit 57.

On 3rd May 1906 Kanhai Singh died. About a year after in 1908 Mehdipur was sold for about Rs. 15,000. Then Bishesharnath brought a suit against Jangi Singh and Jaimal Singh for the cancellation of the lease of 1893. This was settled by compromise dated 12th January 1909 which is Exhibit A 8.

On 5th March 1909 Maiku Singh got a decree against Ganga Singh and others for Rs. 3,000. This is Exhibit 54.

There were various suits by Jangi Singh and his brothers to set aside these alienations. Exhibit 35 is the plaint of a suit against Bishesharnath and others in which the father Ganga Singh was arrayed as a defendant. This suit was dismissed on 16th November 1908 (Exhibit 22). About this time we find the plaintiff on bad terms with his family. That is evidenced by the Sessions Court judgment Exhibit 28 dated 18th December 1911. I do not forget that a judgment is not evidence. But, the question being whether the plaintiff and his family were in good terms, it is a relevant fact that the plaintiff was attacked and seriously injured, and that he charged his own brother Jaimal Singh with having taken part in the attack and Jaimal was convicted and sentenced to seven years' rigorous imprisonment. Whether he was rightly or wrongly convicted, it is plain that Jangi Singh and Jaimal Singh were not on terms of brotherly affection, and this makes it more probable that there was separation in estate and a partition about this time. Apparently what happened was that Jangi Singh left the family house, and laid his hands on as much of the family property as he could. The lease, for instance, which stood in the name of himself and Jaimal, enabled him to seize that property. And the village Rampurlal somehow came into his

hands. Perhaps it was already standing in his name. He has since sold it.

Now this state of things might be explained in two different ways,

The first is that these transactions amounted to a partition, that the plaintiff obtained certain property which was regarded, both by himself and by the other members of the family, as a fair equivalent to his share, and consequently there was a complete severence of interest, by which he became exclusive owner of what he got and ceased to have any undivided interest in the rest of the property. The view of the Court of trial is that this is what did happen, and I see no sufficient reason to differ from this finding. Even now the plaintiff claims to be exclusive owner of what he has got. It is true that he professes himself to be willing, in the last resort, to throw it into the hotchpot. But this I believe to be due to the fact that there is very little left. The only substantial family property is in the hands of *Musammat* Ram Dei.

The other state of things would be that a member of a joint family, quarrelling with his family, might seize some part of the family property in order to provide himself with a living. He might not thereby forfeit his right to obtain a formal partition, in which he would get his proper share.

In order to determine which is the true state of things, the main questions to note would be how long time elapsed before the separating member claimed his share, and whether any alienation of the property took place, whether by himself or by the other members.

Applying these tests we find that many years elapsed without plaintiff's taking any step, and we find that both he himself and the rest of the family have alienated practically all they could alienate.

There is no evidence to show that the share which the plaintiff obtained was inadequate, and the fair inference seems to be that he accepted what he got as representing his share. The result of this finding is that the appeal must be dismissed. But I proceed also to decide the second question which is of the validity of gift to *Musammat* Ram Dei.

I have no doubt that the object of this transaction was to protect property from creditors. Kanhai Singh was very heavily in debt and he was not in a position to make a generous gift to his son's wife, who herself belonged to a wealthy family. But when a person wishes to put property out of the reach of his creditors, he sometimes finds it necessary to make a real gift, and this is what appears to have happened with regards to *Musammat* Ram Dei. It is always difficult in such a case to arrive at the real facts. If, the property was really gifted to *Musammat* Ram Dei, is would naturally be managed by her husband and her sons. If on the other hand, the gift was colourable, and the ownership really remained with Kanhai Singh, again the management would be in the hands of Kanhai Singh's family. The fact that mutation was effected in the name of Ram Dei, and certain leases were granted in her name, are not conclusive. If the transaction is to be colourable it is necessary to give it colour. But, on the whole, I am disposed to say that the plaintiff at least cannot successfully attack this transaction, He has taken part in it and he has acted repeatedly as if it was genuine. There may be no actual estoppel but is a case where he ought to give some definite evidence that the gift was not real.

In the result the appeal fails and is dismissed with costs.

Appeal dismissed.

Z. K.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL NO. 584 OF 1921.

September 3, 1923.

Present:—Mr. Justice Pratt and Mr. Justice Macgregor.

MAUNG MU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MAUNG KAN GYI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VI,

MUNG MU *v.* MAUNG KAN GYI.

r. 17, *O. XXII, r.* 4, *O. XXIII, r.* 1 (3)—*Withdrawal of suit without liberty to bring fresh suit—Second suit in respect of same subject-matter, whether barred—Appeal—Death of respondent—Abatement—Amendment of plaint.*

Plaintiffs brought a suit against certain defendants for a declaration of their right and title to a ticket in a Sweepstake which had won a War Loan Bond. The suit was withdrawn without obtaining leave to bring a fresh suit. Subsequently plaintiffs brought a second suit against the same defendants to recover from them the amount of the Bond which had in the meantime been delivered to them by the Managers of the Sweepstake. One new defendant was added to the suit on the allegation that the other defendants had transferred the bond to him:

Held, that the subject-matter of both the suits was the same within the meaning of O. XXIII, r. 1 (3) of the Civil Procedure Code and the second suit was, therefore, barred under the provisions of that rule. [p. 396, col. 1.]

Case-law discussed.

Where during the pendency of an appeal some of the defendants-respondents die and their legal representatives are not brought on the record within limitation, and the cause of action does not survive against the remaining respondents but it appears that events have happened since the institution of the suit which give the plaintiffs a separate cause of action in respect of the subject-matter of the dispute against each of the defendants, the appeal abates only *qua* the interest of the deceased respondents and the plaintiffs can be allowed to amend their plaint so as to continue the suit against the remaining respondents individually and need not be referred to a separate suit. [p. 395, cols. 1 & 2.]

First appeal against the judgment and decree of the District Court, Kyaukse, in Civil Suit No. 1 of 1920.

Mr. *Chatterjee*, for the Appellants.

Mr. *Mya U*, for the Respondents.

JUDGMENT.

Pratt, J.— Maung Mu, headman, and nine other villagers of Wuntho sued the defendants, 210 in number, to recover a War Loan Bond for Rs. 75,000 or Rs. 75,000 together with interest thereon.

Plaintiffs' case as set forth in the plaint was that the ticket, which won the second prize in the Burma War Loan Sweepstake, a War Loan Bond for Rs. 75,000, which had issued in the name of first plaintiff, had been wrongly made over by the Executive Committee of the Sweepstake to the defendants on their false representations that they were purchasers of the ticket in question. That the defendants were liable jointly and severally to return the bond to plaintiffs or to pay the money equivalent with interest to date, and that defendants No. 1 to 209 had transferred the bond to defendant No. 210.

The Trial Court held that the suit was barred under O. XXIII, r. 1 (3), the subject-matter being the same as that in Suit No. 1 of 1918 of the District Court, Kyaukse, which was dismissed without contest.

In this Court a preliminary objection has been taken that, the appeal having abated against six of the respondents owing to their death, the whole appeal fails.

Counsel for respondents relies upon the rulings in *Ma Zan Nyein* v. *Maung Kyaw Zan* (1), the Lahore case of *Sardari Lal* v. *Ram Lal* (2) the Punjab case *Jamna* v. *Sarjit* (3) and the Privy Council case of *Raj Chunder Sen* v. *Ganga Das Seal* (4).

It is argued that the shares of the various defendants cannot be decided, unless the representatives of the deceased defendants are made parties to the suit. If that were so then the suit must fail because of its abatement against defendants, who were necessary parties. The crucial point is whether plaintiffs can obtain a decree on their claim against the remaining defendants in the suit as framed, in other words whether the defendants against whom the appeal has abated are necessary parties.

In *Ma Zan Nyein's case* (1), it was held that where an appeal abated against a deceased respondent, who was a necessary party to the appeal the appeal abated as against all the respondents.

In the Lahore case cited, where one of the respondents in whose favour a decree was passed jointly with others had died and her legal representatives had not been brought on the record, it was held that the decree being a joint one the appeal abated *in toto*.

(1) 74 Ind. Cas. 1027; 1 R. 189; (1923) A. I. R. (R) 258.

(2) 57 Ind. Cas. 199; 1 L. 225; 1 L. L. J. 225; 143 P. L. R. 1920.

(3) 52 Ind. Cas. 510; 67 P. R. 1919.

(4) 31 C. 487; 1 A. L. J. 145; 8 C. W. N. 442; 31 I. A. 71; 14 M. L. J. 147; 8 Sar. P. C. J. 623 (P. C.).

In *Jamna* v. *Sarjit* (3) similarly where a decree for a declaration of joint title to a share in a piece of land had been granted, and the appeal had abated against one of the respondents it was held that the appeal abated in its entirety.

In *Raj Chunder Sen* v. *Ganga Das Seal* (4) their Lordships of the Privy Council held that the nature of the suit being such that the cause of action did not survive against the remaining respondents alone, the appeal abated entirely.

The Advocate for appellants contends that his suit against the remaining defendants does not necessarily abate but that he still has a cause of action, since the bond, which is the subject of the suit, was cashed through the Imperial Bank, and the proceeds divided amongst the defendants, and he is prepared to prove what each defendant received as his share.

He does not now seek a decree for the whole amount against the defendants jointly, but wishes to recover from each what he has received as his share of the proceeds of the bond.

Counsel for respondents contends that the suit is in substance a suit for declaration of title to the bond and that consequently a decree cannot be given against some of the defendants, when the appeal has abated against others.

I do not know that I am prepared to accept this point of view nor the argument that on plaintiffs' case as now explained a separate suit should be instituted against each defendant. It is a maintainable thesis that on the plaint as at present worded the defendants are sued jointly and the cause of action does not survive against those defendants with reference to whom the appeal has not been ordered to abate.

If, however, as a matter of fact the proceeds of the bond have been distributed amongst the defendants and it can be proved what sum each has received, then plaintiffs still have a cause of action for that sum against each of them, and the necessity of obtaining a declaration of plaintiffs' title to the bond would be a ground for uniting all the surviving defendants in a single suit. This would apparently necessitate an amendment of the plaint, but the circumstances having changed since the suit was filed, I should not be prepared to hold that the amendment of the plaint was inadmissible. I am not, therefore, satisfied that the representatives of the deceased defendants are necessary parties to the suit, or that the appeal must fail because they have not been joined.

It becomes necessary accordingly to decide whether the learned District Judge was right in holding that the suit was barred under O. XXIII, r. 1 (3), by reason of Suit No. 1 of 1918 having been withdrawn without leave to bring a fresh suit.

In Suit No. 1 of 1918 of the District Court, Kyaukse, plaintiffs sued the defendants, the rival claimants to ownership of the ticket in the Sweepstake for a declaration of their right and title to the ticket in dispute. The plaint was filed on March 14th 1918. The War Loan Bond to which the owners of the ticket were entitled was at the time in possession of the Managers of the Sweepstake, Messrs. Craig, Gardner and Harris.

No consequential relief was sought, because as stated in paragraph 7 of the plaint, plaintiffs believed that if they obtained a declaration of title to the winning ticket the Managers of the Sweepstake would deliver the ticket to them.

On the 28th January 1919 after the suit had been transferred by the Judicial Commissioner's orders to the file of the Additional Judge of the District Court an application was filed by Maung Mu on behalf of all the plaintiffs asking for permission to withdraw the suit under O. XXIII, r. 1 (1), and that notice might be given to defendants.

No reason was given for withdrawal.

On the 31st January the case was called and Advocates on both sides were present.

Defendants made no objection to the withdrawal of the suit but asked for costs.

The suit was accordingly dismissed with costs.

On the 13th February 1920 plaintiffs filed Suit No. 1 of 1920 in the District Court, Kyaukse, the decree in which is now under appeal.

MAUNG MU *v.* MAUNG KAN GYI.

The defendants were substantially the same as in the previous suit with the addition of defendant No. 210, J. Carew, to whom it was alleged the remaining defendants had transferred the bond. They did not now ask for a declaration of title to the bond, but, as already stated, prayed for its recovery or for its value Rs. 75,000 with interest as against the defendants, alleging that the bond had been wrongly made over to defendants on a false representation of their ownership.

Paragraph 2 of the plaint set forth that defendants had no right to the bond, and were, therefore, liable jointly and severally to return it to plaintiffs or to pay plaintiffs the money equivalent with interest to date.

In paragraph 4 it was stated that the cause of action arose, when the bond was made over by mistake to the defendants.

In a concise and lucid judgment the learned District Judge after discussing the contention that the cause of action in the former suit was of a different nature being merely for a declaration of title, whereas in the present suit the possession of the bond had passed to defendants and the prayer was for recovery of the bond or its value plus interest, held that plaintiffs could not succeed without a favourable decision as to their title to the bond, and that therefore, the fundamental subject-matter of the two suits was the same. The sole question for decision, therefore, in this appeal is whether the subject-matter of the two suits is the same within the meaning of O. XXIII, r. 1 (3).

The first point made on behalf of appellants is that the previous suit was withdrawn with a view to settlement by arbitration and that in such a case, when the arbitration falls through, a fresh suit on the same cause of action is not barred. In support of this contention reliance was placed on the ruling of the Judicial Commissioner of Upper Burma in *Ma Ko* v. *Maung Po Tun* (5), a case in which both parties put in a joint application to withdraw the suit, stating that they had agreed to refer the suit to arbitration.

It was held following *Juggobundo Chatterji* v. *Watson* (6) that the withdrawal of the suit and the mutual reference to arbitration, which proved infructuous because the arbitrators declined to give a decision was not a bar to the institution of a fresh suit on the same cause of action.

It is not necessary to discuss the correctness of the ruling cited, because it is obvious that the facts in the present appeal are not similar. There is nothing whatever to prove that the previous suit was withdrawn in order that the matter in dispute might be referred to arbitration. The plaint in the second suit makes no reference to any arbitration proceedings. It is true the learned District Judge in his judgment states that the previous suit was withdrawn because there was some talk of arbitration. Apparently this remark was based on some allegation made by one of the Advocates in his Court.

The application for withdrawal made no reference to the subject of arbitration and the suit was dismissed with costs.

There was no joint petition for withdrawal nor any request therefor on the ground that the matter was to be referred to arbitration.

The most that can be said is that the suit was withdrawn because plaintiffs thought that there was more chance of a satisfactory solution by a settlement outside Court than by proceeding with litigation further.

The ruling cited is, therefore, no authority for allowing the institution of a fresh suit on the same cause of action. The suit was dismissed without leave to bring a fresh suit and under the circumstances a fresh suit on the same subject-matter is clearly barred.

On behalf of plaintiffs it is urged that the facts in the two suits are quite different, since the bond has been wrongly made over to defendants since the dismissal of the former suit.

It is contended that in the first suit the cause of action was the refusal of the Managers of the Sweepstake to make over the bond to plaintiffs. Whereas in the second the cause of action was the

(5) 2 U. B. R. (1897-01) 284.

(6) 7 Bourke's Reports 162.

making over of the bonds to defendants by the Executive Committee of the Sweepstake. This is undoubtedly a specious presentment of the case, but unfortunately the Advocate for plaintiffs was unable to adhere to this statement of the causes of action. Nevertheless he is insistent that the subject-matter of the present suit is not the same as that of the former and that the view of the District Court cannot be maintained.

He relies on the definition of "subject-matter" given by Scott, C. J., in *Rakhmabai* v. *Mahadeo Narayan* (7) as "the series of acts or transactions alleged to exist giving rise to the relief claimed," which is taken from O. I. r. 1.

The circumstances in the Bombay case are not parallel with those in the present appeal, because there the first suit was for ejectment, which was bound to fail because no formal notice to quit had been given, whilst the second was brought after formal notice to quit had been given.

The cause of action had clearly, therefore, changed.

The definition of subject-matter is, however, useful and pertinent.

The Calcutta case of *Gopal Chandra Banerjee* v. *Purna Chandra Banerjee* (8), which is also quoted, is also not similar, since in the first suit plaintiff sought partition of joint property, whereas in the second he sought to recover joint possession, from which he had subsequently been dispossessed, on the ground of his title to a share. The subject-matter of the two suits was obviously, therefore, not identical and I am quite unable to agree with the contention that the facts of the case are on all fours with those now before us. To make the rulings cited applicable Advocate for plaintiffs modifies his original proposition as to the causes of action in the two suits and now re-states the cause of action in the first suit as a declaration of title and in the second as a return of money. This is a considerable change from the position previously taken.

Accepting the definition of "subject-matter" put forward as "the series of acts or transactions alleged to exist giving rise to the relief claimed," it has to be considered whether the series of transactions in the suit under appeal and in the suit previously withdrawn is different.

The relief sought is undoubtedly different.

In the first suit the relief sought was merely a declaration of plaintiffs' title to the winning ticket in the Sweepstake, carrying with it the prize of the War Bond for Rs. 75,000.

The bond was at the time still in possession of the Managers of the Sweep.

In the second the relief sought was the War Bond or its value *plus* interest.

The relief sought was different, because in the interval defendants had obtained possession of the bond and had cashed it and divided the proceeds. Plaintiffs could not, however, succeed in the second suit, unless the Court found, as a matter of fact, that their title to the ticket, and consequently the bond, was proved.

The first suit was brought because the Manager of the Sweepstake declined to make over the bond to plaintiffs till they had proved their title to the winning ticket.

The first plaint shows that defendants had already put in a claim to the ticket to the Managers.

It was plaintiffs' case in both suits that defendants had put in a wrongful claim to the bond, and they sued relying on their title as owners of the winning ticket.

Although in the first suit plaintiffs asked for no consequential relief, it was open to them to have sued for the bond or its value joining the Managers of the Sweepstake as parties.

Had they succeeded in the first suit the bond would not have been delivered to defendants and no further suit against them would have been necessary.

The addition of the consequential relief, which (in theory alone) was sought in the second suit, became necessary, because of consequences which ensued owing to the withdrawl and dismissal of the first suit.

I am of opinion, therefore, that viewed broadly the two suits are substantially the same in nature, though couched in different form.

(7) 43 Ind. Cas. 752; 42 B. 155; 20 Bom. L. R. 35.

(8) 4 C. W. N. 110.

HARJI MAL *v.* DEVI DITTA MAL.

The crucial matter of each suit is in reality the title of plaintiffs to the winning ticket. If they failed to prove that title, neither suit could succeed.

Plaintiffs' alleged title to the ticket is in each suit the ultimate cause of action.

Stripped of its trappings the suit now brought is merely the previous suit with its form modified appropriately to the change in circumstances which has supervened consequently on the dismissal of the first suit.

The series of transactions giving rise to the relief claimed is identical, but a stage further has been reached since, and in consequence of the failure of the former suit.

I do not consider it is a maintainable thesis that the subject-matter has changed in its essentials, merely, because of the consequences of the failure of the former suit.

The further relief claimed in the second suit is purely consequential; and the fundamental basis of the suits, to slightly vary the words of the District Judge, remains the same.

I have no doubt that the Trial Court was right in holding that the present suit is barred under O. XXIII, r. 1 (3), by reason of the former suit and I am of opinion that it was precisely to cases of the present nature that sub-rule (3) was intended to apply.

I would dismiss the appeal with costs.

Macgregor, J.—I agree with my learned brother's conclusions on the question of the abatement of the appeal, on the grounds given by him. I am also of opinion that the suit was barred under O. XXIII, r. 1 (3). Alike in the present suit and in the previous one, plaintiffs sued and defendants were sued as claimants to the bond. According as the question of title to the bond was decided one way or the other, plaintiffs must succeed or fail. The fundamental subject matter of the two suits was clearly the same. I agree in the order dismissing the appeal with costs.

Appeal dismissed.

Z. K.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2309 OF 1923.

May 12, 1923.

Present:—Mr. Justice Harrison and Mr. Justice Zafar Ali.

HARJI MAL—AND OTHERS—DEFENDANTS—APPELLANTS

versus

DEVI DITTA MAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XVIII, r. 2—Arguments, oral, not addressed—Written arguments put in—Judgment, validity of—Evidence Act (I of 1872), s. 114—Appeal—Points not mentioned in judgment of Appellate Court—Presumption.

In O. XVIII, r. 2 of the Civil Procedure Code an option is given to the parties to argue their case when the evidence is concluded and it is for them to decide whether they will avail themselves of this privilege. [p. 399, col. 1.]

On the date fixed for arguments in a case Counsel for the parties expressed their inability to argue the case and were given an opportunity to put in written arguments, which they did. Before writing judgment, however, the Sub-Judge was transferred. Counsel had opportunity to argue the case before his successor but did not avail themselves of it and the latter, therefore, pronounced judgment without hearing Counsel:

Held, that there was nothing illegal in the procedure adopted, and the judgment was perfectly valid. [p. 399, col. 1.]

Sher Khan v. *Bahadur Shah*, 91 P. R. 1904; 5 P. L. R. 1905, *Mahmud Khan* v. *Ghazanfar Ali*, 57 Ind. Cas. 34; 2 U. P. L. R. (L.) 133; 141 P. L. R. 1920, distinguished.

The presumption is that an Appellate Court deals with the arguments put before it and if the form of the judgment shows that the only points presented before it were those with which it has dealt, the only inference which can be drawn, especially in the absence of an affidavit to the contrary by the Counsel who appeared before it, is that the remaining points were not urged and were definitely abandoned. [p. 399, col. 2.]

Second appeal from a decree of the Additional Judge, Lahore, dated the 23rd May 1922, affirming that of the Subordinate Judge, First Class, Lahore, dated the 23rd February 1920.

Dr. *G. C. Narang*, Mr. *Jagan Nath* and Bakshi *Tek Chand*, for the Appellants.

Mr. *Badri Das*, R. B. for the Respondents.

JUDGMENT.—In this second appeal the first point raised by Counsel is that the Senior Sub-Judge who disposed of the case and wrote the judgment did not actually hear oral arguments although written arguments were before him, and reliance has been placed on *Mahmud*

Khan v. *Ghazanfar Ali* (1) and *Sher Khan* v. *Bahadur Shah* (2) as authorities to show that under these circumstances the judgment is a nullity and the case must be remanded to the Trial Court.

The facts are that Mr. Muhammad Shah, the Sub-Judge, who heard the case, fixed the 10th of November, for arguments. On that date Counsel appeared and stated that they were not ready to argue and asked for an adjournment, which he did not allow but directed them to put in written arguments, if they wished to do so. They, therefore, failed to avail themselves of the opportunity given them to argue the case before the Judge who had tried it. Further adjournments were given for written arguments and these were finally submitted on the 10th December. The Sub-Judge then came to the conclusion that it was necessary to inspect the spot, though what advantage exactly was to be obtained from this inspection is not clear. He was transferred before he carried out his inspection leaving the judgment unwritten and on the 22rd of January the parties appeared before Mr. Strickland, his successor, who fixed the 5th February for inspection. Later the Counsel for the defendants who are now the appellants, appeared before him and asked for an adjournment which he granted. He eventually carried out the inspection in the presence of the parties and then gave judgment. Now *Sher Khan* v. *Bahadur Shah* (2) is to be distinguished as being the case of a first appeal, and in *Mahmud Khan* v. *Ghazanfar Ali* (1) it is clear that the parties had no opportunity to argue the case before the successor. Here they had ample opportunity before both Sub-Judges. In O. XVIII, r. 2, an option is given to the parties to argue their case when the evidence is concluded and it is for them to decide whether they will avail themselves of this privilege. Here they were given a further opportunity at a later date, the 10th November, and failed to make use of it. It is contended that even so they were entitled to an opportunity before the successor of Muhammad Shah, who was not in the same advantageous position as he was, inasmuch as he had not heard the evidence. Even so they certainly had more than one opportunity when they appeared before Mr. Strickland. It was for them to argue the case if they wished to do so. They did not do so and the only construction which can be put upon the events is that they deliberately failed to avail themselves of such opportunity and left the case in his hands knowing that the written arguments were before him. Under these circumstances we find that it was quite unnecessary for Mr. Strickland to attempt to insist on their availing themselves of the privilege and indeed it would have been futile for him to do so.

In the grounds of appeal various points are raised which are not dealt with in the judgment of the learned District Judge. There were four issues in the Trial Court regarding two of which the judgment of the District Judge is silent. After disposing of two preliminary issues which had not been decided by the Trial Court, the District Judge says in his judgment "The first point for determination is....." and having dealt with this point he proceeds: "Lastly the objection is taken ....." Now, the presumption is that a District Judge deals with the arguments put before him and if the form of the judgment shows clearly, as it does in this case, that the only points presented were those two with which he has dealt, the only inference which we can draw, more especially in the absence of an affidavit to the contrary by the Counsel who appeared before him is that the remaining points were not urged and were definitely abandoned.

Note.—The rest of the judgment is not material for the purposes of this report.—[*Ed.*]

Appeal dismissed.

Z. K.

(1) 57 Ind. Cas. 34; 2 U. P. L. R. (L.) 133; 141 P. L. R. 1920.
(2) 91 P. R. 1904; 5 P. L. R. 1905.

S. N. SEN *v.* ABDUL AZIZ TAR MAHOMED.

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPLICATION NO. 18 OF 1922.

June 26, 1922.

Present:—Sir Sydney Robinson, KT., Chief Justice, and Mr. Justice Macgregor.

S. N. SEN, RECEIVER TO THE ESTATE OF HAJEE TAYUB, DECEASED—APPLICANT

versus

ABDUL AZIZ TAR MAHOMED AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 110—Appeal to His Majesty in Council—"Decision," meaning of.

The term "decision" in section 110 of the Civil Procedure Code means, the decision of the suit by the Court, and it is not necessary that the Appellate Court should also affirm the grounds of fact upon which the judgment under appeal was based.

Where, therefore, the District Court decides that plaintiffs are entitled to a half share in the properties of a certain business and the decision of the High Court is the same, that amounts to affirmation of the decision of the District Court and for the purposes of a certificate for leave to appeal to His Majesty in Council it is immaterial that the High Court comes to a different conclusion on the question of fact as to what the business was.

Tassaduq Rasul Khan v. *Kashi Ram*, 25 A. 109; 30 I. A. 35; 5 Bom. L. R. 100; 7 C. W. N. 177 (P. C.), followed.

Nagendrabala Dasi v. *Dinanath Mahish*, 70 Ind. Cas. 933; 26 C. W. N. 651; (1923) A. I. R. (C.) 215, distinguished.

Application.

Mr. *Das*, for the Applicant.

Mr. *Burjorjee*, for the Respondents.

JUDGMENT.—This is an application for leave to appeal to His Majesty in Council.

That the subject-matter of the suit satisfies the requirements of section 110 of the Code of Civil Procedure as regards value is not disputed.

The question that we have to decide is, whether the decree of this Court on appeal affirmed the decision of the Court immediately below. If it did, the petitioners will have to establish that the appeal involves some substantial question of law.

The suit was brought, praying for an account of the estate of the late Hajee Tayub, and for possession of the same, or, in the alternative, for such share thereof as plaintiff are entitled to, with mesne profits.

The plaintiffs set up that the business that had been carried on by Hajee Tayub was his own separate business, and that the immoveable properties acquired had been paid for out of the profits of this business. The defendants claimed, on the other hand, that the business had originally been a joint family business and had remained so till the end.

The learned District Judge passed a decree, holding that the business was the joint business of Hajee Tayub and another brother of his, Hajee Sulaiman, and that Hajee Tayub's heirs were entitled to a half share of the properties in suit. It is to be noted that this decision was not in accordance with the allegations of either the plaintiffs or the defendants.

An appeal was filed in this Court by the plaintiffs in respect of the half share that had not been awarded to them by the District Court. Our decision was as follows:—"The real question at issue is whether this was a joint family business, or whether it was a partnership between Sulaiman and Tayub, and in my opinion the former is the correct decision." We reversed the decision of the learned District Judge in so far as it held that the business was a partnership between Sulaiman and Tayub, but we confirmed the decree so far as it awards a half share in the properties. The question is whether, under these circumstances, our decree affirmed the decision of the Court below.

In *Tassaduq Rasul Khan* v. *Kashi Ram* (1) their Lordships of the Privy Council held that the word "decision" means the decision of the suit by the Court, and further that it was not correct to say that it was necessary that the Appellate Court should also affirm the grounds of fact upon which the judgment was based. The decision of the District Court was that the plaintiffs were entitled to a half share in the properties, and the decision of this Court was the same. The decision was, therefore, affirmed, and for the purposes of a

(1) 25 A. 109; 30 I. A. 35; 5 Bom. L. R. 100; 7 C. W. N. 177 (P. C.).

certificate, we must hold that it is immaterial that we came to a different conclusion on the question of fact as to what the business was.

We have been referred to the case of *Nagendrabala Dasi* v. *Dinanath Mahish* (2). The facts of that case were somewhat peculiar, and the decision of their Lordships of the Privy Council to which I have referred was not apparently before the learned Judges who passed that decision.

Next, as to whether there exists in this case some substantial question of law, it is urged that the onus of proving that it was not a joint family business had been wrongly placed on the petitioners. It does not appear that the onus was so placed, and the decision did not turn on the question of onus, but was a decision based on a consideration of all the evidence tendered by both sides. We, therefore, hold that no substantial question of law was involved, and that the petitioners are not, therefore, entitled to a certificate.

The application is dismissed with costs, Advocate's fees 3 gold *mohurs*.

Applicat on dismissed.

W. C. A.

(2) 70 Ind. Cas. 933; 26 C. W. N. 651; (1923) A. I. R. (C.) 215.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 142 OF 1923.

February 12, 1923.

Present:—Mr. Justice Jwala Prasad and Mr. Justice Adami.

JADUNANDAN SAHAY—APPELLANT

versus

HANUMAN SAHAY—RESPONDENT.

Limitation Act (IX of 1908), s. 12—Extension of time for appeal—Different applications for copies of judgment and decree—Application for copy of one document within time extended by other, validity of.

Applications for copies of the judgment and the decree must be made before the expiry of the time for filing the appeal so as to obtain extension of time under section 12 of the Limitation Act. There is, however, no obligation on the appellant to file the applications at one and the same time; and applications made at different times will entitle the appellant to take advantage of the time spent to obtain copies of both the judgment and the decree.

If the time requisite for obtaining copy of one of these documents extends the time of limitation, then the application made for obtaining copy of the other document, after the time originally fixed for filing the appeal under the Law of Limitation but before the extension of time allowed by reason of the time required for obtaining copy of one of these documents expires, will entitle the appellant to extension of time required for obtaining copy of the other document. [p. 402, col 1.]

Selamban Chetty v. *Ramanadhan Chetty*, 4 Ind. Cas. 301; 33 M. 256; 7 M. L. T. 29; (1910) M. W. N. 141; 21 M. L. J. 152, *Pandharinath Sakharam* v. *Shankar Narayan Joshi*, 25 B. 586; 3 Bom. L. R. 244 *Raman Chetty* v. *Kadirvalu*, 8 M. L. J. 148 and *Ali Muhammad* v. *Nathu*, 54 Ind. Cas. 879; 163 P. R. 1919, 78 P. L. R. 1919; 1 L. L. J. 106, relied on.

Sher Singh v. *Pem Raj*, 48 Ind. Cas. 31; 100 P. R. 1918; 185 P. W. R. 1918, dissented from.

Second appeal.

Messrs. *Murari Prasad* and *Satya Sundar Bose*, for the Appellant.

JUDGMENT.—This appeal is reported to have been filed out of time by one day.

The term of 90 days for filing an appeal against the decree expired on 29th January 1923 but before the time expired the appellant applied for a copy of the judgment on the 17th November 1922 and obtained a copy on the 23rd November 1922. Under section 12, clause (3) the time for filing the appeal was extended from the 29th January 1923 to the 5th of February 1923; but before the expiry of this extended time, the appellant made an application for a copy of the decree on 31st January 1923 and obtained a copy on the same date. Under clause (2) of section 12 he was entitled to add one day more to the time within which he was required to file his appeal. Adding this one day to the 5th of February within which he could file the appeal by reason of the extension allowed to him under clause (3) of section 12, he was entitled to file the appeal on the 6th February 1923 and he did file the appeal on that day. Therefore, the appeal was filed within time.

No doubt, an application for copies of the judgment and the decree must be made before the expiry of the time for filing an appeal. There is, however, no obligation imposed upon an appellant to file applications for copies of judgment and decree at one and the same time

and, therefore, he can make his applications for copies at different times. It seems to be settled by authorities that the applications made at different times will entitle the appellant to take advantage of the time occupied in obtaining copies of both judgment and decree. Now, if the time requisite for obtaining copy of one of these documents extends the time of limitation, then the application made for obtaining copy of the other document after the time originally fixed for filing an appeal under the Law of Limitation but before the extension of time allowed by reason of the time required for obtaining copy of one of these documents, expires will entitle the appellant to extension of time required for obtaining copy of the other document. The Madras and the Bombay High Courts so far as the rulings have been placed before us, appear to be unanimous upon, the point: *viae Selamban Chetty* v. *Rumanadhan Chetty* (1), *Pandharinath Sukharam* v. *Shankar Narayan Joshi* (2) and *Ruman Chetty* v. *Kadirvalu* (3). The Oudh Court in *Din Dayal* v. *Rameshar* (4) seems also to be of the same view. There was a difference of opinion in the Punjab High Court. That Court in *Sher Singh* v. *Pem Raj* (5) took a contrary view based apparently upon the view that applications for copies of judgment and decree must be simultaneously made and not at different times. The Court however, changed its view laterly in *Ali Muhammad* v. *Nathu* (6). This Court in the case of *Debi Charan Lal* v. *Sheikh Mehdi Hussain* (7) took the view that it is not essential that applications for copies of judgment and decree should be made simultaneously and the time taken in obtaining copies of both the documents, thou h applications for each were made at different times, was allowed to be excluded in computing the period of limitation. It seems that in that case the decree was passed on 27th September 1913 by the Munsif, it was prepared and signed on that very day. The annual vacation began on the following morning and the Court re-opened on November 1st. Ordinarily the appeal should have been filed before the District Judge after the re-opening of the Court, or an application for copies of the judgment and decree should have been made on that day in order to enable the appellant to file his appeal after obtaining copies of the judgment and the decree, but the application for copy of the judgment was made on the 3rd of November and for copy of the decree on the 13th November. The applications were made after the expiry of the time for filing the appeal yet the appeal was held to have been filed within time and the appellant was entitled to take advantage of the vacation as well as of the time required in obtaining the copies of the judgment and the decree. The point in question in the present case was not directly decided in that case, but the dates given above will show that the decision of the case helps the contention of the appellant.

Apart from both the decisions we are of opinion that under true construction of clauses (2) and (3) of section 12, the contention of the appellant must succeed and the appeal filed must be held to be within time.

N. H. *Appeal admitted.*

(1) 4 Ind. Cas. 301; 33 M. 256; 7 M. L. T. 29; (1910) M. W. N. 141; 21 M. L. J. 152.
(2) 25 B. 586; 3 Bom. L. R. 244.
(3) 8 M. L. J. 148.
(4) 28 Ind. Cas. 366; 18 O. C. 74; 2 O. L. J. 159.
(5) 48 Ind. Cas. 31; 100 P. R. 1918; 185 P. W. R. 1918.
(6) 54 Ind. Cas. 879; 163 P. R. 1919; 78 P. W. R. 1919; 1 L. L. J. 106.
(7) 35 Ind. Cas. 888; 20 C. W. N. 1303; 1 P. L. J. 485; 1 P. L. W. 209.

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL NO. 238 OF 1923.

June 15, 1923.

Present:—Mr. Justice Duckworth.

SAW HLA AUNG—APPELLANT

versus

MA MA NYO—RESPONDENT.

Execution of decree—Decree against husband—Sale of property belonging jointly to husband and wife—Suit for declaration by wife, maintainability of—Estoppel.

LINTON MOLESWORTH & CO. *v.* JAGGANNATH SUPAKAR.

A suit brought against a Burmese husband on the basis of a pro-note executed by him in respect of money borrowed by him for the benefit of himself and his wife, was decreed, and in execution of the decree a house belonging jointly to the judgment-debtor and his wife was sold. The wife thereupon brought a suit for a declaration that half the house belonged to her:

Held, (1) that the decree being against the husband only, his right, title and interest in the house alone were sold and passed to the purchaser;

(2) that the plaintiff was not estopped from claiming half the house and her suit was, therefore, entitled to succeed.

Appeal against a decree of the District Court, Akyab, in Civil Appeal No. 33 of 1922.

Mr. *Ba Tin*, for the Appellant.

Mr. *Kyaw U*, for the Respondent.

JUDGMENT.—There is nothing to show that the respondent, Ma Ma Nyo, took any part in the loan to her husband, Pan Tha U, and it is admitted that she was not made a party to the suit by the creditor. It was in execution of a decree passed against Pan Tha U alone that the house and site in question were sold by the Court. Clearly only Pan Tha U's right, title, and interest, were sold to the appellant. There is no ground for holding that Ma Ma Nyo is estopped from claiming, under Buddhist Law, her share in the property, as being the joint property of herself and her husband, Pan Tha U. She has merely stood by, as she has a perfect right to do.

There is nothing to show that in taking the loan, Pan Tha U was in any sense her agent. I indorse the remarks of Burgess, J. C., in *Ma Me* v *Maung Gyi* (1) and the Bench decision in the case of *Maung Po Tha* v. *Maung Shan Gyi* (2). The case of *Ma Sein* v *Muthucurpan Chetty* (3), which was followed in *Ma Nyun* v. *Texeira* (4), is also useful for reference.

I think that there is enough on the record to show that the loan was taken for the benefit of both husband and wife, but the point, which is the kernel of this case is that respondent was no party to the suit on the pro-note evidencing the loan and no decree was passed against her.

It is not disputed that the property was joint.

The case was correctly decided in the District Court, and accordingly I dismiss the appeal with costs, confirming the lower Appellate Court's decree.

Appeal dismissed.

Z. K.

(1) 2 U. B. R. (1892-96) 45.
(2) 11 Bur. L. R. 278.
(3) 25 Ind. Cas. 931; 7 L. B. R. 135.
(4) 51 Ind. Cas. 563; 10 L. B. R. 36; 12 Bur. L. 31 (F. B.).

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 89 OF 1920.

June 14, 1923.

Present:—Mr. Justice Das and Mr. Justice Foster.

MESSRS. LINTON MOLESWORTH & Co. LIMITED—DEFENDANTS—APPELLANTS

versus

JAGGANNATH SUPAKAR AND OTHERS—PLAINTIFFS AND BISWA NATH GORAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Construction of document—Lease—Description by boundaries — Erroneous statement as to area, effect of—Landlord and tenant—Dispute about boundaries of demised land—Tenant whether may rely on landlord's transaction with third party.

Where a deed contains an adequate and sufficient definition of the property which it was intended to pass, any erroneous statement in it as to the dimensions or quantity of the property will not vitiate the description. [p. 405, col. 2.]

When the operative part of a lease does not give the area of the land demised but gives the boundaries only, although in the schedule attached to the document the area of the demised land is mentioned by guess, there is one description of the land demised and only one and that is the description by the boundaries. [p. 405, col. 2.]

In an ordinary action between a landlord and the tenant, it is not open to the latter to rely upon a subsequent transaction between his lessor and a third party and raise a defence which would have the effect of imperilling the identity of the boundaries of the demised land which it was his clear duty to preserve. [p. 407, col. 2.]

Appeal from a decision of the Subordinate Judge, Dhanbad, dated the 12th January 1920.

Messrs. *P. K. Sen, S. N. Bose* and *Subai Chandra Mazumdar*, for the Appellants.

Messrs. *S. M. Mullick, B. N. Mitter, N. C. Rai* and *P. C. Rai*, for the Respondents.

JUDGMENT.

Das, J.—The main queston in this appeal turns upon the construction of an underground lease granted by the plaintiffs to Messrs. Linton Molesworth & Co., Ltd., on the 16th August 1912. In order to understand the lease, it is necessary to refer to an earlier lease dated the 25th August 1892 granted by the plaintiffs to defendants Nos. 3—17, who may be conveniently referred to as the Gorains. That lease was in respect of the enire *Mouza* Swardih with the exception of one pond and homestead land measuring 3 *bighas*. It is admitted that the pond excepted out of the lease of 1892 was not in existence at the date of the lease, and that neither its area nor its geographical position is indicated in the lease of 1892. Nor is there any indication in the lease as to the situation of the 3 *bighas* of homestead land. The lease in favour of Messrs. Linton Molesworth & Co. Ltd., was in respect of that portion of *Mouza* Swardih which was expressly excepted out of the lease of 1892; and the critical question in this appeal is whether the disputed land lies within the block that was demised to the Gorains in 1892 or whether it lies within that portion of the *mouza* which was expressly excepted out of the lease of 1892 and expressly demised to Messrs. Linton Molesworth & Co. Ltd., in 1912. It may be mentioned that, at the date of their lease, Messrs. Linton Molesworth and Co., were in possession of the leasehold interest of the Gorains as their managing agents and that sometime in 1916 they took a sub-lease of that interest from the Gorains. Messrs. Linton Molesworth & Co., are accordingly in possession of the underground rights of the entire *mouza* Swardih as to a portion under the lease of the 16th August 1912 and as to the other portion under their sublease of 1916. It appears that the terms of their lease are more onerous than the terms of the sub-lease and it is important for them to establish that the disputed land lies, not within the area that was excepted out of the lease of 1892, but within the block that was expressly demised by the plaintiffs to the Gorains in 1892. The suit was for recovery of commission at the rate agreed, on the coal raised by the defendant Company, on the footing that the disputed land from which the coal has been raised is within the block of land that was demised to the defendant Company in 1912. The substantial defence is that the land demised to the defendant Company comprises an area of 13 *bighas* and that the disputed land does not form part of the land demised to them in 1912, but that it forms part of the land which was demised to the Gorains in 1892. The learned Subordinate Judge has found in favour of the plaintiffs and has given them a decree for Rs. 23,907.

I have said that the land excepted out of the lease of 1892, that which forms the subject-matter of the lease in favour of Messrs. Linton Molesworth and Co., was not in any way identified in the lease of 1892; but the lease in favour of Messrs. Linton Molesworth and Co., is perfectly clear. After describing the land excepted out of the lease of 1892 as consisting of a *burd* known as *barabund* amounting to 10 *bighas* and homestead land amounting to three *bighas*, that is in all 13 *bighas* by guess, and known as east Swardih, the document proceeds to make a settlement in favour of Messrs. Linton Molesworth and Co., of the entire land known as East Swardih and described in the schedule to the lease of Messrs. Linton Molesworth & Co. Ltd. The schedule is in these terms: "The entire land known as East Swardih whose area is 13 *bighas* and whose boundaries are the following:—

East.....Sutikdih Colliery.
North.....Bridge and Road.
West.....Mine No. 11 of Swardih.
South.....The *Jote* land of *Malik* grantees of the *kabuliyat*.

Stopping here for a moment, it will appear that though the block of land excepted out of the lease of 1892 was not sufficiently described in that lease, its actual situation was known to the parties and it was certainly known to Messrs. Linton Molesworth & Co., who, at the date of their lease, were actually carrying on the mining operation on the land demised in 1892 to the Gorains as their managing agents. In

their *kabuliyat* which they executed in favour of the plaintiffs, they discribed that block of land as East Swardih, and as lying within certain fixed boundaries. One of these boundaries is mine No. 11 of Swardih which Messrs. Linton Molesworth & Co., were actually working as the managing agents of the Gorains. The other boundary is Sutikdih Colliery, by no means a negligible thing for those who were not strangers to the locality, and by their *kabuliyat* Messrs. Linton Molesworth & Co., described the entire block of land between their own mine No. 11 and Sutikdih Colliery bounded on the north by the bridge and the road and on the South by certain jote lands as East Swardih and as having been expressly excepted out of the lease of 1892.

It will be noticed that the area of the land demised to Messrs. Linton Molesworth & Co., is given by guess; but that the actual demise is expressly of the entire land known as East Swardih and described in the schedule at the foot of lease. The Commissioner has found that the disputed land lies within the boundaries given in the schedule of Messrs. Linton Molesworth & Co's., lease and that the area of that land is 4r *bighas* 13 *cottas* and 5½ *gandas*.

Now the important question in this appeal is whether the lease was of 13 *bighas* of land situate within certain boundaries mentioned in the lease or whether the lease was of the entire block of land within the boundaries given at the foot of the lease. I confess that it is quite impossible to arrive at any conclusion other than that at which the learned Subordinate Judge has arrived. The operative part of the lease does not give the area of the demised land; but expressly states that the lease is of the entire land known as East Swardih and described in the schedule below. It was quite true that the schedule gives the area of the demised land; but when the schedule is read together with the recital in the lease, it is perfectly clear that the area mentioned in the schedule is by guess and is purely conjectural. It follows, therefore, that the description of the land demised by acreage is confessedly conjectural; and where this is so, it is impossible to look upon such a description as actually in conflict with the description by boundaries. It is well-established that where a deed contains an adequate and sufficient definition of the property which it was intended to pass, any erroneous statement contained in it as to the dimension or quantity of the property will not vitiate the description. The question is whether the description of the property by its acreage can be regarded as an untrue statement. In my opinion there is in this lease one description and one only of the land demised and that description is the description by the boundaries. No doubt the area of the demised land is mentioned by guess; but the description of area could not be regarded as description of the property demised since it was confessedly conjectural. If I had to decide the case on the construction of the lease of 1912. I would have no hesitation whatever in agreeing with the decision of the learned Subordinate Judge.

But then it is argued on behalf of Messrs. Linton Molesworth and Co., Ltd., by Mr. P. K. Sen, that having regard to what has subsequently taken place we ought to hold that the description of area in his lease was the dominant description and that in that view we ought to dismiss the plaintiffs' suit. Now the circumstances upon which Mr. Sen relies are these. In 1916 a suit was instituted by the Gorains, Messrs. Linton Molesworth and Co., and the present plaintiffs, cited as defendants Nos. 2 to 8 in that suit. The Gorains being under the apprehension that the present plaintiffs as *brahmottardars* or tenure-holders had no title to convey in regard to the underground rights of the *mauza*, took a settlement of the underground rights of the entire *mauza* from the *Zemindar*, and sued to have it declared that the present plaintiffs-defendants Nos. 2 to 8 in that suit, had no right whatever to make a settlement of the underground rights of East Swardih with Messrs. Linton Molesworth & Co. It will be remembered that Messrs. Linton Molesworth & Co., were working the Swardih Colliery belonging to the Gorains as their managing agents, and they sought a declaration in their suit to the effect that Messrs. Linton Molesworth & Co., were actually in

possession of East Swardih, not under any lease that may have been granted to them by the present plaintiffs, for that lease was wholly inoperative, having been granted by persons without title, but as their managing agents and on their behalf. They entered the subject matter of the lease of Messrs. Linton Molesworth & Co., in schedule (*ga*) of their plaint and they described the property in these words:—"The entire land known as East Swardih, the area of which is about 13 *bighas*, and the boundaries of which are the following;—

East.....Sutikdih Colliery.
North.....Bridge and road.
West.....Mine No. 11 of Swardih.
South.....The *Jote* land of Jagannath Supakar and others."

That was the suit which they filed in 1913. On the 20th December 1913 there was a compromise between the present plaintiffs, defendants Nos. 2 to 8 in their previous suit, and the Gorains who were the plaintiffs in that suit. Mr. P. K. Sen relies upon one of the terms of that compromise which runs as follows:—"The area of the land, detailed in the schedule No. 3 of this petition," which is the same as schedule (*gi*) of the plaint, "the sub-soil rights of which we have leased out to defendant No. 1 has been put down to be 13 *bighas* by guess in *patta*. The actual area of the said land will be determined in reference to the Revenue Survey Map, *i. e.*, it is put down in the *patta* that the area of the homestead land is three *bighas* and that of the *barabund* is 10 *bighas*. In fact what is shown as the area of the said homestead land and *bund* in the Revenue Survey Map, will be determined as the actual area of the said lease-hold land, and we and defendants Nos. 2 to 8 both parties agree to this." Now the actual compromise partitioned the lease-hold interest of Messrs. Linton Molesworth & Co., between the present plaintiffs and the Gorains, and provided that the present plaintiffs will be entitled to two-fifths of that interest and that the Gorains will be entitled to three-fifths of that interest; and what is remarkable is that schedule 3 of the *sulehnama* which is the schedule of the land demised by the plaintiffs to Messrs. Linton Molesworth & Co., on the 16th August 1912 is described as follows:—"The entire land known as East Swardih whose area is 13 *bighas* by guess, and whose boundaries are the following:—

East.....Sutikdih Colliery.
North.....Bridge and road.
West.....Mine No. 11 of Swardih.
South.....*Jote* land of Jagannath Supakar and others.

Mr. Sen's contention is this:—"It is impossible to understand my lease unless you consider the lease of 1892 because my lease is in respect of that portion of the land which was expressly excepted out of the lease of 1892" and then he argues that it is impossible to understand what was actually excepted out of the lease of 1892 unless you have regard to the compromise of the 20th December 1913. And he contends that if the terms of the *sulehnama* be taken into consideration, it will be found that what was excepted out of the lease of 1892 was a pond and certain homestead lands as shown in the Revenue Survey Map. In my opinion, the argument does not deserve any success. In the first place, although the *barabund*, that is to say, the pond, is shown in the Revenue Survey Map. It is conceded that the homestead lands are not delineated in the map. In other words, the land demised cannot be completely identified in the Revenue Survey Map, and it is ridiculous to suppose that the demise could be on that Map. In the second place, though the *sulehnama* does say that the actual area of the land demised should be calculated form the Revenue Survey Map, the description of that land in the schedule to the *sulehnama* which is identical with the description of the land in the lease of Messrs. Linton Molesworth & Co., shows conclusively that the parties had no doubt whatever as to the identity of the land. In the third place, in a later transaction between the parties into which they had to enter as a result of the consent decree, they deliberately gave up the plea of having the area of the land demised calculated from the Revenue Survey Map. The fifth paragraph of the *sulehnama* provided as follows:—

"According to the terms of this compromise petition, the bond" that is to say an agreement carrying out the terms o'

the *sulehnama* "will executed between both the parties, the plaintiffs and defendants Nos. 2 to 8 within 15 days from this date." In pursuance of this express term the parties on the 12th February 1914 executed a document which is referred to as the deed of settlement; and that deed provided as follows:—

1. "That the area of the land described in the schedule below, namely, schedule which was intended to describe the land demised by the plaintiffs to Messrs. Linton Molesworth & Co., on the 16th August 1912 which has been stated to be 13 *bighas* in the *patta*, dated the 12th August 1912, was put down by guess. Its area for the present is not determined for certain. The area of the said land is guessed to be 13 *bighas* for the present and this bond is executed.

2. "That it is determined that in respect of the sub-soil and surface right on the said land, described in the schedule, the first party have three-fifths share and the second party two-fifths share. According to the said share, the parties shall continue to be in possession and enjoyment thereof down to their sons, grandsons and representatives in succession."

The third paragraph of the deed of settlement provides that "the first party and the second party, that it to say, the plaintiffs in this suit and the Gorains agree that the first party and the second party shall have according to the aforesaid share whatever interest has been created by the aforesaid *patta* dated the 16th August 1912, since the date of its execution; and according to the share mentioned above, the first party and the second party shall continue to hold possession of the surface and sub-soil right of the land described in the schedule." These provisions in the deed of settlement make it perfectly clear that the parties agree to be bound by the description of the demised land as contained in the schedule of that deed; and that description is identical in every respect with the description as contained in the lease of Messrs. Linton Molesworth and Co.

In my opinion if it is relevant to consider the *sulehnama* of the 20th December 1913, it is also relevant to consider the deed of settlement of the 12th February 1914 and once the terms of the deed of settlement of the 12th February 1914 are examined the issue is determined and the question is solved.

I have thought it necessary to examine the subsequent transactions between the plaintiffs and the Gorains for the purpose of removing a grievance on the part of Messrs. Linton Molesworth & Co., but in my opinion, the question does not arise, Messrs. Linton Molesworth and Co., have been sued in this action for commission on the foot of the *kabuliyat* admittedly executed by them. It is an ordinary action between landlord and tenant, and, in my opinion, it is not open to them to rely upon a subsequent transaction between their lessors and a third party and raise a defence which would have the effect of imperilling the identity of the boundaries which it was their clear duty to preserve. But Mr. Sen explains to us that Messrs. Linton Molesworth and Co., are not only the plaintiffs' lessees, but that they have also taken a sub-lease from the Gorains and it is also their duty not to imperil the title of the Gorairs to any portion of disputed land. But, in my opinion, the defence entirely fails as soon as the Gorains are drawn into the controversy. Their sub-lease is of 1916, and they are conclusively bound by the arrangement between their sub-lessors and the plaintiffs as disclosed in the deed of settlement of the 12th February 1914. In my opinion their defence entirely fails, and the decision of the learned Subordinate Judge on this point must be affirmed.

It was argued by Mr. P. K. Sen that, as a matter of fact, there is not an adequate and sufficient definition of the property by boundaries, because the boundaries as given in the lease of 1912 do not agree with the natural features of the land in the locality. The Commissioner in his report stated as follows:—Schedule 1 of the plaint as shown by the plaintiffs agrees in boundaries on the locality as given in the plaint and in the *kabuliyat* executed by defendant No. 1 dated the 16th August 1912 and schedule 2 of the plaint is included within schedule 1 as will appear from the map The defendants show the land included within 3, x, y, 15, 16, culvert, 1, 2, 3, to be the land

of schedule No. 1 but this does not tally in boundary on the locality for in this plot we do not get on the east the "Sutikdih Colliery" and on the south the "*khas* paddy lands of the plaintiffs as will be clear from the map. Now the Commissioner was examined on behalf of Messrs. Linton Molesworth and Co. It was not suggested to him that his report on this important topic is erroneous and that the map as drawn by him does not support the statement made by him in the third paragraph of his report. In my opinion it is impossible for this Court to entertain an argument of this nature since no opportunity was given to the Commissioner to explain the matter in the witness-box.

Lastly, it has been contended that the plaintiffs, are estopped from disputing that the acreage is the dominant description in the lease or that the area is to be determined by reference to the Revenue Survey Map. The argument again is founded upon the *sulehnama* of the 20th December 1913. In my opinion the argument is an unsubstantial one. There is no representation in this transaction by the plaintiffs and certainly none that was intended to mislead Messrs. Linton Moleworth & Co., and to induce them to change their position to their detriment. The statement contained in the first paragraph of the *sulehnama* is as much the statement of the Gorains as the statement of the plaintiffs, and the actual truth was known to both the paries and estoppel cannot possibly arise Apart from any other consideration, Messrs. Linton Molesworth & Co., actually took the sub-lease of the interest of the Gorains after the real position was made perfectly clear by the deed of settlement of the 12th February 1914. No reason is given by Messrs. Linton Molesworth & Co., who should have acted upon the *sulehnama* of the 20th December 1913 rather than on the deed of settlement of the 12th February 1914.

There is, in my opinion, nothing at all in the argument as to estoppel.

In the result I would dismiss the appeal with costs.

Foster, J.—I agree.

N. H. *Appeal dismissed.*

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPLICATION NO. 23 OF 1922.

August 15, 1922.

Present:—Sir Sydney Robinson, KT., Chief Judge, and Mr. Justice Duckworth.

V. E. R. M. V. E. RAMANATHAN CHETTY AND OTHERS—APPLICANTS

versus

V. E. R. M. N. R. RAMANATHAN CHETTY *alias* SOMASUNDRAM CHETTY AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 22, 23—Transfer of suit—"Subordinate," meaning of—Original Side, whether subordinate to Appellate Side.

Section 22 of the Civil Procedure Code deals with all Courts in which suits may be instituted including the Original Side of a High Court. [p. 409, col. 1.]

The word "subordinate" in section 23 (3) of the Civil Procedure Code refers merely to subordination in the sense that appeals lie from one Court to the other, although the Court may not be a subordinate Court for administrative purposes. [p. 409, col. 2.]

It is difficult to hold that a Court whose decrees and orders are liable to be reversed on appeal is not subordinate to the Court which has the jurisdiction to reverse its decisions. [p. 409, col. 2.]

For administrative purposes the Original Side of a High Court is not subordinate to the Appellate Side but for the purposes of appeals it is subordinate, using that expression in its ordinary sense and without any reference to its technical subordination in the sense of its being a Court of a lower grade. [p. 409, col. 2.]

The Appellate Side of a High Court has, therefore, power to order the transfer of a case pending on the Original Side. [p. 409, col. 2.]

Mr. *Burjorjee*, for the Applicants.

Messrs. *Das* and *Chari*, for the Respondents.

JUDGMENT.—Mr. Das raises a preliminary objection to the hearing of this application for transfer. He urges that the suit having been filed in the Original Side of this Court there is no Court to which that Court is "subordinate" and therefore no Court to which such an application can be made or which has power to pass an order of transfer. This involves a decision as to what is the meaning to be assigned to the expression "subordinate" in sub-clause 3 of section 23 of the Code of Civil Procedure.

Section 22 deals with the power to transfer cases and it deals with all Courts

in which suits may be instituted. There is nothing in this section to suggest that it was not intended to and does not apply to the Original Side of a High Court. Presumably it does so apply but we are asked to hold that as there exists no Court which can exercise the power of transfer it must be held that section 22 does not apply to the Original Side of a High Court. It may be that on a certain reading of section 23 (3) that sub-clause would not govern this case, but inasmuch as we can find no ground for limiting the purview of section 22 or for assuming that it was intended that suits instituted on the Original Side of a High Court should never be transferable under any circumstances we must consider what is the meaning to be assigned to sub-clause 3, and if it is possible to assign a meaning that would allow transfer without any straining of the language used we should assign that meaning. What then is the feature which determines the Court to which an application for transfer should be made? In sub-sections (1) and (2) of section 23 we find the application is to be made to the Appellate Court, that is the Court to which ordinarily appeals will lie from the Court in which the suit, or one of them, has been filed. Where the Appellate Courts are different then it has to be made to the High Court and lastly where the High Courts are different then to the High Court within the local limits of whose jurisdiction the Court in which the suit is brought is situate. There is nothing to show that in the case of a suit brought in the Original Side of a High Court any different rule is to be applied.

But it has been urged that the Judge sitting on the Original Side is a Judge of the High Court, that the Appellate Side is not a different Court and that the Judge on the Original Side is in no way subordinate to the Judges sitting on the Appellate Side. That is quite true. It is pointed out that this Court has held that the Appellate Side cannot interfere in revision with a decision of the Original Side because it is not a subordinate Court. That again is perfectly true. But we are now dealing with the question of transfer and we find that the deciding factor is whether appeals lie from the Court in which the suit is brought. For administrative purposes the Original Side is not subordinate to the Appellate Side but for the purposes of appeals it is subordinate, using that expression in its ordinary sense and without any reference to technical subordination in the sense of its being a Court of a lower grade. In ordinary parlance we find it impossible to hold that a Court whose decrees and orders are liable to be reversed on appeal is not subordinate to the Court which has the jurisdiction to reverse its decisions.

Finding then that section 22 deals with all Courts in which a suit may be brought; finding that the determining factor is whether appeals lie, to the Court in which the application is made; finding that we can properly interpret "subordinate" for the purposes of transfer as referring merely to subordination in the sense that appeals lie, even though the Court may not be a subordinate Court for administrative purposes, we are of opinion that the present application lies and that we have jurisdiction to deal with it if a suitable case is made out for ordering a transfer.

Note.—The rest of the judgment is not material for the purposes of this Report—[*Ed.*]

Application allowed.

Z. K.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL NO. 193 OF 1922.

May 21, 1923.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Martineau.

Bhagat GOBIND DAS AND OTHERS—DEFENDANTS—APPELLANTS

versus

RUPKISHORE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 177—Limitation and Code of Civil Procedure (Amendment) Act (XXVI of 1920), s. 2—Appeal—Death of respondent—Application to bring legal representatives on record—Limitation—Evidence Act (I of 1872), s. 78 (2)—Act

GOBIND DAS *v.* RUP KISHORE.

published in Gazette, whether authentic—Interpretation of Statutes—Intention of Legislature.

The period of six months for an application under the Code of Civil Procedure to have the legal representative of a deceased defendant or of a deceased respondent made a party, as prescribed by Art. 177 of the First Schedule to the Limitation Act has not been reduced to ninety days by anything contained in section 2 of the Limitation and Code of Civil Procedure (Amendment) Act of 1920. [p. 412, col. 2.]

The text of an Imperial Act as published in the *Gazette of India* must be taken to be the authorised text of the Act. [p. 411, col. 2.]

In interpreting a Statute it is not for the Court to speculate as to the intention of the Legislature if that intention has not been carried into effect by the language used. [p. 412, col. 1.]

Letters Patent Appeal against the judgment of Mr. Justice Harrison, dated the 3rd July 1922, reported as 69 Ind. Cas. 748.

Bakhshi *Tek Chand*, Messrs. *Sardha Ram* and *Fakir Chand*, for the Appellants.

Sardar *Dalip Singh*, Messrs. *Piare Lal* and *Kanwar Narain*, for the Respondents.

JUDGMENT.—The question of law, upon which we are invited to express our opinion in this case, is whether the period of six months for an application under the Code of Civil Procedure to have the legal representative of a deceased defendant or of a deceased respondent made a party, as prescribed by Art. 177 of the First Schedule to the Indian Limitation Act, IX of 1908, has been reduced to 90 days. Now, section 2 of the Indian Limitation and Code of Civil Procedure (Amendment) Act, XXVI of 1920, provides that in the third division of the First Schedule to the Indian Limitation Act, 1908, in Arts. 176, 178 and 179 for the word "Ditto" in the second column the words "ninety days," "six months," and "ninety days," respectively, shall be substituted. It will be observed that this section deals directly with only three Articles, namely, 176, 178 and 179, and makes no reference to Art. 177 with which we are concerned in the present case. It is beyond dispute that the period of six months as originally prescribed by Art. 176 has now been reduced to 90 days, and the question for determination is whether this amendment of Art. 176 has resulted in a corresponding amendment of Art. 177 which immediately follows the amended Article.

In order to answer the question we must turn to the Indian Limitation Act of 1908 as passed by the Legislature and find out the exact word or words used in the second column relating to Art. 177. Now, the aforesaid Act, was published in the *Gazette of India* in August 1908, and the First Schedule is so printed that, while Arts. 175 and 176 along with certain Articles preceding them appear on one page, Arts. 177, 178 and a few other Articles appear on the succeeding page; and the period of limitation under these Articles is indicated in the following manner.—

Page 190.

175.	For payment of the amount of a decree by instalments.	Six months	The date of the decree.
176.	Under the same Code to have the legal representative of a deceased plaintiff or of a deceased appellant made a party.	Ditto	The date of the death of the deceased plaintiff or appellant.

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177.	Under the same Code to have the legal representative of a deceased defendant or of a deceased respondent made a party.	Six months	The date of the death of the deceased defendant or respondent.
178.	Under the same Code for the filing in Court of an award in a suit made in any matter referred to arbitration by order of the Court, or of an award made in any matter referred to arbitration without the intervention of a Court.	Ditto	The date of the award.

This is undoubtedly the authorised text of the Act printed by order of Government, and it is clear that the words "six months" which occur opposite Art. 177, have not been modified, either directly or indirectly. by

anything contained in the Amending Act of 1920.

Our attention has, however, been invited to the text of the Act, as printed in the Unrepealed General Acts of the Governor-General in Council (1909 Edition) and also to the 1908 and 1909 Edition of the Act published in book form under the heading:—

"GOVERNMENT OF INDIA
LEGISLATIVE DEPARTMENT."

In all these books Arts. 175 to 178 all appear on the same page, and the period of limitation under these Articles is described in the following manner.—

175.	For payment of the amount of a decree by instalments.	Six months	The date of the decree.
176.	Under the same Code to have the legal representative of a deceased plaintiff or of a deceased appellant made a party	Ditto	The date of the death of the deceased plaintiff or app llant.
177.	Under the same Code to have the legal representative of a deceased defendant or of a deceased respondent made a party.	Ditto	The date of the death of the deceased defendant or respondent.
178.	Under the same Code for the filing in Court of an award in a suit made in any matter referred to arbitration by order of the Court or of an award made in any matter referred to arbitration without the intervention of a Court.	Ditto	The date of the award.

On the other hand, we find that in the 1910 Edition of the Act the aforesaid Articles are printed in the same way as in the *Gazette of India*, and that the words "six months" occur opposite Art. 177.

In view of the confusion created by the various copies of the Indian Limitation Act, 1908, referred to above, it is necessary to decide which text of the Act should be consulted in order to determine the controversy as to whether the Act, as it emerged from the Legislative Council, contained the expression "Ditto" or, the words "six months" opposite Art. 177. Now section 18 of the Indian Councils Act, 1861 (24 & 25 Vict. c. 67), which was in force at the time when the Indian Limitation Act of 1908 was passed, authorised the Governor-General in Council to make rules prescribing *inter alia*, the mode of promulgation and authentication of the laws made by the Council, and one of the rules framed under this section provides that:—

"When a bill is passed by the Council, a copy thereof shall be signed by the President, and, when the Governor-General has declared his assent thereto, such copy shall be signed by the Governor-General, and the Bill shall be published as soon as possible in the official Gazettes under the signature of the Secretary, as an Act of the Governor-General in Council. Such publication shall be made in the *Gazette of India* in English....."

(*Vide* General Statutory Rules and Orders, Volume I, 1915 Edition, page 15, rule 34). It was in accordance with this rule that the Limitation Act was published in the *Gazette of India*, and under sub-section (2) of section 78 of the Indian Evidence Act the text as published in the Gazette must be taken to be the authorised text of the Act. The books containing the Act, which have been relied upon by the learned Vakil for the appellants, do not purport to have been printed by order of Government and cannot be used under the aforesaid sub-section for the purpose of proving the provisions of the Indian Limitation Act as passed by the Legislature.

It is possible, nay probable, that the draftsman of the Amending Act of 1920 had before him a copy of the Indian Limitation Act in which Arts. 175 to 178 were all printed on the same page, and he accordingly thought that when the period of limitation under Art. 176 was altered to 90 days, the word "Ditto" opposite Art. 177, which existed in his copy of the Act, would be regarded as equivalent to 90 days, and that the retention of that word would automatically

reduce the period of limitation under Art. 177. It is not, however, for the Court to speculate as to the intention of the Legislature if that intention has not been carried into effect by the language used. As pointed out by Maxwell in his book on the Interpretation of Statutes 6th Edition, at page 10, when the words admit of but one meaning:—

"A Court is not at liberty to speculate on the intention of the Legislature, and to construe them according to its own notions of what ought to have been enacted. Nothing could be more dangeous than to make such considerations the ground for construing an enactment that is unambiguous in itself. To depart from the meaning on account of such views is, in truth, not to construe the Act, but to alter it. But the business of the interpreter is not to improve the Statute, it is, to expound it. The question for him is not what the Legislature meant, but what its language means, *i. e.*, what the Act has said that it meant. To give a construction contrary to, or different from, that which the words import or can possibly import, is not to interpret law, but to make it, and Judges are to remember that their office is *jus dicere* not *jus dare*."

It is urged that the text contained in the *Gazette of India* makes the amendment of Art. 178 superfluous, for the words "Ditto' that occurred opposite that Article, would attract to it the words "six months" printed in the Gazette opposite Art. 177, and it was consequently unnecessary to provide in the Amending Act of 1920 that the words "six months" be substituted for the word "Ditto" in Art. 178.. It is contended that the interpretation of an enactment should be such as not to render any portion of it superfluous. This consideration, however, applies only when the language of the Statute is capable of two rival meanings, but in the case before us the language is clear and unambiguous and there is, therefore, no scope for the application of the rule against superfluity.

We must accordingly hold that the words "six months" that occur opposite Art. 177 in the authenticated text of the Limitation Act, have not been altered by anything contained in the Amending Act of 1920, and that the period of limitation for making an application to implead the legal representative of a deceased defendant or of a deceased respondent is still six months. It is regrettable that the question of amendment should depend upon the use of the words "Ditto", which has, it appears, been used only in those copies of the Act in which Art 177 has been printed on the same page as the preceding Article. It is certainly desirable that the word "Ditto" should be omitted altogether, and that it should be replaced by words mentioning the actual period which it was intended to represent.

In this view of the law it is unnecessary for us to deal with the contention urged on behalf of the respondent that sufficient cause has been shown for setting aside the abatement. We accordingly dismiss the appeal with costs.

Z. K.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 643 OF 1921.

November 14, 1922.

Present:—Mr. Justice Marten and Mr. Justice Fawcett.

SHA BULAKHIDAS JAMANDAS—DEFENDANT—APPELLANT

versus

SHAH GANPATRAM DALSUKHRAM—PLAINTIFF—RESPONDENT.

Construction of deed—Sale of house property—Courtyard, common, user of—Intention of parties—Nuisance—Injunction, when to be granted.

Defendant was the owner of four houses out of which he sold three to the plaintiff. The sale-deed contained the following clause:—"There is an open *chowk* belonging to these three houses and in front of the door of my other house. All may use the said *chowk* according to the limits of their respective houses, and the inmates of all the four houses have the right of egress and ingress through the main Khadki door."

Held, that the clause relating to the *chowk* did not mean that the *chowk* was to be in the exclusive ownerships and possession of the plaintiff.

that it was intended to be used by the occupants of all four houses, but that no particular owner was to be entitled to use the *chowk* more than would be reasonable according to the proportion of the whole property which he actually occupied. [p. 413, col. 2.]

A Court ought not to grant an injunction on the ground of nuisance, unless the particular nuisance complained of is proved. [p. 414, col. 2.]

Second appeal against the decision of the Assistant Judge, Ahmedabad, in Appeal No. 8 of 1919.

Mr. *R. J. Thakor*, for the Appellant.

Mr. *H. V. Divatia*, for the Respondent.

JUDGMENT.

Marten, J.—This is an unfortunate suit between neighbours, and it concerns mainly the rights of the parties to the *chowk* coloured pink on the plan, Exhibit 17, and the rights in respect of the water tap Exhibit G shown on the same plan. It appears that formerly, that is to say prior to 1911, the whole of the property shown on this plan belonged to the defendant or his predecessors-in-title. The property consists of four houses, and as the result of a sale-deed of the 19th of March 1911, Exhibit 16, three houses were conveyed to the plaintiff's predecessors-in-title, and the remaining house was retained by the present defendant. The plan I have referred to has the parties just the other way round, but that is because it was made for the purpose of another suit where the parties were reversed.

The plaintiff's claim as regards the *chowk* is founded on the allegation that he is the owner of the *chowk*. This allegation has been decided against him in both the lower Courts, but the lower Appellate Court has in effect granted an injunction restricting the defendant to the use of ¼th of the *chowk*, and also against his using that ¼th in such way as to cause a nuisance and annoyance to the owners of the other three quarters. It is this injunction of the lower Appellate Court that the present appellant the defendant objects to. The cross-objections raised by the plaintiff contend *inter alia* that he is the owner of the *chowk*.

It is all important, therefore, to consider what is the true construction of the sale-deed, Exhibit 16. This deed recites that there was originally one house, and it then proceeds that three houses were afterwards built anew and "are hereby sold to you with the right of ingress and egress through the main door and given over to your possession." Then followed particulars of the boundaries. Then comes a clause about the *chowk* which has given rise to much controversy in the present case. It runs "There is an open *chowk* belonging to these three houses and in front of the door of my other house. All may use the said *chowk* according to the limits of their respective houses, and the inmates of all the four houses have the right of egress and ingress through the main Khadki door."

In my judgment, if it had been intended to include the *chowk* in this sale-deed, it would have been included as part of the three houses which are expressly sold to the defendant with the express boundaries which are there described. But if, on the other hand as, I think, is the true view, it was intended to keep this *chowk* as an open space for the benefit of all the four houses, then one can understand that only three houses would be expressly conveyed, and that there would be a separate provision as to the rights of the parties in connection with the *chowk*. In my opinion the words "open *chowk* belonging to these three houses do not mean, having regard to the context, that this *chowk* was to be in the exclusive ownership and possession of the three houses. I construe the words "all may use the said *chowk*" as meaning all four houses, and that they have the same meaning as "the inmates of all the four houses" referred to in the next sentence.

The words "according to the limits of their respective houses" no doubt create some difficulty. But, in my opinion, the dominating motive of the parties was that all might use the *chowk* and this means the whole *chowk*. Accordingly the limitation put in that deed was intended to prevent any one particular owner using the *chowk* more than would be reasonable according to the proportion of the whole property which he actually occupied. For instance, one party could not tether his horses, or put up linen or pots and pans

over the whole of the *chowk*. It is difficult in these cases where some open space is intended to be used in common by all parties proportionately to their respective holdings, to frame any rules which unreasonable or cantankerous men won't find an opportunity of creating quibbles about and possibly bringing about litigation. Obviously a small space like this used in common may lead to squabbles and quarrels, if the parties who have the right of user cannot be reasonable enough to respect their neighbour's rights as well as their own. However, that may be on the true construction of this deed, I am of opinion that the plaintiff is entirely wrong in contending that it conveyed the *chowk* to him and that he is the sole owner of the *chowk*.

I am further of opinion that the learned Appellate Judge was wrong in granting an injunction restraining the defendant from using any more than $\frac{1}{4}$th of this *chowk*. That injunction in effect amounts to a partition of the *chowk* because if you restrain a man from using any more than $\frac{1}{4}$th of land, for all practical purposes you have given him that quarter and prevented him from exercising any rights whatever over the remaining $\frac{3}{4}$ths. Further in the present case the unfairness of such an injunction is that it only operates against the defendant and that there is no corresponding injunction against the plaintiff debarring him from exercising rights over the $\frac{1}{4}$th allotted to the defendant. On the contrary the learned Judge gives the plaintiff a right of passage over this quarter which is nowhere found expressly in the deed under construction. In a formal partition, each party would have been allotted a particullar portion and could not have afterwards used the portion of the other party, apart from any rights of way or other easements granted on partition.

Then as regards the injuction which the learned Judge has granted restraining the defendant from so using his quarter as to create a nuisance to the plaintiff, the issue on that question of fact in the Trial Court was Issue No. 2, *viz.*; whether the defendant and his tenants obstruct the plaintiff and his tenants from passing through and using open *chowk*. The answer to that issue was no. When we come to the Appellate Court, there is no issue whatever raised as to whether there was any such nuisance as is the subject of this injunction. Nor do I find that the learned Appellate Judge has even found as a fact that there was such a nuisance and annoyance. The Trial Court held on page 14, line 55 that in almost all important particulars the plaintiff was guilty of exaggerations and falsehoods. Then with reference to the plaintiff's witness he refers to Exhibit 57 as being a friend of plaintiff's who speaks of defendant's children being made to answer the calls of nature in the *chowk*, and alleged nuisance which even plaintiff has not the hardihood to mention.

In my judgment, the Court ought not to grant an injunction on the ground of nuisance, unless the nuisance, which is a question of fact, is proved. Here there is no issue raised on the point in lower Appellate Court. There is no finding of fact and on the contrary I find the facts found quite clearly the other way in the Trial Court. In my opinion the learned Appellate Judge erred in granting this injunction; and I cannot for one moment accept the contention of the respondent's Pleader that all that the learned Judge was really doing was to endeavour to carry out the rights of the parties under Exhibit 16. As I have said he had no right to grant an injunction for nuisance unless the nuisance was proved.

Now I come to the question of the tap. There was an express issue on this in the Court of first intance, *viz.*, whether the defendant's water tap near the Khadki door is a nuisance to the plaintiff. The answer to that finding was no. In the lower Appellate Court there is no issue raised about this tap, Exhibit G, at all, except Issue No. 2, *viz.*, as to whether the lower Court erred in holding that the tap, Exhibit G, and Chokdi Fare not new but they looked old. The answer to that issue was no. There is no finding here whatever as far as I can see,

that the defendant has committed a nuisance in respect of his user of this tap. G. There again, if I may say so with all respect, the learned Judge seems to have granted an injunction merely by way of emphasizing his views as to how this particular tap should be used. He says in paragraph 20 "He (the plaintiff) can only have an injunction restraining the user of the pipe for any other purposes such as, washing and bathing than that of taking water from it", and paragraph 23 is the formal order to that effect.

Now I can quite understand that if on the facts here it could be proved that the defendant's household at all hours of the day were either washing their dirty clothes or washing their persons and slopping dirty water over the entrance to the *chowk* and keeping the main Khadki door open for that purpose and really causing a nuisance to their neighbours and particularly if this injuriously affected the common user of the *chowk*, then I can understand that the Court would force the defendant by injunction or otherwise to preserve a more neighbourly and gentlemanly attitude. But here, again, these matters of nuisance are questions of fact and no such evidence is brought before our notice.

Accordingly it seems to me that on the facts at present before us, the learned Judge erred in granting an injunction in these terms. It follows, therefore, that, in my opinion, the decision which the learned Trial Judge arrived at was the correct one, and that this appeal must be allowed and the judgment of the learned Trial Judge must be restored. Then as regards costs, I would also restore the learned Trial Judge's order as to costs, *viz*, that each party pay the costs mentioned in his judgment. As regards the costs of the lower Appellate Court and of this appeal they must be borne by the respondent to this Appeal No. 643 of 1921. Similarly the cross-objections in which he has urged *inter alia* his absolute ownership of the *chowk* will be dismissed with sosts.

I wish to add, speaking for myself. one word of advice if I may be allowed to do so to the parties. I regret to see neighbours fighting and squabbling and spending their money over litigation in this way for years and years. They have adjoining properties where if they choose to behave in this ungentlemanly way, they can no doubt find opportunities for further quarrels. Up to now it may be said that the honours of the fight have rested fairly easy between them. Now that this Court has explained what their legal rights are, I trust that there will be no more conduct on either the one side or the other such as we have seen in the past, as to lead to further litigation. I trust in particular that nobody will think that as a result of this judgment he is entitled to make an unreasonable use of either the *chowk* or the water tap in such a way as to cause annoyance and nuisance to his neighbours. If he does he will probably find that the result of such future litigation will be extremly unpleasant. But I sincerely hope that the parties will have the good sense to regard this present litigation as their last venture in the law Courts.

Fawcet, J.—In regard to the plaintiff's claim to ownership of the whole *chowk*, I think that the construction put upon the sale-deed, Exhibit 16, by the Subordinate Judge is a more reasonable one than that adopted by the Assistant Judge in appeal. On this point I fully concur in the remarks and conclusion of my learned brother. I would only add that, on the facts of this case, it seems to me analogous to one falling under section 22 of the Easements Act, which in effect lays down that the dominant owner is to exercise his right in a reasonable manner, with due regard to the interests of the other person concerned.

As regards the injunction which has been granted by the lower Appellate Court, I concur fully with the views of my learned brother. I think that the learned Judge had no jurisdiction to grant those injunctions, because the proper foundation for such an injunc-

tion is not forthcoming. There in no proof that there has been an actual invasion, or threat of invasion, of the plaintiff's right as to entitle him to an injunction under section 54 of the Specific Relief Act, *cf.* section 35 of the Easements Act.

Accordingly I concur that the Trial Court's order should be restored and that costs should be borne as proposed in my learned brother's judgment.

Z. K. *Appeal allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2558 OF 1922.

March 15, 1923.

Present:—Mr. Justice Moti Sagar.

Agha MUHAMMAD ASLAM—PLAINTIFF—APPELLANT

versus

JODH SINGH—DEFENDANT—RESPONDENT.

Interest, future—Discretion of Court—Appeal, second—Interference by High Court—Costs, rule as to.

The award of future interest is discretionary with the Court and where this discretion has been exercised by the lower Appellate Court by disallowing future interest, the High Court will not interfere in second appeal.

Ordinarily costs should abide the result.

Second appeal from a decree of the District Judge, Lahore, dated the 16th May 1922.

Lala *Tirath Ram*, for the Appellant.

Mr. *Barkat Ali*, for the Respondent.

JUDGMENT.—There are only two questions for decision in this second appeal (1) whether the learned District Judge was justified in disallowing future interest, and (2) whether the costs have been rightly disallowed. A preliminary objection has been raised by Mr. Barkat Ali on behalf of the respondent that the appeal is barred by limitation inasmuch as the full amount of Court-fees on this appeal was not paid till the 23rd October 1922, when the period of limitation had already expired. I do not see any force in this preliminary objection. The appeal was filed on Rs. 18 stamp on the 10th October 1922 within limitation, and the balance of Court-fees was made up within a week under the orders of the Court without any objection on the part of the appellant. The mistake clearly appears to be a *bona fide* one, and I am of opinion that this is a fit case for the extension of time under section 5 of the Indian Limitation Act. I accordingly overrule the preliminary objection and hold that the appeal is within time.

As to future interest it has been contended by Mr. Tirath Ram that it had been allowed by the Court of first instance from the date of the decree, and that the lower Appellate Court was not justified in disallowing it in the absence of a specific ground of appeal in this respect. A reference to the grounds of appeal, however, makes it clear that the defendant objected to the correctness of the decree and pointed out that the decree of the Court of first instance was wrong both in law and on facts. This ground of appeal, in my opinion, included also a prayer to the effect that the decree of the First Court allowing future interest should be set aside. In any case the question of the award of future interest was discretionary with the Court and following *Kishna Mal v. Muhammad Bakhsh* (1) I do not see any reason to interfere on this point in second appeal.

The question of costs, however, stands on a different footing. The learned District Judge has disallowed costs simply because future interest had been disallowed and because, as the learned District Judge observes, the defendant had succeeded in part in his appeal. In my opinion the reason given by the learned District Judge for disallowing costs is quite arbitrary and no sufficient cause has been shown by the learned Vakil for the respondent why they should not be allowed in this case. Costs generally abide the result and as the plaintiff's suit was practically decreed in full, costs should have been awarded to him. I accordingly accept the appeal and setting aside the order of the Court below direct that the plaintiff's suit shall be decreed with costs in both the Courts below. The prayer as to future interest is disallowed, and in this Court the parties shall bear their own costs.

Z. K. *Appeal allowed.*

(1) 27 Ind. Cas. 616; 52 P. L. R. 1915; 131 P. W. R. 1915.

PATNA HIGH COURT.

CRIMINAL MISCELLANEOUS APPLICATION NO. 11 OF 1922.

March 21, 1922.

Present:—Mr. Justice Ross.

Maharaj Kumar NAND KISHORE NATH SAHI DEO AND OTHERS—PETITIONERS

versus

EMPEROR AT THE INSTANCE OF MESSRS. GARG BROTHERS AND CO.—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 107, proceedings under—Indefinite information—Magistrate, duty of.

In the case of proceedings under section 107 of the Criminal Procedure Code the Magistrate must show that he had information entitling him to act under the section. [p. 418, c l. 1.]

Where proceedings drawn up by a Magistrate, against one party to a dispute concerning some property, under section 107 of the Criminal Procedure Code, recite simply that he has received a report from the Police that that party is likely to commit a breach of the peace or do a wrongful act which may occasion a breach of the peace, inasmuch as it is using threats of violence to the other party, the information is too vague and indefinite to justify action and the proceedings must be set aside. [p. 418, col. 1.]

Messrs. *Manuk* and *G. C. Pal*, for the Petitioners.

The Government Advocate, for the Opposite Party.

JUDGMENT.—By this application the petitioners seek that proceedings drawn up against them under section 107 of the Criminal Procedure Code may be quashed or in the alternative that the case be transferred from the Magistrate who is trying it.

There are five petitioners. The first is the son of the Maharaja of Chota Nagpur and is *Khorposhdar* of Diwarkband Pargana in the District of Ranchi, the second is a Barrister who has obtained a prospecting lease from the first, the third is the Tahsildar and the fourth is a *Barahil* of the first petitioner, and the fifth is a lessee under him. The opposite party are Messrs. Garg Brothers and Co. who have taken a prospecting lease for coal from the Maharaja. The proceedings drawn up by the Magistrate recites that it appears from the report of the Sadar Inspector of Police that the second party, that is, the petitioners, are likely to commit a breach of the peace or do a wrongful act which may occasion breach of the peace inasmuch as the first and second petitioners personally and through their servants, the other petitioners, and other men employed by them, are using threats of violence to the men of the first party. It further alleges that the petitioners Nos. 1 and 2 are believed to have instigated various offences. This second allegation refers apparently to a series of cases set forth in the Police report, in all of which, except one which is still under trial, the petitioners have been acquitted or discharged. It is conceded by the learned Government Advocate who opposed this application that this affords no basis for a proceeding under section 107 of the Criminal Procedure Code and the question is, therefore, restricted to the first ground.

It is contended on behalf of the petitioners that this ground is too vague; it does not give the necessary details which are required to inform the petitioners of the accusation that they have to meet and does not satisfy the tests laid down *In the matter of Jaiprakash Lal* (1) and *In re Nagireddy Kondareddy* (2). It is also contended that it does not comply with the provisions of section 112 of the Criminal Procedure Code and that the proceeding is, therefore, bad. The learned Government-Advocate relies on the last paragraph of the Police report in which it is stated by the Police Officer that on recent enquiries he had come to learn that the servants of the Garg Brothers and others assisting them in their prospecting operations, including witnesses Nos. 4, 5, 6, 9, 10, 11, 12, 13, 14, 15, 17 and 18 have been threatened with violence on different occasions by the petitioners. It is argued that, if the petitioners have not received due notice of the acts of intimidation alleged against them in the proceeding, they can apply to the Magistrate for further particulars. But it appears that this very objection was taken in the written statement filed

(1) 6 A. 26; A. W. N. (1883) 208; 3 Ind Dec. (N. S.) 641 (F. B.).
(2) 41 Ind. Cas. 990; 41 M. 246; 18 Cr. L. J. 878.

by the petitioners and that the Magistrate nevertheless did not amend the proceeding. Now it appears that there was an earlier proceeding drawn up on the 4th of August 1921 which was quashed by the High Court on the 30th of September last. It was pointed out by the learned Judge of this Court in dealing with that earlier proceeding that "the responsibility of issuing notice under section 112 is of the Magistrate." The proceeding drawn up in that case was discussed and it was found that it did not show that there was any information before the Magistrate entitling him to act under section 107. Now the Magistrate has been informed by the judgment of the High Court in that earlier case of the necessity of showing that there was information before him entitling him to act under section 107. But the present proceeding can hardly be said to be more definite than the last or to show any definite ground for proceeding against the petitioners. The Police report, if it can be referred to in this connection, is little better. It does not give any details nor does it allege any recent acts of intimidation. It is too indefinite to be met and the petitioners are necessarily prejudiced by being called upon to meet vague allegations of this kind. It is difficult to avoid the conclusion that when the Magistrate, after having had his attention drawn by this Court to the necessity of setting out the specific allegations to be met, has nothing more definite to say than what is contended in this proceeding, the proceeding in itself is without substance. The proceeding in this case does not satisfy me that there are any genuine tangible grounds for calling upon the petitioners to show cause why they should not be bound down to keep the peace and it must be set aside.

There is one other matter to which I ought to refer in connection with the application for transfer although that question no longer falls to be decided. In paragraph 13 of the affidavit it is alleged that the Magistrate at the suggestion of the Pleader of the first party got the chamber of Mr. Basu, Barrister-at-Law, petitioner No. 2, and also the chamber of the Counsel appearing for the accused searched to find out the petitioner, Jawahir. Now the Magistrate has dealt with the other allegations contained in this paragraph, but has said nothing about this alleged search. This may be due to an oversight, but if it is to be construed as an acknowledgment of the truth of the allegation then I must say that the Magistrate acted with grave impropriety and on this ground alone the case would have had to be transferred from his file.

N. H.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 913 OF 1923.
CRIMINAL REVISION PETITION NO. 731 OF 1923.

December 13, 1923.

Present:—Mr. Justice Odgers.

In re BHARATA AYYAR—PETITIONER.

Criminal Procedure Code (Act V of 1898), s. 488—Offspring of Sambandham—*Maintenance.*

The offspring of a *sambandham* are entitled to maintenance from their mother and not from their father provided the mother has sufficient means to maintain them. But if the mother is not in a position to maintain them without an allowance from the father, the latter is liable to pay the allowance [p. 419, col. 1.]

The expression "unable to maintain" in section 488 of the Criminal Procedure Code is not confined to physical inability but includes also pecuniary inability. [p. 419, col. 1.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise an order of the Court of the Sub-Divisional Magistrate, Malapuram, dated the 27th October 1923 in M. C. No. 12 of 1923.

Mr. *N. R. Sesha Aiyar*, for the Petitioner.

ORDER.—This is an application to revise the order of the Sub-Divisional Magistrate of Malapuram made under section 488, Criminal Procedure Code, wherein he ordered the petitioner to pay a monthly allowance of Rs. 4 for the maintenance of the child of the respondent, a Nair woman, the petitioner being

a Brahmin. The petitioner denied the *sambandham* and disowned the paternity of the child. The learned Magistrate, however, observed that his Vakil did not press this point seriously either in the cross-examination of the prosecution witnesses or in his own defence, and has come to the finding that the paternity of the child is proved. The main point relied upon before the lower Court was that the woman was in a position to maintain the child and, therefore, the father was not liable to maintain it. Mr. N. R. Sesha Aiyar before me has taken the same point and relies on two decisions of this Court, namely, *Chantan* v. *Chakkapayyan Mathu* (1) and *Parappati Chinna* v. *Shankunni Menon* (2). In the former case it was held that a child that possesses a right to maintenance from its mother's *tavazhi* is not entitled to an order for maintenance against its father. It was also held that the words "unable to maintain" are not confined to physical inability but include also pecuniary inability. Abdur Rahim, J., in that case said:

"I think the ability contemplated by the section applies as much to the case of a child which has got means of its own or which is entitled in law to be maintained, and is being maintained as in this case by some other person, as to a child which is able to earn a living by its own exertions."

In the later case in *Parappati Chinna* v. *Shankunni Menon* (2) to which Ayling, J., was also a party as in the earlier case which was followed, the learned Judges say that the offspring of a *sambandham* are entitled to maintenance from their *tavazhi*, and if the *tavazhi* or *tarwad* has sufficient means to maintain them they are not entitled to an order for maintenance against their father. And the reason which prompted the learned Judges there to revise the order of the Magistrate was that the lower Court had not found what the income of *tavazhi* was, nor had it given any finding as to the income of the *tarwad*. In this case the learned Magistrate has found as a fact that the respondent's *tarwad* is not in a position to maintain the child without an allowance from the petitioner. Sitting here in revision, I am bound by that finding of fact. I must, therefore, dismiss this Criminal revision case.

V. N. V.
S. D. *Petition dismissed.*

(1) 32 Ind. Cas. 144; 39 M. 957; 19 M. L. T. 231; (1916) 1 M. W. N. 111; 17 Cr. L. J. 16.
(2) 52 Ind. Cas. 893; 37 M. L. J. 361; 10 L. W. 229; 26 M. L. T. 238; (1919) M. W. N. 632; 20 Cr. L. J. 733.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION NO. 267 B OF 1922.
June 26, 1922.
Present:—Mr. Justice Duckworth.
PAN BU AND OTHERS—APPLICANTS
versus
EMPEROR—RESPONDENT.

Burma Village Act (VI of 1907), s. 12—Refusal to obey requisition of Headman—Knowledge of requisition—Burden of proof.

In Settlement Operations Headmen have to assist Settlement Officials by turning out villagers for such duties as soil classification, holding-marking, crop-reaping, etc., and a villager who refuses to comply with such a requisition by a Headman is guilty of an offence under section 12 of the Burma Village Act. [p. 420, cols. 1 & 2.]

Under section 12 of the Burma Village Act the prosecution has to prove that the accused was either present at the time when the requisition was made or was informed of it in time to obey it. [p. 420, col. 2.]

Criminal revision of an order passed by the Township Magistrate, Dedaye.

Messrs. *Ba Dun* and *San Shwe*, for the Applicants.

The Assistant Government Advocate, for the Respondent.

JUDGMENT.—The 39 applicants were convicted by the Township Magistrate, Dedaye, under section 12 of the Burma Village Act for refusing to comply with a requisition of the Headman to assist him in his public duties. They were each fined a sum of Rs. 15 only, or, in default, were sentenced to undergo seven days' rigorous imprisonment.

PAN BU v. EMPEROR.

A Settlement Party is at work in Pyapon District. In the village tract in question eight plots of paddy land were marked out for crop reaping and measuring, for the purposes of revenue assessment. The crops on five of these plots had been reaped and measured. This case concerns the remaining three plots. The Headman ordered the villagers to turn out on the day in question, and to reap and measure the crops. The applicants are shown to have refused to go, unless they were paid to do so. For this, they have been punished as stated. They have applied to this Court on revision through their Counsel Maung Ba Dun, on the grounds that the requisition was not for the performance of any public duty imposed upon villagers under the Burma Village Act, and that, even if it was the applicants admittedly reaped the said three plots a week after their refusal. It was further contended that there was no proof that applicants, Le Gyaw, Po Han, Ba E, Po Tha Han, Po Kyaw, and Po Htaw were present, or ever received the Headman's order and that, therefore, the Magistrate was in error in placing the burden of proof on these six applicants under section 12 of the Act. Finally it was argued that the Township Magistrate, as an executive officer, was biased, and that he should have held that Thu Daw's statement that " if only the Deputy Commissioner's order explicitly stated that the reaping must be done with the villagers, they would undertake the work," was a complete answer to the Headman's requistion and a reasonable excuse.

I will take the last point first. It was, of course, no excuse or answer even if Thu Daw said it. The Headman had an order from the Deputy Commissioner to reap the plots, to carry out the work, and adopt the usual procedure. The requisition was well within his rights. It is well known that, in Settlement Operations, Headmen have to assist the Settlement Officials, by turning out villagers for such duties as soil classification, holding-marking and crop-reaping, and for him to order them to do so is an old established rule, under which they have to turn out and receive no pay for their efforts. Crop-reaping by a large crowd of villagers in a few plots is very light labour. In this case the Headman states that it would only have involved some three sheaves of paddy per man. The order or requisition in question, though not defined in the Act, was usual and quite legal and as the Headman was responsible, it was clearly a requisition to assist him in his public duty. Of that I have no doubt at all. I have been an Assistant Settlement Officer, and I speak of that, which I know. Even if the villagers considered that they should, in these expensive modern days, be paid for such work, it was their duty to comply with the order and represent matters afterwards. This is, incidentally, sufficient answer to ground No. (1) referred to above. As regards the point that the applicants actually reaped the plots a week after their refusal, this was not until the Headman had taken the matter to Court, and, in reaping, as every farmer knows, time is often of the greatest importance.

The whole trouble was due to the actions of the applicants Pan Bu and Thu Daw, leaders of the local Y. M. B. A. which I am surprised to find wasting its energies in an attempt to obstruct local administration by their Headman. As regards the six applicants referred to above, there is no proof either that they were present or that they were informed of the requisition in time. Even under section 12 of the Act, the prosecution has to prove this, and cannot cast the onus of proving absence on the accused. The words used in section 12 are clearly not intended to apply to anything of this kind, but to cases where a man sets up just cause for not having obeyed a requisition; which he has received. That is, of course, a very different matter.

As regards the thirty-three other applicants, the convictions were undoubtedly correct, but in the case of each man (with the exception of the two leaders Thu Daw and Pan Bu), the sentence was in the circumstances unnecessarily severe.

The six applicants, who are not proved to have been present, are entitled to an acquittal.

The applications of Nga Thu Daw and Nga Pan Bu are dismissed. The con-

victions of the other applicants (excepting Le Byaw, Po Han, Ba E, Po Tha Han, Po Kyaw and Po Htaw) are confirmed, but the fines are reduced in each case to one of Rs. 5 each or, in default, three days' rigorous imprisonment.

The excess fines paid will be refunded to them.

The applicants Le Byaw, Po Han, Ba E, Po Tha Han, Po Kyaw and Po Htaw are acquitted, their convictions and sentences being set aside. The fines paid by them will be refunded.

Z. K.

Order accordingly.

LAHORE HIGH COURT.

CRIMINAL CASE NO. 146 OF 1923.

April 24, 1923.

Present:—Mr. Justice Moti Sagar.

THE MUNICIPAL COMMITTEE, MULTAN—PETITIONER

versus

MOTI RAM AND OTHERS—ACCUSED RESPONDENTS.

Punjab Municipal Act (III of 1911), ss. 172, 195, 219—Encroachment on Municipal land—Refusal to remove—Composition, whether can be accepted.

Under section 219 of the Punjab Municipal Act a Magistrate can either dismiss the complaint if he finds that the facts alleged by the Municipal Committee have not been established, or he can impose a fine up to Rs. 50 if the orders of the Committee lawfully issued have not been complied with. A Magistrate has no jurisdiction to accept a penalty for a projection which has been constructed without the permission of the Municipal Committee. It is only in cases of buildings constructed without the permission of the Committee on one's own land that a composition can be accepted under section 195 of the Municipal Act. For a case falling under section 172 of the Act no composition is provided for. [p. 224, col. 1.]

Case reported by the Additional District Magistrate, Multan, with his No. 169 of 1922.

REPORT.—This is an application for revision of the order of M. Rab Nawaz Khan Honorary Magistrate who while passing a sentence under section 219 of Act III of 1911, ordered that the projection (overhanging structure) for which notice of removal had been issued by the Municipality under sections 172 and 195/214 of the above mentioned Act may be allowed to stand. It is against these words that objection has been taken and it is argued that the said words which read in Urdu as below :—"*Badhao bahal rakha jawe*", may be expunged from the order. That the lower Court had no jurisdiction to pass such an order is admitted by the respondents' Counsel but he argues that the relation of this sentence in the order of the lower Court has not affected the Municipality in any way and that the inclusion of the sentence objected to does not amount to an illegality, impropriety and incorrection within the meaning of section 435, Criminal Procedure Code, also that it does not form part o the finding which is nothing else but the imposition of the fine or penalty. I am unable to accept this view of the respondents' Counsel. The words objected to are a clear order or finding which is *ultra vires* and which being beyond the jurisdiction of the Magistrate and leading as it is to a misapprehension of the position by the respondents is certainly improper. Under section 488, Civil Procedure Code, I recommend that the words *Badhao bahal rakha jawe* may be expunged from the order of the lower Court. Case with connected file will be submitted to the High Court for orders.

Lala *Hari Chand* for the Petitioner.

Lala *Jagan Nath*, for the Respondent.

ORDER.—This case has been reported by the Additional District Magistrate, Multan, under section 438 of the Criminal Procedure Code. It appears that the accused erected certain projections overhanging a public street without the permission of the Municipal Committee. The Committee issued a notice under sections 172 and 195 of the Punjab Municipal Act for their removal. The accused removed all the projections with the exception of one which was about 9 inches in width. The Committee thereupon prosecuted the accused under sections 172/219 of the Punjab Municipal Act. Some of the members were of opinion that the case should be dropped on taking some penalty from the accused. The Vice President of the Municipal Committee also supported the recomendation. The Trial

THIRUMALA REDDI, *In re.*

Magistrate ordered that the accused should pay a penalty of Rs. 5 and that the protection should be allowed to remain intact. An application for revision was filed to the Additional District Magistrate by the Municipal Committee against this order, and he was of opinion that the order that the projection should remain intact was *ultra vires* and without jurisdiction and that it should be set aside.

I entirely agree with the learned Additional District Magistrate that the order is without jurisdiction and that it cannot be sustained. Under section 219 of the Punjab Municipal Act a Magistrate can either dismiss the complaint if he finds that the facts alleged by the Municipal Committee have not been established, or he can impose a fine up to Rs. 50 if the orders of the Committee lawfully issued have not been complied with. A Magistrate has no jurisdiction to accept a penalty for a projection which has been constructed without the permission of the Municipal Committee. It is only in cases of buildings constructed without the permission of the Committee on one's own land that a composition can be accepted under section 195 of Act III of 1911. This was a case falling under section 172 of the Punjab Municipal Act for which no composition is provided for. The order passed by the Trial Magistrate was clearly illegal and must be set aside.

I accept the revision and remand the case to the Trial Court with a direction that it should pass fresh order in accordance with law.

Revision accepted.

Z. K.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 355 OF 1923.

(CASE REFERRED NO. 62 OF 1923).

October 4, 1923.

Present:—Sir Walter Salis Schwabe, KT., Chief Justice, and Mr. Justice Waller.

In re S. THIRUMALA REDDI—ACCUSED.

Madras Panchayat Courts Act (II of 1920), s. 78, rules under—Penal Code (Act XLV of 1860), s. 179—Refusal of accused to plead in Panchayat Court—Offence.

Under the Madras Panchayat Courts Act as under the Code of Criminal Procedure, the mere refusal on the part of an accused person to plead to a charge before the Panchayat Court, is not an offence under section 179, Indian Penal Code. [p. 423, col. 1.]

Per *Schwabe, C. J.*—An accused person is not bound to answer any question put to him at all and can, if he likes, decline to plead. [p. 423, col. 1.]

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the District Magistrate of North Arcot, Vellore, in his letter, dated the 14th May 1923.

The Public Prosecutor, for the Crown.

ORDER.

Schwabe C. J.—This is a reference by the District Magistrate of North Arcot, under section 438 of the Code of Criminal Procedure, in relation to a conviction by the Sub-Magistrate of Gudiyatham of one Tirumala Reddi under section 179 of the Indian Penal Code, he being fined Rs. 10, in default seven days' simple imprisonment.

The facts appear to be that the accused had been summoned for some offence before the Village Panchayat Court at Kandiapedu, he being charged with instigation to beat. On being charged before the Court he said he would not make any reply and remained silent. The Panchayat Court thereupon sanctioned the prosecution of the accused under section 179 of the Indian Penal Code. Section 179 runs, "Whoever, being legally bound to state the truth on any subject to any public servant, refuses to answer any question demanded of him touching that subject by such public servant, in the exercise of the legal powers of such public servant, shall be punished." The procedure before the Panchayat Court is governed by the Madras Act II of 1920 and the rules made in pursuance of section 78 of that Act. The rules have been published and are to be found in Government Order No. 572 of 1922 dated the 2nd of March 1922 published in the *Fort St. George Gazette*. By rule 36, "If the accused pleads not guilty or declines to plead, the Court will proceed to examine the complainant, if any, the witnesses for

the prosecution and the witnesses of the accused." Those rules make the procedure of the Bench Court precisely the same in respect of the pleading of the accused as the provisions of the Criminal Procedure Code which apply to other Courts in this country. As far as this matter is concerned, they come to this, that an accused is not bound to answer any question put to him at all and can, if he likes, decline to plead, and, if he declines to plead the case goes on just the same. In my judgment, section 179 of the Indian Penal Code has nothing whatever to do with the conduct of accused persons in Court. What they have to do and what they have not to do is provided by the Code of Criminal Procedure where it applies, and by the rules governing a Panchayat Court where they apply. This conviction of the accused under section 179 of the Indian Penal Code was entirely wrong. No offence under that section had been committed. The order of conviction must, therefore, be set aside and the fine, if paid, must be refunded.

Panchayat Courts have got ample powers to deal with such cases. They can simply go on with the case. Having heard the evidence, if they choose to convict, their conviction will be perfectly in order although the accused has failed to plead and although the accused by his demeanour has been contemptuous of the Court which has been trying him.

Waller, J.—I agree to the order proposed. It is quite clear that section 179, Indian Penal Code, has no application to a refusal to plead to a charge.

V. N. V.
S. D. *Conviction set aside.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 401 OF 1923.

April 6, 1923.

Present:—Mr. Justice Moti Sagar.

JASSU RAM—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 465—Forgery—Conviction based solely on evidence of Finger-Print Expert, validity of—Thumb impression of accused, whether can be taken during trial.

Ordinarily a man should not be convicted of the offence of forgery soley upon the evidence of a Finger-Print Expert relating to similarity of thumb-impressions. [p. 424, col. 2.]

The thumb-impression of an accused person should not be taken during his trial for purposes of comparison [p. 424, col. 2.]

Bazari Hajam v *Emperor*, 68 Ind. Cas 958; 1 Pat. 242; 4 U. P. L. R. (Pat) 1; (1922) (Pat.) 46; (1922) A. I. R. (Pat.) 73; 3 P. L. T. 526; 23 Cr. L. J. 638, relied on.

Application for revision of an order of the Sessions Judge, Mianwali, dated the 19th January 1923, modifying that of the Magistrate, First Class, Mianwali, dated the 18th December 1922.

Mr. *Anant Ram*, for the Petitioner.

JUDGMENT.—After hearing Counsel I am clearly of opinion that the convictions of the accused persons in these cases are unsustainable, and that their convictions and sentences must be set aside. The circumstances under which these convictions were recorded are briefly as follows:—

On the 12th of November 1917, one Jassu Ram brought a suit for the recovery of Rs. 600, principal and interest, against one Mawaz Khan on the basis of a *bahi* account. Under the entry on the *bahi* there was a thumb-impression which, it was alleged by the plaintiff, was that of the defendant, Mawaz Khan. The defendant denied the thumb-mark, and contended that he had not borrowed any money from the plaintiff. The plaintiff produced one Kalla Ram as a witness in the case who stated that he was the scribe of the entry in the *bahi*, and that the defendant had affixed his thumb-mark in his presence. The defendant, however, persisted in his denial that the thumb-mark on the entry was his. The Court thereupon obtained certain thumb-marks of the defendant on a piece of paper in Court and

sent them along with the disputed thumb-mark in the *bahi* for comparison to the Finger Print Bureau at Phillor. The report was that the impression on the *bahi* did not correspond with any of the other impressions and that it did not appear that the impressions on the two documents were made by one and the same person. The case was set down for a hearing for the 30th of April 1918. On that date the plaintiff failed to appear in Court, and the case was accordingly dismissed for default under O. IX, r. 8 of the Code of Civil Procedure. On the 19th of May 1918 an application was made by the plaintiff for the restoration of the case, but it was dismissed. An appeal to the District Judge and application for revision to the Chief Court also met with the same fate. The defendant Mawaz Khan thereupon made an application to the District Judge for sanction to prosecute Jassu Ram and Kalla Ram, the former under sections 465 and 471 of the Indian Penal Code, and the latter under sections 465, 467 and 197 of the Indian Penal Code. The District Judge granted the sanction upon which a complaint was filed by Mawaz Khan against Jassu Ram and Kalla Ram which eventually resulted in the conviction of both. An appeal was filed to the Sessions Judge but was dismissed.

The petitioners have now come up in revision to this Court, and it has been contended on their behalf that there is no legal evidence on the record upon which these convictions could have been based. It is urged that the only evidence in support of the contention that the thumb impression on the *bahi* was not that of the complainant, Mawaz Khan, is that of the Finger-Print Expert, Pandit Ram Narain, and that the petitioners should not have been convicted on the sole testimony of this witness It appears that a portion of the document, which was supposed to have borne the forged thumb-impression was torn away when the case came up before the Criminal Court, and that under these circumstances it became impossible to compare the genuine thumb-impressions of the complainant, Mawaz Khan, with the disputed thumb-mark on the *bahi*. The Court, however, relied upon the fact that the original document was examined by the Finger-Print Expert in the civil case and also upon the fact that he had then come to the conclusion that that thumb-mark was forged and that it did not tally with the admitted thumb-marks of the complainant. It is clear, however, that the Finger-Print Expert was not cross-examined in the civil case, and that the accused had no opportunity in that case to show that the opinion of the Expert was wrong. In the present case there is no evidence to corroborate the statement of the Finger-Pint Expert, and it seems to me that it would be very dangerous to convict the petitioners on his sole testimony. In the case of *Bazari Hajam* v. *Emperor* (1) it has been held that ordinarily a person should not be convicted of a serious crime solely upon evidence of similarity of thumb-impressions and that the thumb-impression of an accused person should not be taken during his trial.

I entirely concur in this opinion and hold that the evidence in the present case is wholly insufficient to justify the convictions of the accused and that they are entitled to an acquittal.

I accordingly accept the revisions, set aside the convictions and the sentences and direct that the accused be released forthwith.

Z. K.

Revisions accepted.

(1) 68 Ind. Cas. 958; 1 Pat. 242; 4 U. P. L. R. (Pat) 1; (1922) Pat 46; (1922) A. I. R. (Pat.) 73; 3 P. L. T. 526; 23 Cr. L. J. 638.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 397 OF 1923.
May 29 1923.

Present:—Mr. Justice C. C. Ghose and Mr. Justice Cuming.

A. K. MAITRA—PETITIONER
versus
KAMINI MOHAN BOSE—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 177—Penal Code (Act XLV of 1860), s. 406—Offence of criminal misappropriation—Place of trial.

An offence under section 406, Indian Penal Code, can be tried only at the place where the money was received and misappropriated by the accused.

Rule against the order of the District Magistrate, Barisal.

Babus *Tarakeswar Pal Chowdhury* and *Jnan Chander Roy*, for the Petitioner.

Babus *Suresh Chander Taluqdar* and *Mohendra Kumar Ghose*, for the Opposite Party.

JUDGMENT.—This is a Rule calling upon the District Magistrate of Barisal and also upon the opposite party to show cause why the case against the petitioner should not be transferred to the Court of the Chief Presidency Magistrate or any other stipendiary Magistrate in Calcutta as this Court may think fit to transfer to, or why such other or further order should not be made as to this Court may seem fit and proper.

It appears that a complaint under sections 406 and 420 of the Indian Penal Code was lodged against the petitioner in the Court of the Deputy Magistrate at Barisal. The circumstances which gave rise to this complaint being lodged, shortly stated, are these:— The petitioner before us, carries on business as a coal merchant at 1 Pollock Street in Calcutta. The complainant who resides in Barisal entrusted the petitioner with a sum of Rs. 400, being part of the price of a certain quantity of coal which the complainant asked the petitioner to despatch to Barisal from Calcutta. The petitioner says that he sent down instructions to a colliery in Raneegunge to despatch the coal to the complainant. But the coal was not despatched in time owing to the shortage of wagons. Now, so far as the charge under section 406 is concerned, it is, in our opinion, having-regard to the terms of section 177 of the Code of Criminal Procedure, only triable by a Magistrate in Calcutta.

The misappropriation took place in Calcutta, where the money was received by the petitioner from the complainant. We are fortified in this view by the decision of this Court in the case reported as *Simhachalam* v. *Rati Kanta Laha* (1). In these circumstances it is unnecessary to say anything as regards the charge under section 420. They may or may not be triable by a Court in Calcutta. For the purposes of this Rule we propose to confine ourselves to the charge of criminal misappropriation and to the provisions of section 406 and of section 177 of the Code of Criminal Procedure and we think that this is a case which should be tried by the Court of the Chief Presidency Magistrate in Calcutta. We accordingly make the Rule absolute and direct that the case be transferred to the Chief Presidency Magistrate in Calcutta to be tried either by himself or by a stipendiary Magistrate to be nominated by him.

S. D. *Rule made absolute.*

(1) 41 Ind. Cas. 138; 44 C. 912; 21 C. W. N. 573; 25 C. L. J. 451; 18 Cr. L. J. 762.

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 417 OF 1923.
June 19, 1923.

Present:—Mr. Justice Ffoide.

LYME—APPELLANT
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 297, 299, 304, 353, 537—Examination of witnesses—Procedure—Deposition, previous, read out—Illegality—Trial by Jury—Verdict before conclusion of evidence, legality of—Further evidence after verdict—Fresh verdict.

In a criminal trial it is entirely illegal to read out to the witnesses their depositions made on a previous occasion, to put a few additional questions and then to tender them for cross-examination, and the illegality is not cured by the provisions of section 537 of the Criminal Procedure Code.

Allu v. *Emperor*, 75 Ind. Cas. 980; 4 L. 376, *Attorney-General of New South Wales* v.

LYME *v.* EMPEROR.

Henry Louis Bertrand, (1867) 36 L. J. P. C. 51 at p. 57; 4 Moo. P. C. (N. S.) 460; 1 P. C. 520; 16 L. T. 752; 16 W. R. 9; 10 Cox C. C. 618; 16 E. R. 391, relied on.

Before a case can be submitted to a Jury all the evidence on both sides must be concluded. There is no power in a Judge to present a case to a Jury subject to conditions, and once a verdict is deliverd there is no power in the Trial Court or in the Jury to reconsider that verdict except under the provisions of section 304 of the Code of Criminal Procedure, which provides that where a wrong verdict is delivered by accident or mistake the Jury may amend it before or immediately after it is recorded. With this exception the Jury is *functus officio* as soon as its verdict is announced to the Court. [p. 428, col. 2; p. 429, col. 1.]

Once the verdict of the Jury has been given it is illegal to admit further evidence and to invite the Jury to give a fresh verdict. [p. 429, col. 1.]

Appeal from an order of the District Magistrate, Bannu, dated the 26th March 1923.

Messrs. *Shamair Chand* and *Sagar Chand*, for the Appellant.

Mr. *Dalip Singh*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—The appellant has been tried by the District Magistrate of Bannu, sitting with a Jury of three persons, on a charge of rape. He has been found guilty of an attempt to commit the offence and has been sentenced to a term of six months' rigorous imprisonment.

A number of grounds of appeal have been put forward but the principal ground relied upon by Mr. Shamair Chand, Counsel for the appellant, is that the manner in which the trial was conducted was illegal in certain material particulars.

The facts relevant, to the determination of the questions which have been raised on this contention are as follows:—

On the 12th March 1923 the prisoner was brought before the District Magistrate upon a charge under section 376, Indian Penal Code. After seven witnesses for the prosecution had been examined the Public Prosecutor closed the case for the Crown, the cross-examination of these witnesses having been reserved. The case was then adjourned to the 14th, when the prisoner claimed as an European British subject to be tried by a Jury under the provisions of section 451 of the Code of Criminal Procedure, and the proceedings were accordingly stayed to enable the necessary steps to be taken in compliance with the section.

On the 17th of March the prisoner was again brought before the Magistrate, when he was formally charged and the trial fixed for the 22nd. On the 22nd the Jury were duly ballotted for and the names of three persons, one Indian and two Europeans, were returned. These names were read out to the prisoner at the bar who was asked to challenge them. He, however, accepted them without challenge and the trial commenced.

Two witnesses were then duly examined by the psosecution and cross-examined by Counsel for the defence, namely, *Musammat* Mir Galla, the person against whom the offence in question was alleged to have been committed, and Bisl en Das, Sub-Inspector of Police. So far as these two witnesses were concerned it is not suggested that there was anything illegal or irregular in the mode in which their evidence was presented. As regards the remaining witnesses for the Crown, however, the course adopted was as follows:—

When each witness came into the box the recorded statement of the evidence given by him at the first hearing was read out to him. A few further questions were then put to the witness and he was tendered for cross-examination. In the case of Khan Sahib Akbar Ali Khan, prosecution witness No. 3, the following note appears on the record:—"This witness is called and the above statement made by him in this Court on 12th March 1923 is read out to the Jury and the statement transferred to the file." It does not appear from the record that this particular witness was even sworn.

With regard to the next witness Shai Mast (P. W. No. 4) the note on the record is as follows:—"22nd March 1923. Shai Mast Khan" recalled:—"I have heard the above statement made at the first hearing on the 12th March 1923 read over to me. It is correct and I adhere to it." Again it does not appear from the record that this witness was sworn though I will assume that this formality at least was observed in every case. The evidence of the next witness (P. W. No. 5) is recorded as being on solemn affirmation. He also says that he has heard his statement

made in the Court on the 12th March 1923 read out and that it is correct and he adheres to it. The remaining three witnesses for the prosecution are dealt with in similar fashion.

Now, it is quite obvious that this method of presenting the evidence for the prosecution is irregular, and not only irregular but entirely illegal. It is a wholly unauthorized variation from the ordinary and proper procedure. It is argued by Counsel for the Crown that this departure from the ordinary procedure is an irregularity covered by section 537 of the Code of Criminal Procedure which enacts that no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account, *inter alia*, of any error, omission or irregularity in the proceedings before or during trial, unless such error.... has in fact occasioned a failure of justice. I entirely disagree with this view as to the scope of that section. I have already expressed my views on this section in the case of *Allu* v. *Emperor* (1) I need not repeat them here. The procedure being illegal it is not material to determine whether or not it has occasioned a failure of justice. In many cases where the authorised mode of trying a criminal offence has been departed from it is impossible to say whether it has or has not occasioned a failure of justice. It is otherwise when the irregularity is one of form and not of substance. A mere slip or oversight in the manner in which evidence is recorded, for instance, can rarely prejudice the person who is being tried. But a substantial departure from authorised procedure in the mode in which the evidence of witnesses is presented to a Jury may very seriously affect the prisoner's chances. Had the proper course been adopted in presenting the evidence for the prosecution the Jury would have had an opportunity of gauging the value of the testimony of each individual witness by his general demeanour. A witness may show a suspicious hesitancy in answering certain questions put by Counsel for the prosecution, or he may show an equally suspicious excess of zeal. Both Judge and Jury are undoubtedly influenced to a considerable extent by the manner in which a witness gives his evidence in-chief; and, moreover, the demeanour of a witness during the examination-in-chief may be of the greatest help to Counsel for the defence in his cross-examination.

In this context I cannot do better than quote the words of Sir John Coleridge in delivering the judgment of the Privy Council in *Attorney General of New South Wales* v. *Henry Louis Bertrand* (2) where one of the matters to be determined was the propriety or otherwise of the very procedure now under discussion:

"Those of their Lordships who have been used, on motions for new trials, to hear the Judges' notes of the evidence read, probably know well by experience how difficult it is to sustain the attention, or collect the value of particular parts, when that evidence is long; and one cannot but feel how much more this difficulty must press upon twelve men of the ordinary ranks, intelligence and experience of common Jury men. But this is far from all. The most careful note must often fail to convey the evidence fully in some of its most important elements,—those for which the open oral examination of the witness in presence of prisoner, Judge, and Jury, is so justly prized. It cannot give the look or manner of the witness; his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration; it cannot give the manner of the prisoner, when that has been important, upon the statement of anything of particular moment; nor could the Judge properly take on him to supply any of these defects; which indeed, will not necessarily be the same on both trials; it is, in short, or it may be, the dead body of the evidence, without its spirit which is supplied, when given openly and orally, by the ear and eye of those who receive it."

In that case there had been two trials and at the second trial the Chief Justice who was trying the case, at the request

(1) 75 Ind. Cas. 980; 4 L. 376.

(2) (1867) 36 L. J. P. C. 51 at p. 57; 4 Moo. P. C. (N. S.) 460; 1 P. C. 520; 16 L. T. 752; 16 W. R. 91; 10 Cox C. C. 618; 16 E. R. 391.

of the prisoner and also of his Counsel and with the consent of the Counsel for the Crown, read over to certain of the witnesses the evidence which they had given at the first trial, and then permitted Counsel for the prosecution and Counsel for the defence to put such further questions to the witnesses as they might think fit; the witnesses of course being sworn in the usual manner. This procedure, which was much the same as was adopted in the present case, was strongly disapproved of by their Lordships of the Privy Council. It is true that the prisoner's application for a new trial was not granted, but that was on the ground that there could be no new trial in a case of felony. That case was decided in 1867 when there was no appeal in such cases, the decision, therefore, is only of value for the general principles enunciated in the judgment.

A further illegality in the mode of trying the present case, which is relied upon by Counsel for the appellant as vitiating the trial, is the manner in which the case was presented to the Jury.

After a certain number of witnesses for the defence had been examined, the Foreman of the Jury asked if the defence could not cut down the number of witnesses they had summoned. The defence, therefore, agreed to dispense with all further witnesses save one.

The learned Magistrate, thereupon, apparently with the desire to conclude the trial that day, proceeded to charge the Jury upon the case as it stood. He explains in his judgment that he took the Foreman's intervention as an indication that the Jury had decided to acquit, and he further states that he warned them that it might be necessary to summon the remaining witnesses for the defence. By this, he explains, he meant that if they had the intention of convicting the accused they must first hear the remaining witnesses, but if on the other hand they had made up their minds to acquit they need not bother about the further defence evidence. These mental reservations of the learned Magistrate were, however, not understood by the Jury who apparently did not possess sufficient telepathic powers to read what was in his mind. It may be remarked that in the official report of the charge to the Jury there is no indication of any reservation. After Counsel on both sides had addressed the Jury the learned Magistrate proceeded to charge them, commencing his address in these terms:—

"On the facts before you I am going to ask you to determine the issues."

The proper issues are then set out and towards the end of the charge appears the statement.

"Now gentlemen, you have heard the evidence on both sides.....I will not now detain you longer. The evidence has been well dealt with by Counsel on both sides. I need only remind you in conclusion of your oath as jurors to deal fairly and impartially between the Crown and the prisoner at the bar."

Nowhere on the record, save in the judgment itself and in a subsequent note of the Magistrate does it appear that the case for both sides was not concluded when the Jury were asked to return their verdict. The Jury having then considered their verdict found the prisoner not guilty on the first issue and guilty on the second.

On being faced with this verdict the Magistrate ordered that the evidence of the remaining witness be taken on the following day. On the following day, however, not only was the evidence of this witness taken but two more witnesses for the defence were examined. A further address to the Jury was then delivered by the Court and they were asked to reconsider their verdict in the light of this additional evidence. The Jury then brought in the same verdict as before. Upon this verdict sentence was subsequently passed.

Now it is obvious that the course here adopted was in direct contravention of the exress provisions af the Code of Criminal Procedure. All the evidence on both sides must be concluded before the case can be submitted to the Jury. There is no power in a Judge to present a case to a Jury subject to conditions, and once a verdict is delivered there is no power in the Trial Court or in the Jury to re-consider that verdict except under the provisions of section 304 of the

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Code of Criminal Procedure, which provides that where a wrong verdict is delivered by accident or mistake, the Jury may amend it before or immediately after it is recorded. With this exception the Jury is *functus officio* as soon as its verdict is announced to the Court. What has been done in this case is that after a trial has been concluded and verdict given, a new trial has been held on further evidence and a fresh verdict given. It is immaterial that the second verdict happened to be to the same effect as the first. The second verdict upon which judgment has been given and sentence pronounced is a nullity and the judgment based upon it is, therefore, made without jurisdiction and is void. For this reason alone the finding and sentence must be set aside.

In view of the conclusions I have come to it is unnecessary to examine the remaining grounds upon which this trial is sought to be impeached.

For the reasons I have given I accept the appeal, and setting aside the conviction and sentence of the Court below I direct that a new trial be held.

Appeal accepted.

Z. K.

RANGOON HIGH COURT.

CRIMINAL APPEALS NOS. 626, 649, 650 AND 730 OF 1923.

August 31, 1923.

Present:—Mr. Justice May Oung.

MAUNG LAY AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Evidence Act (I of 1872), ss. 26, 27, 114 ill. (b), 133—Approver—Corroboration—Conviction, whether can be based on uncorroborated statement of approver—Police custody—Identification of stolen property—Burmese coins.

There is no positive legal bar to taking an approver' evidence as a basis for a conviction but unless some reliable corroboration on a material point were super-added to it, it would, in almost all cases, be unsafe to accept it as conclusive. [p. 430, col. 1.]

As soon as an accused or suspected person comes into the hands of a Police Officer, he is, in the absence of clear and unmistakeable evidence to the contrary, no longer at liberty and is, therefore, in custody within the meaning of sections 26 and 27 of the Evidence Act. [p. 432, col. 1.]

Though Burmese coins cannot be absolutely identified they are sufficiently uncommon at the present day to cast upon an accused person, in whose possession they are found and identified as stolen, the burden of proving that he came by them honestly. [p. 432, col. 1.]

Appeals from an order of the Sessions Judge, Meiktila, in Sessions Trial No. 9 of 1923.

JUDGMENT.—These four appeals were filed by seven men who were convicted on a charge of dacoity committed on the 30th June 1922. They were the 1st to 6th and 8th, accused in the Court of Session; the 7th was acquitted.

The only evidence accepted against Nos. 1, 2, 4, 5 and 6 was that of one Kwe Ni (2 P. W.), an approver. In a lengthy and most painstaking judgment, the learned Sessions Judge found that particular corroboration was lacking as regards these men, but held, on the authority of *Nga Po Chit* v. *Emperor* (1), that the evidence of the approver was sufficient.

That ruling appeared to the learned Judge to be "authority, not merely for the proposition that a conviction based on the uncorroborated evidence of an approver is not illegal, but also for the further proposition that, when the approver's evidence is accepted as substantially true, *i.e.*, as leaving no room for reasonable doubt that he actually took part in the crime, the abstract possibility, unsubstantiated by anything on the record, that he may have substituted the innocent for the guilty, or added the innocent to the guilty, is not a sufficient ground for refusing to accept that evidence as a basis for the conviction of each accused whom it implicates."

No authority beyond section, 133, Indian Evidence Act, was needed for the first proposition above set out, and it is more than doubtful whether the learned Judges who decided *Nga Po Chit's case* (1) had any intention of laying down a general proposition of law. Indeed, Fox, C. J., at page 11 of the report, expressly said:—"The decision in each case must depend on its own

(1) 9 Ind. Cas. 778; 6 L. B. R. 4; 4 Bur. L. T. 50; 12 Cr. L. J. 132.

particular circumstances, and no general rule can be laid down as to when an accomplice's uncorroborated evidence alone should be accepted and acted on against an accused."

On page 10, it is conceded "that a conviction on the uncorroborated evidence of an accomplice is to be regarded as exceptional," and the two illustrations given under section 114 of the Act clearly indicate that the application of section 133 must be exceedingly rare.

The suggested extension of the principle would in some cases lead to unlooked-for results. To take a concrete example:—*A* commits a crime in conjunction with *B* and, later, having been pardoned, is cited as a witness for the Crown. Secretly prompted by *X*, he implicates *C* instead of *B*, and *C* is unable to establish an *alibi*. There is nothing on the record to show that *A* was prompted by *X* or any one else. In these circumstances, the Court, being satisfied that *A* was one of the criminals might, according to the learned Sessions Judge's reasoning, be justified in convicting *C*. The presumption of innocence, added to the presumption allowed by section 114, would be insufficient to save him.

There is no positive legal bar to taking an approver's evidence as a *basis* for a conviction, but unless some reliable corroboration on a material point were superadded to it, it would, in almost all cases, be unsafe to accept it as conclusive.

The case of *Nga Po Chit* v. *Emperor* (1) was in many ways exceptional. The approver was naturally overcome with remorse because he had been privy to the murder of a little boy, his own cousin, and both Fox, C.J., and Twomey, J., laid considerable emphasis on this circumstance. It is note-worthy that Hartnoll, J., took a different view.

In the case before me, the approver was unearthed through the instrumentality of one of several bad characters whom the Police, at a loss for a clue, had called in to assist them. Kwe Ni was brought before an array of Police Officers and questioned, but four or five times denied that he had had a hand in the dacoity. Finally, an Inspector told him that, if he spoke out, he would be made an approver. He, thereupon, told a story which gave the Police material on which to act. He also took them to various places and, at different times, produced sundry coins and articles which he said were part of the stolen property. There is one matter on which considerable stress was laid, namely, that Kwe Ni gave "information that there would probably be found the stumps of some cheroots which had been smoked by some of the dacoits at the time of the distribution of the spoil" and that "in accordance with Kwe Ni's prediction cheroot ends were found at the place pointed out by him." This, if fully borne out, would afford strong general corroboration of the approver's story; but Kwe Ni himself (page 156 of the record) says.—"As far as I know cheroot stumps were found only at the place of distribution. *Before they were found, I had not mentioned that any one smoked at the place of distribution.*"

In several respects, the approver's evidence did not appear to the Trial Court to be quite satisfactory. The likelihood of his "playing a double game" strongly suggested itself at one time, and, as regards the 7th accused, Po Ket (who was acquitted), the learned Judge held that "it may be reasonably suggested that *the approver may have been induced to add him to the list of genuine participants in the dacoity.*"

The difficulty seems to me to be to determine where exactly the line can be drawn, if Kwe Ni was capable of implicating one innocent man, and there is no doubt that Kwe Ni is a thorough paced scoundrel, he was equally capable of dragging in others, and, taking this into consideration, I must come to the conclusion that, in the circumstances of the present case, the uncorroborated testimony of the approver does not afford a sufficient foundation on which a conviction can safely be based.

I, therefore, allow the appeals of Maung Lay, Maung Lu Tha, Maung Po Maw, Manug Po Thaw, and Maung Thin, and direct that they be acquitted and set at liberty.

The cases of Maung Pu and Po Chi are on a different footing. Both made

confessions which were subsequently retracted in Court; that of Maung Pu was ruled out on the ground that it had been made under inducement, it having been established that the Circle Inspector Maung Than (who had prevailed on the approver to speak out) not only held out a promise of pardon but actually spoke of a reward. Po Chi's confession was admitted though not "very convincing" and "entitled to but little weight." When retracting it in the Committing Magistrate's Court, Po Chi stated that the station officer and the Circle Inspector had beaten him and put chillies into his eyes, nevertheless, the Inspector Maung Than was not called as a witness at the trial, and I can find no reason for this omission. In any case, I think that the learned Sessions Judge's argument, that if Maung Than was capable of illegally promising a pardon to Kwe Ni he was equally capable of doing so to Maung Pu, must have equal force in the case of Po Chi, and it is at best doubtful if his confession was obtained by moral suasion and nothing more. Besides this, his village Headman Kywe Wa (18 P. W.) on at least two or three occasions urged him to confess, and this was at a time when Kwe Ni and Maung Pu had confessed, but had not yet been kept in handcuffs, and it was rumoured that they would be made approvers (pages 293 and 294). There is also the fact that this Headman is the brother of Tun Naing, the principal "bad character" who was assisting the Police and at whose suggestion the approver, Kwe Ni, was called in. On the whole, therefore, the confession of Po Chi should, in my view, have been excluded.

Apart, however, from these confessions, there is the allegation that Maung Pu and Po Chi "produced" certain articles said to be part of the stolen property. The former gave up four silver anklets, two peacock rupees and Rs. 48. The latter pointed out a place near his house from which Rs. 44 were dug up, and also certain stumps of the castor plant; he is also said to have led the Police to the place where the dacoits had divided the spoil and to the hut of one Po Mya, both of which had been indicated by Kwe Ni on the day previous.

The learned Sessions Judge appears to have held in the case of both these accused that section 27, Indian Evidence Act, was inapplicable, as neither was at the time in Police custody. Maung Pu was in custody on the evening of the 6th July, at some time during that day he had given up the anklets and peacock rupees, but it was not till the next day that he produced the Rs. 48. From the approver's evidence it appears that on the morning of the 6th, he set out with an Inspector and others to return to his house. On the way the party stopped at Maung Pu's house and the Inspector took him along. Later Maung Pu led the party to a well south of the village and near it dug up two peacock rupees and two pairs of silver anklets. Maung Pu was then arrested and kept at the house of the village Headman. "I myself;" said Kwe Ni, "had not yet been arrested. I was being kept in 'free detention.'"

As to Po Chi, the Sub-Inspector, Maung San Pu, says.—"The same day (8th) we went to Po Chi's hut. There we found Po Chi. Kwe Ni and Maung Pu were with us and both pointed him out..... .....After that Po Chi was sent into Thekkegyin village by cart, he was not yet arrested. I forget who went with him." It was not till the next day the 9th, that Po Chi produced the Rs. 44 and pointed out certain things and places. Probably this was another instance of "free detention."

I have come across several cases in which Police Officers have, after detaining a person accused of an offence, put forward the plea that the latter *was not in custody because he had not yet been formally arrested*. The object of this seems to be either to avoid the operation of section 26, Indian Evidence Act, or to shorten the period of time between the arrest and the confession subsequently made to a Magistrate; or to postpone the necessity for applying for a remand order; in one case which came under my notice the object was to put in as evidence a statement, taken down in

writting, which was inadmissible under section 162, Code of Criminal Procedure.

This idea of "free detention" is, in my view, altogether mistaken, sometimes even hypocritical. It is an infringement of the spirit, while appearing to conform to the strict letter, of the law, and I would lay down that as soon as an accused or suspected person comes into the hands of a Police Officer, he is, in the absence of clear and unmistakeable evidence to the contrary, no longer at liberty and is, therefore, in custody within the meaning of sections 26 and 27, Indian Evidence Act.

The failure to recognise this principle, has, in the present case, had the unfortunate result that statements which might have been admitted under section 27 have not been recorded and the Court was obliged to fall back on section 8 and to consider only the conduct of the accused.

Undoubtedly the conduct of Maung Pu was such as to fix him with guilt. Among the properties taken by the dacoits were four pairs of silver anklets, 20 peacock rupees and several hundred modern rupee coins. He led the Police to a spot where two pairs of similar anklets and two peacock rupees had been buried and were dug up, and on the following day gave up 48 ordinary rupees. The identity of the anklets was sworn to by the complainant, and though the Burmese coins cannot be absolutely indentified they are sufficiently uncommon at the present day to cast upon the accused the burden of proving that he came by them honestly; moreover, it has not been shown that Maung Pu is a man who would be likely to possess such a sum as Rs. 48. Besides this, it was not only Kwe Ni but Maung Pu as well who took the Police to the place where the booty was divided and to Po Mya's hut, the dacoit's rendezvous before they set out on their nocturnal expedition. Add to all this the fact that he is related to Kwe Ni, and there is, with the latter's evidence, enough to show conclusively that he was one of the dacoits. No witness was cited by him and his story that he was cajoled into making the "discoveries" was rightly discredited. I, therefore, hold that the conviction in his case was correct and his appeal (No. 649) is dismissed.

There remains the case of Po Chi. All that he was in possession of was a sum of Rs. 44 and the he has produced evidence which, in the learned Sessions Judge's opinion, goes to show that his financial position is such that no adverse inference could be drawn against him from the mere fact of his possessing so much money. As to the allegation that he pointed out certain caster stumps (because castor sticks were used in the dacoity for the purpose of fixing fire-rings thereon) and certain places, namely, Po Mya's hut and the spot where the division took place, the Court accepted the evidence of headman Maung Ba Din, who was associated with the investigation from the outset and was thus not an altogether independent witness. The accused's version was that the ex-convict and registered criminal, Tun Naing, showed the stumps and the places and as the learned Sessions Judge remarks, the Police were seriously to blame for permitting the presence of a man like Tun Naing, instead of an independent respectable elder. At any rate, there was only "an implied admission of guilt". As against this, there is one important fact that has been excluded from consideration, namely, that in Kwe Ni's first statement to the Police (page 363) he did not name Po Chi as one of his accomplices, but merely referred to him "as a man who came along with Po Ket." Po Ket is the man who was acquitted and it is not clear that Kwe Ni was speaking to the actual time of the dacoity. Kwe Ni's statement, being a confession to a Police Officer, was, as acknowledged in the lower Court's judgment, wrongly admitted, but the part which I have referred to was relevant for the purpose of contradicting Kwe Ni, who now states that Po Chi was one of the dacoits. In these circumstances it would not be safe to convict Po Chi and he is, therefore, acquitted.

The money and properties seized from the possession of those who have now been acquitted will be returned to them.

Z. K. *Order accordingly.*

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 30 OF 1923.

May 31, 1923.

Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Campbell.

WALLU—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 237, 238, 423—Conviction of murder—Appeal—Appellate Court, whether can alter conviction to offence against property.

Where a person has been charged with and convicted of the offence of murder it is not open to the High Court, on appeal, to alter the conviction under section 302 of the Penal Code to a conviction under one of the sections dealing with offences against property.

Queen-Empress v. *Yusuf*, 20 A. 107; A. W. N. (1897) 240; 9 Ind. Dec. (N. S.) 429, relied on.

Appeal from an order of the Sessions Judge, Ferozepore, dated the 14th October 1922.

Mr. *Cooper*, for the Appellant.

Mr. *Des Raj Sawhney*, Public Prosecutor, for the Respondent.

JUDGMENT.—The appellant, Waliu, has been convicted under section 302 of the Indian Penal Code of the murder of a boy named Haku and has been sentenced to transportation for life.

The offence is alleged to have been committed on the 2nd July 1922 on which day Haku was last seen alive. His body was discovered in the canal on the 3rd July at a place about 3 miles from Mohanke village where he and the appellant lived. The medical man who conducted the *post-mortem* examination was unable to give any opinion as to the cause of death because putrefaction was too far advanced. He deposed that there were a faint blue mark on the right side of the neck, 2 slight bruises on the left side of the face, a scratch on the right ear and another blue mark on the front of the chest and he said that as the above marks on the body indicated violence and struggle, death might have been due to suffocation or strangulation. This, however, the deposition of the witness made clear, was a mere guess. The final conclusion was as stated abov that owing to advanced putrefaction no opinion could be formed about the cause of death.

The learned Sessions Judge has held the following facts to be proved:—

1. The appellant found the deceased Haku playing with 3 other companions, gave him a melon and took him away on the promise of giving him more.

2. The appellant and Haku were afterwards seen together near the canal by one Sundar and after that Haku was never seen alive again.

3. Melon seeds were found in the deceased Haku's stomach at the *post-mortem* examination.

4. The appellant's shoes were found near the canal bridge hidden in some reeds.

5. Haku when taken away by the appellant was wearing 3 ornaments, and these were not on his dead body.

6. The appellant subsequently had knowledge of the place in which these ornaments were concealed and himself dug them up during the Police investigation at a hut where he and some of his family lived.

We express no opinion on these findings, but assuming them to be correct we do not think that they exclude every reasonable hypothesis other than that Haku's death was caused by the appellant. If the appellant can be held to have robbed the deceased it does not follow necessarily that he afterwards killed him. It is not impossible that the deceased fell into the canal without the agency of the appellant, and there is no evidence of the actual cause of death.

The sole charge framed against the appellant was one under section 302 of the Indian Penal Code, and it would not, in our opinion, be open to us to alter the conviction under section 302 to a conviction under one of the sections dealing with offences against property. The appellant might perhaps have been charged under section 236, Code of Criminal Procedure, with the offence of robbery as well as with the offence of murder, but he was not so charged, and the essentials of the two offences are so widely different that we do not think that section 237 (1) and still less section 238 (2), could be applied. In this view we are supported by the decision

HARI CHAND v. AYA RAM.

of the Allahabad High Court in *Queen-Empress* v. *Yusuf* (1).

Whether the appellant is to be retried on another charge is a question which must be decided by the District Magistrate of his district. We say no more than that our present order of acquittal on the charge of murder shall not prevent another trial upon a charge under one of the sections of Chapter XVII, Indian Penal Code.

We accept the present appeal, set aside the conviction and sentence, and acquit the appellant of the charge under section 302, Indian Penal Code.

Z. K.

Appeal accepted.

(1) 20 A. 107; A. W. N. (1897) 240; 9 Ind. Dec. (N. S) 429.

LAHORE HIGH COURT.

CRIMINAL REVISION NO. 164 OF 1922.

March 31, 1922.

Present:—Mr. Justice Martineau.

HARI CHAND—PETITIONER

versus

AYA RAM—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute—Parties on bad terms—Sanction, grant of.

Where it is found, after a consideration of the evidence that a charge of an offence against an accused person is false, the accused should be allowed to prosecute his accuser for having brought a false charge. The fact that parties are on bad terms is not a reason for refusing sanction for prosecution.

Petition, under section 439, Criminal Procedure Code, for revision of an order of the Magistrate, First Class, exercising enhanced powers under section 30, Criminal Procedure Code, Gujranwala, dated the 18th October 1921, affirming that of the Bench of Honorary Magistrates, Second Class District Gujranwala, dated the 27th June 1921.

Lala *Madan Gopal*, for the Petitioner.

Lala *Amin Chand Mehta*, for the Respondent.

LAL SINGH v. EMPEROR.

JUDGMENT.—The fact that the parties are on bad terms is not a reason for refusing sanction for the prosecution, otherwise no sanction would be granted in any case. The Magistrates found after a consideration of the evidence that the charge of criminal breach of trust was false, and I do not see why on that finding the petitioner should not be allowed to prosecute his accuser for having brought a false charge.

I accept this application and grant sanction to the petitioner Hari Chand to prosecute Aya Ram for an offence under section 211, Indian Penal Code, in that the latter on the 17th January 1921 brought a false charge of criminal breach of trust against him in the Court of the Honorary Magistrates of Hafizabad.

N. K. *Revision accepted.*

LAHORE HIGH COURT.

CRIMINAL REVISION NO. 1508 OF 1922.

March 16, 1923.

Present:—Mr. Justice Campbell.

LAL SINGH AND OTHERS—PETITIONERS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 323, 382—Theft after preparation for causing hurt—Hurt.

BIKARAMA PRASAD *v.* EMPEROR.

In order to sustain a conviction under section 382 of the Penal Code, actual theft must have been committed.

Complainant was sleeping on a bed in front of an enclosure containing his cattle and was awakened to find the accused persons round his bed, who threw him to the ground and beat him:

Held, that the accused were guilty of an offence under section 323 but not of one under section 382 of the Penal Code.

Criminal revision against the order of the Sessions Judge, Gujranwala, dated the 7th September 1922.

Mr. *Bakshi Ram*, for the Petitioners.

JUDGMENT.—The petitioners have been convicted of an offence under section 382, Indian Penal Code, and have been sentenced each to fifteen months' rigorous imprisonment. Both the convictions and the sentences have been maintained on appeal by the Sessions Judge, but there is no specific finding that theft was committed, and on examining the record, I can find no evidence to that effect. The story of the complainant was that he was sleeping on a bed in front of an enclosure containing his cattle, that he was awakened to find several persons round his bed and that he was thrown to the ground and severely beaten. Other witnesses came up and saw the complainant being beaten. There was every reason to surmise that the accused were there for the purpose of committing theft but section 382, requires that actual theft shall be committed.

The conviction, therefore, should have been under section 323, Indian Penal Code. It has been argued on behalf of the petitioners that the evidence of identification is insufficient, but it has been believed by both Courts and I see no reason to interfere on this point. The sentences awarded are in excess of the maximum provided by section, 323 and must be reduced. The offence was a serious one of its character.

I find that the appellants were arrested on the 6th April and were kept in custody until the 13th March when they were convicted. Thus they have been altogether under detention for a period of over eleven months. The appropriate sentence is the maximum of one year to be calculated from the date of arrest, but, as this period has almost expired, the petitioners may be released now.

I accept the petition to the extent of altering the convictions under section 323, and to reducing the sentence of imprisonment in each case to one of nine months' rigorous imprisonment from the 13th June 1922. The petitioners thus will be released.

Petition accepted.

Z. K.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 95 OF 1921.

April 20, 1922.

Present:—Mr. Justice Gokul Prasad.

BIKARAMA PRASAD TEWARI—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 195, 476—Proceedings under s. 195, whether judicial—S. 476, application of.

Proceedings under section 195 of the Criminal Procedure Code are judicial proceedings for the purposes of section 476 of the Code.

Chadammi v. *Lalta Prosad*, 16 Ind. Cas. 525; 10 A. L. J. 174; 34 A. 602; 13 Cr. L. J. 717, followed.

Criminal Revision.

Mr. *M. L. Agarwala*, for the Applicant.

Mr. *L. M. Banerjee*, for the Opposite Party.

JUDGMENT.—This is an application to revise an order of the Sessions Judge of Gorakhpur taking action under section 476 of the Criminal Procedure Code. It appears that a certain suit was tried by a Bench of Honorary Munsifs. The decree passed by them was appealed from. The appeal was transferred to the Court

of a Subordinate Judge, who dismissed the appeal. Later on, the successful party put in an application before the Munsifs for sanction to prosecute the opposite side. This application was very carefully considered by the Munsifs, who refused the sanction asked for. They also went on to consider the merits of the case and came to the conclusion that it was not a case in which they would take action under section 476 of the Criminal Procedure Code. The successful applicant took the matter up in appeal and the learned Sessions Judge has agreed with the reasons given by the learned Munsifs for refusing sanction under section 195 of the Indian Penal Code, but he has made an enquiry into the matter, examined witnesses and directed the institution of proceedings under section 476 of the Criminal Procedure Code. The applicant comes here in revision and the main argument advanced on his behalf with his usual strength by Mr. Alston, his learned Counsel, is that the learned Sessions Judge had no jurisdiction to pass such an order, because he was not seised as an Original Court or as a Court of Appeal of the original civil case in which the offence is alleged to have been committed. This is so and I would have, if the matter had been open, perhaps, come to the same conclusion, but it has been held in the case of *Chadammi* v. *Lalta Prosad* (1), that proceedings under section 195 of the Indian Penal Code are judicial proceedings and, therefore, proceedings under section 476 of the Criminal Procedure Code could have been taken. I am bound by this ruling and following it I dismiss this application in revision.

N.H. *Application dismissed.*

(1) 16 Ind. Cas. 525; 10 A. L. J. 174; 34 A. 602; 13 Cr. L. J. 717.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION NO. 320 OF 1922.

December 6, 1922.

Present :—Sir Norman Macleod, KT., Clief Justice, and Mr. Justice Crump.

EMPEROR—PROSECUTOR

versus

MARMADUKE PICKTHALL

—RESPONDENT.

Contempt of Court—Apology, whether sufficient satisfaction—Repetition.

The publication of an apology is not necessarily a sufficient satisfaction for a contempt of Court which has been committed. [p. 438, col. 2.]

An apology does not remedy the evil caused by publication of the objectionable matter, and although it may, to some extent, be a reparation on the part of the offender, it becomes little more than an idle form when the publication is due to a repetition of negligence which has been condoned in the past. [p. 438, col. 2.]

Criminal application.

Mr. *Kanga* (with him Mr. *S. S. Patkar*), for the Crown.

Mr. *Thakor*, for the Respondent.

JUDGMENT.

Macleod, C.J.—On November 13, 1922, a Rule was issued at the instance of the Government of Bombay against the respondent as Editor, Printer and Publisher of *The Bombay Chronicle* to show cause why he should not be committed for contempt of Court in respect of the publication of an article headed 'En Passant' containing the paragraph "Long live our Judges" in the Sunday issue of the paper of October 8, 1922.

The respondent published an apology in the issue of the paper of October 11 characterizing the paragraph as highly objectionable and apologizing to the Chief Justice and Judges of the High Court for the offensive expressions it contained and for the appearance of such a paragraph in his paper as the result of defective supervision due to illness. A copy of the paper containing the apology was sent to the Prothonotary for the information of the Chief Justice and Judges and came before us in due course. In his affidavit filed in showing cause against the Rule, the respondent said he knew of the publication of the article in the paper after it was printed therein. On Saturday, October 7, he was in his office till about 8 p. m, until when the proofs of

the article were not received by him for perusal He left office for dinner and in the ordinary course he would have returned to office about 10 p. m. As he felt tired and exhausted he did not go back to office. He had had a serious illness. The suggestion in the affidavit that if we had seen the apology we would not have granted the Rule was singularly ill-advised, as a copy of the apology was annexed to the petition of the Government Pleader. The offensive and objectionable nature of the allegations against the Judges in the paragraph referred to in the petition having been admitted the only question which remains is what order should be made on the Rule. We demur entirely to the veiled suggestion in the respondent's affidavit that the publication of an apology must necessarily be sufficient satisfaction for the contempt committed. In this case, at any rate, it was necessary that the respondent should be called upon to appear before us. Then it was unfortunate for the respondent that this was the fifth occasion during the last three and a half years on which we have had to complain of matter published in *The Bombay Chronicle*. On the first two occasions we were satisfied with apologies without ordering the then Editor to appear before us in Court.

On June 9, 1922, a Rule was issued against the present respondent with regard to an article headed "The Malegaon Appeals"; and on June 10, another Rule was issued with regard to an article headed "British Justice". In his affidavit on the first Rule the respondent contended that he had done nothing beyond offering reasonable criticism of the judgment of the Division Bench and pointed out what the public opinion in the country expected of the High Court for whom he never intended to show disrespect. The acting Chief Justice in his judgment of September 20, described the article in question in the following words: *In re Marmaduke Pickthall* (1).

"We have considered the article and the affidavit in the light of the arguments before us. I am prepared to concede that the article does not constitute a personal abuse of the Judges such as we find for instance in *Reg.* v. *Gray* (2) or *In re Narasinha Chintaman Kellar* (3) nor does the article contain such a comprehensive condemnation of Courts including this Court and British Justice as is to be found in the recent case of *In re Satyabodha Ramchandra* (4).....Taking the article as a whole, and making due allowance for the style, the view point and the possible political bias of a journalist, I find it difficult to avoid the conclusion that the article does attribute improper motives and political bias to the Judges in upholding the several covictions.....The article as a whole would leave on the mind of an ordinary reader the clear impression that injustice had been deliberately done on political grounds to some of the accused who were apparently innocent. In other words it attributes judicial dishonesty to the Judges."

The Court then imposed a fine of Rs. 200 without costs.

In his affidavit on the second Rule the respondent said he knew of the publication in the *Chronicle* of the article complained of after it was printed therein. It was impossible for him as Editor of the paper personally to supervise everything that went into the paper every day. If he had seen the article in question he would not have passed it for publication. It was published through a mistake of the Assistant Editor and he was sorry for the publication. Neither he nor the Assistant Editor meant any disrespect to the Court. When the Rule came on for hearing the Court considered that the statements in the affidavit afforded under the circumstances a reasonable explanation of the manner in which the extract came to be published without his knowledge and discharged the Rule.

It cannot be suggested for a moment that the Court has not treated the Editor of the *Chronicle* with the very greatest

(1) 72 Ind. Cas. 17; (1923) A. I. R. (B.) 8; 23 Bom. L. R. 15; 24 Cr. L. J. 289.

(2) (1900) 2 Q. B. 36; 69 L. J. Q. B. 502; 82 L. T. 534; 48 W. R. 474; 64 J. P. 484; 16 T. L. R. 305.

(3) 2 Ind. Cas. 288; 33 B. 240; 10 Bom. L. R. 1040; 4 M. L. T. 359; 8 Cr. L. J. 426.

(4) 69 Ind. Cas. 84: 24 Bom. L. R. 928; (1922) A. I. R. (B.) 426; 23 Cr. L. J. 644; 47 B. 76.

leniency, which appears to me, I must regret to say, to have been entirely misunderstood. The respondent charged with commenting on pending proceedings says "you can't expect me to supervise everything that goes into the paper" and he is discharged. The respondent accuses the Judges of judicial dishonesty and he is fined Rs. 200 without costs. The paragraph now before us evidently refers to these two proceedings for contempt, for it begins, "Speaking of contempt of Court," though there was no previous reference to the subject. The object of the writer was to convey to his readers the idea that the Judges were the creatures of the Executive. This is not a criticism on a pronouncement of the Judges in a particular case, it is a sweeping assertion of the vilest character against all the Judges in India. Entirely accepting the respondent's statement that the article in question was very far from being in accordance with his policy or views with the remark that he could hardly have said less and might well have expressed himself more directly, still the responsibility for the publication of the objectionable matter must rest with him. The same excuse which secured his discharge in September will hardly avail again. He had had his warning that it was eminently necessary either that he should revise the paper himself before it went to press, or that he should have some responsible person on his staff whose duty it was to put before the Editor any objectionable matter. If the impression is abroad that the grossest libels on Judges can be published with impunity provided an apology is offered, then it is time that such an impression should be removed. An ignorant public is far more likely to believe the imputation and discard the apology.

As was said by Crump, J., on the last Rule against the respondent;

"It is impossible to permit the public to be poisoned with such calumnies as these. In a country such as this where more importance is attached to the printed word than it perhaps at times deserves, it would be difficult for the average reader to read the language used without conceiving grave doubts as to the integrity and impartiality of the Judge of the Court. Therefore in the interests of the administration of justice the Court cannot overlook this contempt."

The imposition of a nominal fine has been found to be useless. The ink was hardly dry on that judgment before the offence was repeated. If an individual had been libelled a substantial sum would have been awarded for damages on the principle that a newspaper should not be tempted to increase its profits by encroaching on private rights. We are now acting in defence of public rights. The respondent must pay a fine of Rs. 5,000 and the costs of the Rule. We allow a week for the payment of the fine.

Crump, J.—So far as principles go I have nothing to add to what I have said in my judgment of September 20, 1922. The article now in question is plainly a contempt and in view of the past record of this paper I agree that the time for leniency is gone. In the last case we dealt leniently with the offence because it was apparent to us that the true limitations on criticism of this nature were imperfectly understood, and we hoped that the result of our order would be that such criticism would be confined within its proper limits. The result has not been achieved. The apology in the present case cannot be accepted. It is not the first instance of careless supervision, and an apology does not remedy the evil caused by publication of the objectionable matter. If, as I have already pointed out, we act in the interests of the administration of justice, it is clear that while an apology may be to some extent a reparation on the part of the offender, it cannot overtake and counteract the mischief already done by the original publication. Where the publication is due to a repetition of negligence which has been condoned in the past, an apology becomes little more than an idle form. I agree in the order proposed.

Rule made absolute.

Z. K.

SHEO AMBAR v. EMPEROR.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 236 OF 1923.

July 9, 1923.

Present:—Mr. Dalal, A. J. C., and Mr. Cuming, A. J. C.

SHEO AMBAR AND OTHERS—PRISONERS—APPELLANTS

versus

EMPEROR—COMPLAINANT.

Evidence Act (I of 1872), s. 30—Confession of co-accused, value of—Corroboration, necessity of—Confession, what amounts to—Motive, whether corroboration.

Evidence of motive is not a corroboration of any of the incidents of the crime. [p. 441, col. 1.]

Hira Lal v. *Emperor*, 7 Ind. Cas. 1012; 13 O. C. 243; 11 Cr. L. J. 554, relied on.

The statement of an accomplice can be taken into consideration under section 30 of the Evidence Act, only when he admits his own guilt to the same extent to which he implicates others. [p. 441, col. 2.]

The word "confession" in section 30 of the Evidence Act cannot be construed as including a mere inculpatory admission which falls short of being an admission of guilt. [p. 441, col. 2.]

Queen-Empress v. *Jagrup*, 7 A. 646; A. W. N. (1885) 131; 4 Ind. Dec. (N. S.) 799, relied on.

A confession unsupported by other testimony is evidence of the weakest kind against a co-accused. [p. 442, col. 1.]

Khanjan v. *Queen-Empress*, 4 O. C. 69, *Sri Krishna* v. *King-Emperor*, 6 O. C. 204 at p. 209 and *Raghbir* v. *King-Emperor*, 11 O. C. 328; 8 Cr. L. J. 393, followed.

Criminal appeal against an order of the Sessions Judge, Fyzabad, dated the 26th May 1923.

Messrs. *K. P. Singh* and *E. R. Qidwai*, for the Appellants.

The Government Pleader, for the Crown.

JUDGMENT.—Sheo Ambar, Ram Saran, and Din Bandh, all Brahmans, have been convicted by the learned Judge of Fyzabad of an offence of murder and sentenced to death. Their appeal and a reference by the learned Judge for the confirmation of the sentences of death are before us for decision. Chandika Brahman, who was murdered, was brother of the grandfather of Sheo Ambar and Ram Saran appellants. There was a family dispute between them over the property of a deceased female of the family. There had been litigation between the parties for some years, and 24 years ago Sheo Ambar and his brother had been convicted and sentenced by a Criminal Court for beating Chandika. There was peace for a few years while Sheo Ambar was away in Burma. On Sheo Ambar's return about three years ago disputes started again. Recently Chandika had brought a criminal case and a civil suit against the two brothers; the criminal case was compromised, but the hearing of the civil suit was fixed for the 18th of January last. Chandika left home on the morning before dawn on the 16th of January for Fyzabad to attend to the civil suit. His son Mahadeo has described how the murder was discovered. A few minutes after sunrise a resident of village Mithegaon came and stated to him that his father's dead body was lying by the road side. He went to the spot and found that his father had been killed by the side of the *kaehha* road which goes to Fyzabad The place is about a mile from Mahadeo's house. Some of the clothes carried by Chandika were missing. He at once suspected Sheo Ambar and Ram Saran and also the other accused persons whom he considered to be their associates. A report was made at the Police station eleven miles away at 1 P. M. The *chowkidar* of village Mithegaon made the report and in this report no suspicion is expressed against any particular accused. This, however, is a matter of small account because the murder must have come as a shock to Mahadeo and he could not be expected at such a time to give detailed information to the *chowkidar* to carry to the Police station. The Investigating Officer, Munshi Mohammad Baqar Khan (P. W. No. 10), reached the scene of the occurrence at 11 P. M. that night. He has detailed all the evidence which he has obtained to connect the appellants with the crime. He took steps to arrest Sheo Ambar, Ram Saran, Janga and Din Bandh and Bhagwati against whom suspicion was expressed by Mahadeo. Janga and Din Bandh were arrested at their houses on the 17th. The same day their houses were searched and a bed-spread *kathri* of *dhussa* cloth was recovered from Din Bandh's house. It has been certified by the Imperial Serologist to contain two small spots of

human blood. On 19th January, on information received either from Din Bandh alone or from Din Bandh and Janga both a *dhoti* and an *angocha* were recovered out of a stack of *dhak* leaves at a little distance from the scene of the occurrence. These two accused were arrested and sent to the Fyzabad Jail on the 20th. On the 21st Din Bandh made a statement before the Committing Magistrate. As this statement is practically the sole basis for the conviction of all the three appellants it may be quoted at length to determine its nature and the value that should be attached to it:—

"*Musammat* Ram Dei was Chandika's aunt and there was dispute between Chandika and Sheo Ambar regarding her property. She was Sheo Ambar's grandmother. There was a case in the Civil Court and 18th was the date of hearing fixed therefor. Chandika was going to Fyzabad in connection with the above case. Janga, Bhagwati, Ram Saran, Sheo Ambar and I were sitting under a tree beside the road near Kuchhera in the jungle of Mithepur. It was Tuesday morning. (Chandika) was on his way, when he reached the place (where we were sitting) it was all dark. Ram Saran, his younger brother, that is, Sheo Ambar's younger brother, recognised him. Janga said to Sheo Ambar that Chandika was going. Thereupon both Bhagwati and Sheo Ambar started. Having reached near Chandika, Bhagwati gave a *lathi* blow from behind and Sheo Ambar struck with a *banka*. Sheo Ambar had a *banka* with him. Then Chandika gave an alarm, whereupon Janga, Ram Saran and I also went there from beneath the tree and said, 'Will you murder him outright'. Sheo Ambar was hitting him with a *banka* and killed him outright. In the meantime three persons were seen coming on the road from the southern direction. Thereupon Sheo Ambar and Bhagwati dragging the corpse, put it in under a Sirsa tree away fram the road. I, Ram Saran and Janga ran away to our houses. Sheo Ambar and Bhagwati also made off to their houses. Bhagwati and Sheo Ambar ran away at that time.

Formerly Sheo Ambar was at Rangoon and was intending to go there again after this case was settled. Bhagwati had also run away with a woman to Rangoon when Sheo Ambar was there. The name of the woman is Birji. Now Birji lives at her house, that is, at her brother's house. Bhagwati and Sheo Ambar had taken the blanket, *gilaf* and *charban*; *dhoti*, *kurta* and shoes were on the person of the deceased. I do not know whether (the deceased) had any cash about him. The *dhak* wood having been cut was lying in Sheo Ambar's field and he (Sheo Ambar) had concealed Chandika's *dhoti*, *angocha* and *charban* there. The Sub-Inspector had recovered all these things before me at the time of investigation. A day before the occurrence it was agreed upon at Janga's house that Chandika should be beaten when he goes to the Court. We the five persons had conspired that he may not reach (the Court) on the date of hearing. But those persons killed him outright. Sheo Ambar had gone ahead with a *banka*. Lal Bahadur Pundit, had told Chandika the auspicious time to attend the Court. Lal Bahadur is the father of this Bhagwati. Bhagwati told Janga first and then to Sheo Ambar that Chandika would go at that particular time; that is, the next day, early at dawn during twilight. They had taken the property of the deceased, so that it may be understood that some dacoits had killed and robbed him of his property. Sheo Ambar came and woke all of us, saying, 'Come, the time is near at hand.' Sheo Ambar, Janga, Bhagwati and I reached the place of occurrence first; and subsequently Ram Saran arrived and said that Chandika had already started. The place where we were sitting was the one previously fixed and is situate at a distance of less than a mile from our village. It was two or three *gharis* before sunrise. I have made this statement out of my free will. There is no Police man here in sight at this time. I have been in the jail lock up since yesterday. No undue influence has been brought to bear upon me in respect of the above statement. Thinking God to be above me, I make this statement."

The record of Din Bandh's statement in the Court of the Committing Magistrate

is so short that it is not clear whether in that Court he desired to retract the above statement or not. He denied having killed Chandika but when questioned as to the correctness of this statement he replied "Yes, this statement A (1) which had been read over to me is correct. I made this very statement." The Committing Magistrate ought to have questioned Din Bandh further in the matter to explain why while admitting the statement he denied having murdered Chandika. In the Sessions Court on 21st May, Din Bandh specifically retracted this statement. He explained as follows how he came to make this statement.

"I was suffering from giddiness and made the statement while not in my proper senses at the instance of the *Thanadar*. I made that statement because the *Thanadar* had promised to get me pardoned and released. I was kept separate from others and was told that I was accepted as an informer. I was at my house. I am under surveillance." The reasoning of the learned Judge put shortly is this. Din Bandh's statement of 21st January amounted to a confession and was relevant as evidence against him though retracted. Taken in conjunction with the recovery of blood stained *kathri* from his possession inside his house the evidence was sufficient to prove his guilt. The Judge has not believed the evidence that the deceased's *sheets* were recovered on information given by Din Bandh. As regards the other two appellants, Din Bandh's statement may be taken into consideration by the Court as against them and the fact of their enmity with Chandika was sufficient to confirm the truth of this statement of Din Bandh. Janga was also implicated in this statement but the learned Judge acquitted him because that accused person had no motive to commit the murder.

In our opinion Din Bandh's statement is not of such a nature as to be conclusive proof of the guilt of the co-accuseds, Sheo Ambar and Ram Saran. Evidence of motive is not a corroboration of any of the incidents of the crime. To begin with, the statement is not a confession of the guilt of murder by Din Bandh. The statement of an accomplice is taken into consideration when he himself admits his own guilt to the same extent to which he implicates others. To use the words of Mr. Justice Straight, "What was intended by section 30 was that where a prisoner—to use a popular phrase—'makes a clean breast of it', and unreservedly confesses his own guilt, and at the same time implicates another person who is jointly tried with him for the same offence, his confession may be taken into consideration against such other person as well as against himself, because the admission of his own guilt operates as a sort of sanction which to some extent takes the place of the sanction of an oath, and so affords some guarantee that the whole statement is a true one. But where there is no full and complete admission of guilt no such sanction or guarantee exists, and for this reason the word 'confession' in section 30 cannot be construed as including a mere inculpatory admission which falls short of being an admission of guilt" *Queen-Empress* v. *Jagrup* (1). The learned Judge of the lower Court was of opinion that Din Bandh made a confession of murder because he knew that Sheo Ambar carried a *banka* and must be presumed to have known that murder was likely to take place when Chandika was assaulted. He has, however, overlooked the distinct statement of Din Bandh that Sheo Ambar had gone ahead with a *banka*. This must have been before sunrise in the dark and the whole tenor of Din Bandh's statement indicates that the attack with the *banka* came to him as a great surprise. According to him the accomplices had only agreed to beat Chandka and this more severe form of attack was unexpected. These are the words used by him: "Thereupon both Bhagwati and Sheo Ambar started. Having reached near Chandika, Bhagwati gave a *lathi* blow from behind and Sheo Ambar struck with a *banka*. Sheo Ambar had a *banka* with him. Then Chandika gave an alarm whereupon Janga, Ram Saran and I also went there from beneath the trees and

(1) 7 A. 646; A. W. N. (1885) 131; 4 Ind. Dec. (N. S.) 799.

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said, 'Will you murder him outright? Sheo Ambar was hitting him outright."

On such a statement Din Bandh cannot be said to have confessed to the guilt of murder. The learned Government Pleader referred to the ruling reported in *Emperor* v. *Kehri* (2) and argued that the confession of an accomplice by itself is sufficient to support a conviction of accused persons. As already pointed out the confession, however, must be of the same crime of which the accused are being tried. The ruling, moreover, is no authority for the proposition that such a confession would be sufficient in the entire absence of any corroborative evidence, In his judgment Mr. Justice Richards has mentioned several corroborative facts in support of the confession of the accomplice in that case. In this Court there has been a series of rulings for nearly a quarter of a century emphasising the necessity of corroborative evidence. In *Khanjan* v. *Queen-Empress* (3), the Judicial Commissioner pointed out in 1901 that the confession is to be taken into consideration to corroborate otherevidence. This principle was affirmed in *Sri Krishna* v. *King-Emperor* (4). In *Raghbir* v. *King-Emperor* (5) a Bench of this Court laid down that a confession unsupported by other testimony is evidence of the weakest kind against a co-accused. In 1910 another Bench of this Court was of opinion that the value of a confession taken into consideration under section 30 of the Evidence Act was very small and did not constitute legally sufficient coroboration of the testimony of an approver either as to the crime or the identity of the person affected.

Motive by itself is not corroborative evidence of Din Bandh's statement [*Hira Lal* v. *Emperor* (6)]. Considering the matter more closely it is not proved that Sheo Ambar and Ram Saran were the only enemies of Chandika in the neighbourhood. It appears from the testimony of Gaya Dat, prosecution witness, that Chandika was a man of many activities and such a man was likely to have many enemies. The witness said:

"Chandika was a well-known man. He used to collect rent of two villages on behalf of B. Baldeo Prasad Vakil. He used to lend money in cash and also grain for seed and food."

In our opinion the evidence on the record, when properly tested, falls very short of establishing the complicity of Sheo Ambar and Ram Saran.

The next question is whether Din Bandh can be convicted of murder. As explained above, his statement which is called a confession is not an admission of the crime of murder. Having regard to the habits and mode of life of villagers two small stains on a bed-spread could be caused in various ways without raising a presumption that Din Bandh took part in the murder. In his statement he make no mention of the allged recovery of the deceased's clothes on information given by him. The lower Court has not reliedupon the prosecution evidence produced to prove that it was on his information that the articles were found in a heap of leaves. He had once been bound over for bad livelihood and was consequently under the influence of the Police. Though a blood stained coverlet was found in his house on the 17th he was not arrested till the 19th; so it is probable that what he says is true and that he was given a promise of a pardon to induce him to make the statement which he did on 21st January. In his case also the evidence, in our opinion, is not sufficient for a conviction. We set aside the convictions and sentences of all the three appellants and direct that they be released at once.

Z. K. *Conviction set aside.*

(2) 29 A. 434; 4 A. L. J. 310; A. W. N. (1907) 140; 5 Cr. L. J. 360.
(3) 4 O. C. 69.
(4) 6 O. C. 204 at p. 209.
(5) 11 O. C. 328; 8 Cr. L. J. 393.
(6) 7 Ind. Cas. 1012; 13 O. C. 243; 11 Cr. L. J. 554.

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 1046 OF 1922.

March 19, 1923.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice LeRossignol.

SHER SINGH—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 84—Unsoundness of mind—Medical and legal points of view—Person conscious of doing wrong, whether of unsound mind.

The medical and the legal standards of sanity are not identical. From the medical point of view every man at the time when he commits a murder is insane, that is, he is not in a sound, healthy normal condition, but from the legal point of view a man must be held to be sane so long as he is able to distinguish between right and wrong, so long as he knows that the offence he is committing is a wrong thing to do, so long as he has a guilty mind. [p. 444, col. 1.]

A person who is in a highly excited and unbalanced condition, but is nevertheless conscious that what he is doing is wrong and a crime cannot be said to be of unsound mind within the meaning of section 84 of the Penal Code. [p. 444, col. 1.]

Criminal appeal from an order of the Sessions Judge, Jhelum, dated the 28th August 1922.

Mr. *Ishwar Das Khanna*, for the Apellant.

Mr. *Jai Lal*, for the Respondent.

JUDGMENT.—On the 1st of February 1920 the appellant Sher Singh attempted to kill his wife and his mother-in-law and did kill his brother-in-law Balwant Singh and subsequently set fire to the hut belonging to his mother-in-law. He has been convicted in respect of all four offences and sentenced under section 302, Indian Penal Code, in respect of the murder of Balwant Singh to transportation for life, in respect of the offence of arson to three years' rigorous imprisonment and in respect of the two offences of attempted murder to seven years' transportation in each case, with a proviso that all the sentences are to run concurrently.

The facts of the case are not challenged. The appellant at the time of the commission of the offences was employed in the army but had come on leave to his home. On the date in question he had gone to his mother-in-law's to ask for the hand of his sister-in-law for his younger brother. On the refusal of his prayer he fell into a rage and with a razor which was lying on his bed attempted to cut his wife's throat and when she was rescued he turned upon his mother-in-law. She was rescued by the witnesses, Ganesha Singh and Banshi Ram, and all three left the court yard whereupon the appellant shut the door after them and remained inside the house with Balwant Singh, his brother-in-law, aged about 10. Shortly after smoke was seen issuing from the *kothri*. The villagers collected and, as the appellant refused to open the door, a hole was made in the roof and the appellant was ordered to bring out Balwant Singh and Kartar Kaur, the appellant's sister-in-law who also had remained inside the house when the appellant shut the door. He replied that he had a revolver and would shoot anybody who approached. Thereupon the door was broken in and Sher Singh who rushed out with a club was over-powered. Balwant Singh was found inside the hut with his throat cut and his abdomen slashed open. *Musammat* Kartar Kaur was uninjured and was removed safely although the hut was burnt down.

On behalf of the appellant the contention is, that he was insane at the time when these offences were committed, and great stress is laid before us on the evidence of Major Cox, Superintendent of the Lunatic Asylum, Lahore, who stated that the appellant was admitted to the Asylum on the 27th of March 1920, and was pronounced sane on the 28th of November 1921. Whilst in the Asylum and at the time of his entrance, the appellant was suffering from *katatonia* and the witness was of the opinion, after hearing the facts of the case, that the appellant did not know what he was doing at the time of the murder and was insane at that time. The learned Sessions Judge, agreeing with the Assessors was of the opinion that, though the appellant, some considerable time after the commission of the offence became insane, he was not insane at the time of the murder, and there are sufficient reasons, in our opinion, for holding that his conclusion is correct. Undoubtedly the appellant at the time when he committed these offences had in him the

seeds of insanity and there seems no reason to doubt that he had a fit of insanity, which lasted for two months, fourteen years before the date of the offences. Since that date, however, he appears to have been sane and, as mentioned above, was accepted for service in the Army and was employed in the Army at the time of the offences. On arrest nothing abnormal in his condition was noticed by either the Police or the Magistrate and even the Civil Surgeon of Sargodha, who examined him on the 4th of February 1920, perceived nothing abnormal in his condition. It was only about a month later, that signs of insanity were observed in him.

It is not necessary to hold that Major Cox's opinion is incorrect, for the medical and the legal standards of sanity are not identical. From the medical point of view it is probably correct to say that every man at the time when he commits a murder is insane, that is, he is not in a sound, healthy normal condition, but from the legal point of view a man must be held to be sane so long as he is able to distinguish between right and wrong, so long as he knows that the offence he is committing is a wrong thing to do, so long as he has a guilty mind. In this case the appellant was sane enough to be anxious to secure his sister-in-law's hand for his brother and to feel anger and resentment when his request was refused. He also threatened to shoot anybody who interfered with him and immediately after his arrest made what we are told by the Sub-Inspector was a sensible and rational statement.

For these reasons we agree with the learned Sessions Judge that, though at the time of the commission of the offences the appellant was in a highly excited and unbalanced condition, he was, nevertheless, conscious that what he was doing was wrong and a crime and we dismiss his appeals and maintain the sentences.

Z. K. *Appeals dismissed.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASES NOS. 278 AND 86 OF 1923.

(TAKEN UP CASE NO. 18 OF 1923 AND CRIMINAL REVISION PETITION NO. 290 OF 1923).

November 20, 1923.

Present:—Mr. Justice Odgers and Mr. Justice Wallace.

In re P. KOTTOORA THEVAN AND OTHERS—PETITIONERS.

Penal Code (Act XLV of 1860), ss. 34, 149, 395—Dacoity by force of s. 34 or 149—Charge—Consolidated sentences.

To constitute the offence of dacoity, it is necessary to prove that five or more persons joined in a robbery. A conviction for dacoity based either on a finding of common object not charged, or on evidence which does not prove the essential ingredients of the offence cannot be sustained. To justify a conviction for dacoity by the application of section 34 or 149, Penal Code, it is necessary to charge and prove that the unlawful assembly as a whole had the common intention of committing dacoity or that each accused knew that dacoity was likely to be committed in prosecution of the common object of the unlawful assembly. [p. 445, col. 2.]

Where the accused were charged with being members of an unlawful assembly whose common object was to commit mischief and cause hurt, but there was no count in the charge that the common object of the unlawful assembly was to commit dacoity or to cause hurt for the purpose of committing theft, no conviction for dacoity by force of section 34 or 149, Penal Code, can be sustained. [p. 445, col. 2.]

It is not proper to pass consolidated sentences on an accused person for a number of offences. [p. 446, col. 1.]

Case taken up under the orders of Mr. Justice Coleridge, dated the 10th April 1923, and petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Sessions Judge, Tinnevelly, in Criminal Appeals Nos. 76 and 79 of 1922, dated the 31st March 1923.

Mr. *T. Rangachariar* with him Mr. *A. Srirangachariar*, for the Petitioners:—My contention is that the several ingredients necessary to constitute the offence of dacoity are not present in the case and so the petitioners cannot be convicted for dacoity.

The prosecution case from the beginning is that the petitioners came to

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Iluvankul.m village to attack the Adi-Dravidas and the common object with which the petitioners are charged is to cause hurt and mischief. There is absolutely no evidence that five people joined together and carried away the property and in so carrying away they caused hurt. This is not a case of d.coity by extortion. The petitioners have not been charged as having had the common intention of committing dacoity. The mere fact that some of the members of the unlawful assembly in the course of the same transaction commit robbery cannot render the other members constructively liable for this same offence.

Mr. *V. L. Ethira*, for the Public Prosecutor, for the Crown:—It is true there is no evidence that 5 people joined together and committed robbery. But the petitioners are constructively liable for the offence under section 34 as also under section 149 because they must have known that dacoity was likely to be committed.

Further, a consolidated sentence for the various offences they have been found guilty of, is bad. For, an Appellate Court cannot know what is the sentence for each particular offence and in case of reversal of conviction for any one offence, the Appellate Court may find it difficult what portion of the sentence has to be reduced.

Mr. *Ringachariar*:—The petitioners have not been charged under section 34 or 149. So they cannot be convicted under these sections.

As regards the consolidated sentences there is no legal prohibition.

ORDER.—Petitioners in this case were convicted before the Assistant Sessions Judge of Tinnevelly, by a Jury, of the offence of dacoity, and by the Assistant Sessions Judge himself of the offence rioting, and by force of section 149, Indian Penal Code causing various kinds of hurt. On appeal, the Sessions Judge reversed the convictions under sections 324 and 325, Indian Penal Code, by force of section 149 and sustained the convictions under sections 395, 147 and 323, Indian Penal Code. Petitioners contend that there was no legal material on which a conviction under section 395, Indian Penal Code, can be sustained.

The facts, which before us as a Court of Revision may not be traversed, are that an unlawful assembly, of which petitioners are said to have been members, attacked the Adi Dravida village of Illuvankulam, with the common object of committing mischief to the properties of the residents and hurt to their persons, that mischief and hurt were so caused and that in the course of this outrage, various articles of property belonging to various inhabitants were carried off by persons in the mob.

Now there is no evidence that any such article was carried off by 5 or more persons, or that 5 or more persons invaded any house, caused hurt to the inmates *for the purpose of committing theft there*, and carried off articles therefrom. The only evidence that we can find of theft of articles from a house or person, accompanied by the use of hurt or violence to the inhabitants of the house, or to that person, is as follows:—Prosecution 7th witness says that accused Nos. 5, 6 and 10 beat him with sticks, and then entered his house and looted it, and prosecution 10th witness says that the 9th accused beat him with a stick and then stole vessels from his house. In neither case, is there any evidence that 5 or more persons joined in these robberies.

Prima facie then, there is no evidence that any dacoity was committed. The only legal justification for a conviction for dacoity then, must rest on an application of section 34 or section 149, Indian Penal Code. For either section to apply, it was necessary to charge and prove that the unlawful assembly as a whole had the common intention of committing dacoity, or that each accused knew that dacoity was likely to be committed in prosecution of the common object of the unlawful assembly. No charge in such tenor was framed against accused; nor were they called upon to defend themselves on such a count. In the charge framed, they were no doubt called upon to defend themselves, *inter alia*, against the charge of being members of an unlawful assembly, whose common object was to commit mischief and cause hurt. But there was no count in the charge that the common object of the unlawful assembly was to

commit dacoity, or to cause hurt *for the purpose of* committing theft, without which no conviction for dacoity by force of section 34 or section 149, Indian Penal Code, can be sustained. Again, no doubt, all the accused were charged substantively with the offence of "dacoity by robbing Sankarapandyan and others," but, as we have pointed out, there is no evidence that any or all of the accused directly committed dacoity.

The conviction for dacoity, based either on a finding of a common object not charged, or on evidence, which does not prove the essential ingredients of the offence, cannot be sustained. The learned Assistant Sessions Judge, therefore, misdirected the Jury and should have directed them that a conviction for dacoity could not be sustained on the charge and the evidence. We must, therefore, as this is a case of an illegal conviction, interfere in revision and set aside the conviction of the petitioners for dacoity.

There is evidence, however, that accused Nos. 1, 2, 3, and 9 committed theft (P. W. No. 5), that accused Nos. 5, 6 and 10 committed robbery (P. W. No. 7); and that the 9th accused committed robbery (P. W. No. 10). As they have been charged with dacoity they may be convicted of these lesser offences of the same kind. We, therefore, convict the accused Nos. 5, 6, 9 and 10 of the offence of robbery under section 392, Indian Penal Code, and accused Nos. 1, 2 and 3 of the offence of theft under section 379, Indian Penal Code.

As to sentences, the method of the Assistant Sessions Judge of passing one consolidated sentence for all offences is not a happy one, and leads to complications as we now find. We do not know what sentence he intended to inflict for the offence of dacoity. Considering that dacoity was one of the offences which he found proved, the sentences were extremely lenient. Though we hold that no dacoity was proved to have been committed, we agree with the lower Courts that a very serious and concerted attack was made on these unfortunate villagers. We do not find ourselves inclined to reduce the sentences by much. In the case of accused Nos. 4, 7 and 8 now acquitted of dacoity and kindred offences, we reduce the sentences by six months. In the case of accused Nos. 1, 2, 3, 5, 6, 9 and 10 now acquitted of dacoity, but convicted of robbery or theft, as above, we reduce the sentences by three months. The lower Appellate Court's order under section 106, Criminal Procedure Code, will stand.

V. N. V. *Conviction for dacoity set aside.*

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 1176 OF 1922.

February 19, 1923.

Present:—Mr. Justice Scott-Smith.

GHULAM AND OTHERS—CONVICTS—APPELLANTS

versus

EMPEROR—REPONDENT.

Penal Code (Act XLV of 1860), ss. 442, 458—House-breaking—Entry, actual, not effected—Applicability of s. 458—Person who has not himself made preparation, whether guilty of offence.

Accused having made a hole in the wall of complainant's shop found that their way was blocked by the presence of beams on the other side of the wall and they could not, therefore, enter the shop:

Held, that as there was no entry into the shop within the meaning of section 442 of the Penal Code accused were guilty not of house-breaking but merely of an attempt to commit house-breaking. [p. 447, col. 1.]

Section 458 of the Penal Code applies only to the house-breaker who has actually himself made preparation for causing hurt to any person or for assaulting any person or for wrongfully restraining any person, etc., and not to his companions who themselves have not made such preparation. [p 447, col. 2.]

Criminal appeal from an order of the Magistrate, First Class, exercising enhanced powers under section 30, Criminal Procedure Code, Montgomery, dated the 23rd November 1922.

Mr. *Cooper*, for the Appellants.

Mr. *Amar Nath Chona*, for the Respondent.

JUDGMENT.—The three appellants have been convicted of an offence under section 458, Indian Penal Code, and have been sentenced, Ghulam, son of Mutalli, to seven years' rigorous imprisonment, Waryam, son of Mutalli, to five years' rigorous imprisonment, and Waryam, son of Beg, to two years' rigorous imprisonment.

Mr. Cooper, who appeared for the appellants, did not argue on the facts but urged that the offence of house-breaking

had not been committed because there was no proof that any of the appellants had effected an entry into any building within the meaning of section 442 of the Indian Penal Code. The evidence shows that the would-be burglars first of all attempted to break into the house of Bahadur Singh (P. W. No. 1); they made a hole in the wall but owing to the presence of some beams inside the shop they did not enter but proceeded to make a hole in the common wall of one Bahta (P. W. No. 5), and of Bahadur Singh. It was contended before the Magistrate that there could only be a conviction for an attempt to commit house-breaking. The Magistrate, however, was of opinion that the case was analogous to that of Illustration (*a*) to section 445 of the Indian Penal Code. The Illustration in question is as follows:

"*A* commits house-trespass by making a hole through the wall of *Z's* house, and putting his hand through the aperture. This is house-breaking."

The learned Magistrate says that when the accused had made the hole, and with the assistance of their hands found that their way was blocked, the offence of "lurking house-breaking" was complete. I am unable to agree with this view. When the burglars had made the hole they found that their way was blocked by the presence of beams on the other side of the wall, these beams prevented them from entering the shop and we certainly cannot assume that any one of the culprits actually put his hand right through the hole. I am unable to agree with Counsel for the Crown that the mere putting of a hand into a hole in the wall without putting it through the hole is an entry into the house within the meaning of section 442 of the Indian Penal Code. I thus hold that there was no complete house-breaking, but merely an attempt to commit house-breaking.

It was found by the Magistrate that two of the appellants, Ghulam and Waryam, son of Mutalli, were armed with *lathis* at the time and that, therefore, they were guilty of house-breaking within the meaning of section 458, Indian Penal Code. With regard to Waryam, son of Beg, he said that even if it be admitted that he had no *dang* then according to section 34 he is as much responsible for the actions of his companions in being armed with *lathis* as if he himself had been armed with a *lathi*. I am unable to accept this view of the law. In my opinion section 458 only applies to the house-breaker who actually has himself made preparation for causing hurt to any person or for assaulting any person and so on, and not to his companions as well, who themselves have not made such preparation.

I, therefore, accept the appeal and alter the convictions of Ghulam and Waryam, son of Mutalli, to one under sections 458/511, Indian Penal Code, and the conviction of Waryam, son of Beg, into one under sections 457-511 of the Indian Penal Code. As Waryam, son of Mutalli and Ghulam, previous convicts, have been convicted only of an attempt at house-breaking, section 15, Indian Penal Code, is inapplicable. The fact, however, that Ghulam has been three times previously convicted may be taken into consideration in fixing his sentence. Waryam, son of Mutalli, has only been convicted once before this and that was eighteen years before the present offence.

I sentence Ghulam to three years' rigorous imprisonment, Waryam, son of Mutalli, to two years' rigorous imprisonment and Waryam, son of Beg, to one year's rigorous imprisonment. In the case of the first two the imprisonment will include three months' solitary confinement and in that of Waryam, son of Beg, one month's solitary confinement.

Z. K. *Appeal accepted.*

LAHORE HIGH COURT.

CRIMINAL REVISION NO. 1762 OF 1922.

February 12, 1923.

Present:—Mr. Justice Abdul Raoof.

ALIA—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Arms Act (XI of 1878), s. 19 (f)—Chhavi *found in house in joint occupation of two persons—Possession.*

Where a *chhavi* is found in a house in the joint occupation of two persons it cannot be said with any degree of certainty that one of them was in exclusive possession thereof for the purposes of section 19 (*f*) of the Arms Act.

Criminal revision against the order of the Additional Sessions Judge, Amritsar, dated 14th November 1922.

ABDUL RASHID KHAN *v.* NISAR MUHAMMAD KHAN.

Mr. *L Saunders*, for the Petitioner.

JUDGMENT.—The house of Fatti and Alia was searched by the Police during the investigation in connection with a case of dacoity and a *chhavi* was found in it. The house admittedly was jointly owned and possessed by both. Therefore, both of them were tried and convicted under section 19 (*f*) of Act XI of 1878. On appeal the learned Additional Sessions Judge accepted Patti's appeal and acquitted him. He, however, upheld the conviction of the petitioner, Alia.

For the purposes of the decision of this petition for revision it is not necessary to decide whether the reasons given by the learned Additional Sessions Judge for adopting this course were good or bad, for I am clearly of opinion that having regard to the fact that the *chhavi* was found in a house admittedly in the joint possession of both the accused, it could not be said with any degree of certainty that the petitioner Alia was in exclusive possession thereof. The petitioner must be given the benefit of this doubt.

I accordingly accept this petition for revision, and, setting aside Alia's conviction and sentence, order that he be acquitted and forthwith released.

Z. K. *Conviction set aside.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE NO. 300 OF 1923.

June 6, 1923.

Present:—Mr. Justice Kanhaiya Lal.

ABDUL RASHID KHAN—APPLICANT

versus

Hajl NISAR MUHAMMAD KHAN AND ANOTHER—OPPOSITE PARTIES.

Workman's Breach of Contract Act (XIII of 1859), ss. 2, 4—Proceedings under Act—Agreement executed in lieu of former advance, validity of.

The "advance" mentioned in section 2 of the Workman's Breach of Contract Act may be an advance made at the time of entering into the contract or at some time earlier.

Accused on being arrested under the Workman's Breach of Contract Act and being charged with a breach of contract executed another agreement in lieu of the former advance to work for another period of one year for the complainant. He failed to carry out the agreement and proceedings under the Act were taken against him:

Held, that the fresh agreement executed by the accused in lieu of the former advance was perfectly valid and was recognised by section 4 of the Workman's Breach of Contract Act.

Criminal Reference by the Sessions Judge, Moradabad, dated the 23rd of April 1923.

Mr. *M. A. Aziz* (for Mr. *S. Raza Ali*), for the Opposite Parties.

JUDGMENT.—This is a reference by the Sessions Judge of Moradabad in a case in which the accused Abdul Rashid Khan has been directed to pay Rs. 300 to the complainant Haji Nisar Muhammad Khan by certain instalments under section 2 of Act XIII of 1859 as amended by Act XII of 1920. It appears that in 1920 Abdul Rashid Khan obtained an advance of Rs. 300 for doing a certain work. He worked for a few months after the execution of the agreement but failed to complete the engagement. He was arrested and on being charged with a breach of the contract executed another agreement in lieu of the former advance to work for another period of one year. Thereupon the complaint originally filed against him was withdrawn. After the execution of the second agreement he worked again for a little while and then broke off the engagement. The complainant thereupon proceeded against him again to enforce his agreement and obtained an order, the correctness of which forms the subject of this reference. The view taken by the learned Sessions Judge is that inasmuch as no advance in cash was made at the time of the second agreement, section 2 of Act XIII of 1859 as amended by Act XII of 1920 was inapplicable. But the advance may be an advance made at that time for the performance of the engagement or at some time earlier. The new contract entered into under the circumstances above mentioned merely superseded the old contract, and its validity is recognised by section 4 of the Act, which provides that the word "contract" as used therein would include all contracts falling within the meaning of the Indian Contract Act of 1872 except where the period specified for performance exceeds one year. The new contract provided for the performance of the engagement for one year only and was valid and enforceable. The order of the Trying Magistrate need not, therefore, be disturbed.

Z. K. *Recommendation rejected.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 836 OF 1917.

November 8 1922.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

BABUSING NARAYANJI RAJE SHIRKE —APPELLANT

versus

SAMBHAJI SHIWAJI RAJE SHIRKE —RESPONDENT.

Partition, suit for—Khotki *lands*—*Questions between mortgagor and mortgagee*—*Procedure.*

In partiton suits relating to *khotki* lands it is advisable that any questions relating to disputes with regard to particulars between a mortgagor and a mortgagee should be kept out of the suit, or if they are taken up in the course of the trial, very great care should be taken to keep such questions separate as far as possible. [p. 449, col. 2.]

Second appeal against the decision of the Assistant Judge, Ratnagiri, in Appeal No. 114 of 1912.

Mr. *K. N. Koyaji*, for the Appellant.

Mr. *P. B. Shingne*, for the Respondent.

JUDGMENT.—This is a very complicated suit for partition of a Khoti village. We are only concerned in this appeal with the heir of the original defendant No. 22 on the one hand and defendant No. 24 on the other. Yeshwant, the father of the original defendants Nos. 21, 22 and 23, mortgaged his share in the *khotki* including Khasgi Thikans to defendant No. 24: Yeshwant died before suit, and his heirs were defendants Nos. 21, 22 and 23. The present appellant is the heir of the original defendant No. 22. It appears that in 1880 a creditor of Yeshwant issued an attachment against his interest in the property mortgaged to defendant No. 24, which would be the equity of redemption, and it was put up for sale in execution of the decree and was purchased *benami* for Yeshwant by defendant No. 24. Yeshwant would then be recognized still as the owner of the equity of redemption, though the property would be charged with the additional payment which the mortgagee made for his purchase at the Court sale. Thereafter by Exhibit 522, defendant 24 gave notice to Yeshwant to pay off the mortgage-debt. Nothing was said in the notice as to what should be done if the mortgage-debt was not paid. The result was that the *status quo* continued, the mortgagee being in possession of certain of the mortgaged property, the remainder being in possession of the mortgagor. That was a state of affairs when the suit was filed. It appears that in the Trial Court an attempt was made to decide matters which might be in dispute between the mortgagor and mortgagee with regard to his particular share in the *khotki*. Considering that partition suits of this nature are always extremely complicated, it is certainly advisable that any question regarding dispute with regard to particulars, such as this between a mortgagor and mortgagee should be kept out of the partition suit, or if they are taken up in the course of the trial, very great care should be taken to keep such question separate as far as possible. Such issues ought to be raised as in a suit between the mortgagor and mortgagee. Here there is only the general issue "What are the final shares, rights and Thikans to which parties are at present entitled?" Apparently it was under that issue that the Trial Judge endeavoured to deal with this particular share in the *khotki* which was mortgaged to defendant No. 24. By some process of reasoning, which we cannot follow, he came to the conclusion that the mortgagors had lost all interest in the share mortgaged to defendant No. 24, although they might have some claim to retain possession of what they had been in possession of as owners by adverse possession, while the mortgagee might claim to have acquired equity of redemption by adverse possession because his notice was not replied to.

Now we are not disposed to agree in any way with the reasoning of the Trial Court as it appears to us that there is no evidence from which it could be held either that the mortgagee was holding adversely against the mortgagor or that the mortgagor was holding adversely against the mortgagee. Certainly nothing could result from non-compliance with the notice, Exhibit 522. Mr. Kotwal does not appear to have accepted the reasoning of the lower Court and at the end of his judgment he says "I hold the Court-sale binding, but the actual possessions as they continue need not be disturbed as equity between the parties can be satisfied by helping neither party

to disturb the sale as it existed at the date of the suit." We understand what he must have meant by those words was that the possession of each party should remain as it existed at the date of the suit, and any questions between the mortgagor and mortgagee would have to be decided thereafter. We certainly find nothing in the judgment which could lead us to infer that the learned Judge decided that either the mortgagor or the mortgagee had become owner of any part of the mortgaged property or any interest in the mortgaged property by adverse possession. Certainly that was an important question which ought to have been dealt with in the appeal judgment. All that was decided was that the purchase of the equity of redemption at the Court-sale by the mortgagee was *benami* for the mortgagor. We think, therefore, that the mistake which Mr. Kotwal made was in not altering the decree in accordance with his judgment so as to reserve the rights of the mortgagor and mortgagee, leaving them to take such further action as they might be advised.

It is necessary, therefore, to amend the shares of the Thikans in accordance with the rights of the parties which appear at page 61 and the following pages of the print. With regard to defendants Nos. 21, 22 and 23 the direction that the share of these defendants had been lost should be deleted, and it need only be mentioned that these defendants should remain in possession of the Thikans in their possession at the date of the suit. As regards defendant No. 24 it will be stated that the remaining portion of the 1/6th share mortgaged to him by the father of defendants Nos. 21 to 23 will remain in his possession, leaving all questions between him and the heirs of the mortgagor to be decided in any suit which the parties may be advised to file hereafter. No order as to costs. No order as to costs of the cross-objections, which are not pressed and are dismissed.

Z. K. *Order accordingly.*

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL DECREES.

NOS. 192 TO 194 OF 1919.

August 29, 1922.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Cuming.

SARADA PRASANNA ROY—DEFENDANT—APPELLANT

versus

UMA KANTA HAZARI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Dayabhaga v. Mitakshara—*Family migrating from one province to another—Presumption—Joint tenancy—Gift by maternal grandfather to grandsons—Partition—Intention of parties—Evidence Act (I of 1872), s. 11—History and status of connected family—Evidence, admissibility of.*

A Hindu family, residing in a particular province of India, is presumed to be governed by the law of the place where it resides. This presumption is rebutted, where the family is shown to have migrated from one province to another. [p. 451, col. 2.]

Where a Hindu family migrates from one province to another, the presumption is that it carries with it the laws and customs as to succession and family relations prevailing in the province from which it came: but this presumption may be rebutted by proof that the family has adopted the law and usages of the place to which it has migrated. The reason is that the Hindu law is not a merely local law, but is essentially personal law, an integral factor of the status of every family which is governed by it. In its new domicil, the family may, by the reflex action of manners and customs prevalent in resident families, consciously or unconsciously, modify its own governing rules; there may thus be an acceptance of a new law, not due to sudden change by choice or agreement, but by the gradual evolution of a family usage. When a new family usage has thus grown up in the course of generations, possibly with the concurrence or acquie cence of families of the same group, it furni hs the governing law of the family. [p. 458, col. 2.]

It is not, however, open to an individual member of a family which has migrated and adopted the law of its new domicil, merely of his own choice to revert to the law which governed the family in its original home. [p. 458, col. 2.]

Case-law discussed.

Technical rules of English conveyancing should not be imported into Hindu Law. [p. 460, col. 2.]

Jogeswar Narain v. *Ram Chandra Dutt*, 23 C. 670; 23 I. A. 37 at p. 44; 7 Sar. P. C. J. 13; 6 M. L. J. 75; 12 Ind. Dec. (N.S.) 445 P.C.), followed

The principle of joint tenancy is unknown to the Hindu Law apart from the Mitakshara doctrine of survivorship. [p. 460, col. 2.]

A *Yaluk* or affectionate gift of property by a maternal grandfather to his grandsons does not constitute the donees joint tenants with right of survivorship. [p. 460, col. 2.]

The true test of partition under Hindu Law is the intention of the members of the family

to become separate owners. Consequently, there may be partition, even though there be no actual division by metes and bounds. [p. 460, col. 1.]

Case-law referred to.

Where the history and status of a particular family, which is one of a group, is in question, evidence may be adduced to elucidate the history and status of connected families in the same group, and such evidence is admissible under section 11 of the Evidence Act. [p. 457, col. 1.]

Mohesh Chunder Dhal v. *Satrughan Dhal*, 29 I. A. 62; 29 C. 343; 6 C. W. N. 459; 4 Bom. L. R. 372; 8 Sar. P. C. J. 238 (P. C.), *Shimbhu Nath* v. *Gayan Chand*, 16 A. 379; A. W. N. (1894) 123; 8 Ind. Dec. (N. S.) 246 and *Harnabh Pershad* v. *Mundil Dass*, 27 C. 379 at pp. 486; 390; 14 Ind. Dec. (N. S.) 251, referred to.

Appeals against the decrees of the Subordinate Judge, Jessore, dated the 5th April 1917.

Babus *Sarat Chandra Rai Chowdhuri*, *Gunada Charan Sen* and *Anilendra Nath Rai Chaudhuri*, for the Appellants.

Dr. *Dwarka Nath Mitter*, Babus *Mrityunjay Chatterjee*, *Pramatha Nath Banerjea* and *Rama Prasad Mookerjee*, for the Respondents.

JUDGMENT.—The subject-matter of each of the three litigations, which have culminated in these appeals, formed part of the estate of one Tara Prasanna Roy, brother of the appellant Sarada Prasanna Roy. Tara Prasanna made a testamentary disposition of his properties on the 3rd July 1914, and died on the 3rd October 1914. He left a widow, Trilok Mohini Debi, who executed three conveyances on the 13th September 1915, 25th April 1916, and 12th July 1916 in favour of Manmohan Panda, and dealt with the estate left by her husband on the footing that she was under the Will absolutely entitled thereto. The three conveyances constitute the foundation of the title set up by the plaintiffs. They alleged that the first defendant Sarada Prasanna had unlawfully kept them out of possession of the properties vested in them by virtue of the conveyances. The defendant resisted the claim on a variety of grounds which need not be enumerated in detail for our present purpose. It is sufficient to mention two of the defences which were unsuccessfully urged in the Court below and have been reiterated in this Court, namely, first, that Tara Prasanna was governed by the Mitakshara Law and was not competent to make a testamentary disposition of his estate which was held jointly by him with his brother and upon his death passed to him by survivorship; and, secondly, that in respect of a property called Rautara, the brothers obtained it as a testamentary gift from their paternal grandfather and held it as joint tenants with right of survivorship. The Subordinate Judge has overruled these contentions and decreed the suits. Upon the first point, he has found, first, that Tara Prasanna was governed by the Dayabhaga Law and was competent to make a testamentary disposition in favour of his wife; and, secondly, that even if he were held to be governed by the Mitakshara Law, he could make such disposition, as he was not joint with his brother. Upon the second point, the Subordinate Judge has found that in respect of Rautara, the brothers were not joint tenants with right of survivorship. On the present appeal, the questions mentioned have been argued with great elaboration, and our attention has been drawn to all the relevant materials on the record. We have minutely considered the evidence, in spite of the obvious imperfections of the paper-book, and we shall now state our conclusions with the reasons therefor.

The first question we have to take up for consideration, is, whether Tara Prasanna was governed by the Dayabhaga or the Mitakshara Law. He was resident in Bengal, and consequently we start with the initial presumption that he was governed by the Dayabhaga Law; for it is well settled that a Hindu family, residing in a particular province of India, is presumed to be governed by the law of the place where it resides: *Ram Das* v. *Chandra Dassi* (1). This presumption is rebutted, where the family is shown to have migrated from one province to another; the presumption then arises that the family carried with it the laws and customs as to succession and family relation prevailing in the province from which it came: *Soorendronath Roy* v. *Heeramonee Burmoneah* (2) and *Parbati Kumari Debi* v. *Jagadis*

(1) 20 C. 409; 10 Ind. Dec. (N. S.) 277.

(2) 12 M. I. A. 81; 1 B. L. R. (P. C.) 26; 10 W. R. (P. C.) 35; 2 Suth. P. C. J. 147; 2 Sar. P. C. J. 372; 20 E. R. 271; 3 Mad. Jur. 432; 1 Ind. Dec. (N. S.) 17.

SARADA PRASANNA ROY v. UMA KANTA HAZARI.

Chunder (3). In the case before us, the existence of a tradition has been established by evidence, that in the time of Prataparaditya, that is, towards the end of the sixteenth century, this family, together with several others, migrated to Bengal from a place in the North-West Provinces where the Mitakshara Law, as modified in the Mithila School, prevailed. Consequently, the initial presumption is displaced, and the presumption arises that Tara Prasanna was governed by the Mitakshara Law, using that expression, for the sake of brevity, as indicating for the purposes of this case, the Mitakshara Law as modified in the Mithila School. The burden thus shifts, and now lies upon the plaintiffs to prove that the family, after migration, has adopted the law and usages of the place to which it has migrated: *Gobind Chandra Das* v. *Radha Kristo Das* (4), *Jagannath* v. *Narayan Lal* (5); *Mailathi Anni* v. *Subbaraya Mudaliar* (6) and *Kuladi Prosid Pandey* v. *Haripada Chattopadhyaya* (7).

The genealogical table, marked "A" and annexed herewith, shows the ancestry of Tara Prasanna Roy and his brother Sarada Prasanna Roy. They are descended from Raghunath Roy, who had two sons Kartick Chandra and Radha Mohan. Chandra Sekhar, one of the sons of Radha Mohan, was the paternal grandfather of the appellant and his brother. On the 13th October 1863, Chandrasekhar instituted a suit for establishment of title to the estate of his maternal uncle, Totaram, who had died in 1823, leaving a widow Subhadra who succeeded to her husband's estate and died in 1851. The genealogical table of the family of the mother of Chandrasekhar is marked B (1) and is annexed herewith. In the litigation commenced by Chandrasekhar, the question arose whether the deceased and his nephew were governed by the Dayabhaga Law or by the Mitakshara Law. Chandrasekhar asserted that the Dayabhaga Law had been adopted by the families, and his contention was upheld. The judgment delivered by Bayley and Sambhunath Pandit, JJ., in that suit on the 20th February 1865, has found its way into the reports and is regarded as a leading authority on the subject of change of personal law by migration: *Chundro Seekhur Roy* v. *Nobin Soondur Roy* (8). Reference is made in that decision to an earlier judgment in a litigation commenced by Obhoychurn, the son of the daughter of Baidyanath, brother of the very Totaram who was the maternal uncle of Chandrasekhar. The decision in the suit by Obhoychurn was pronounced on the 30th December 1862 by Raikes, Seton Karr, and Jackson, JJ., and has also found its way into the reports: *Ootum Chunder Bhuttacharjee* v. *Obhoy Churn Misser* (9). In the suit by Obhoychurn an opinion had been expressed that the evidence did not establish that the family of Totaram had abandoned the Mithila Law in favour of the Dayabhaga Law; Bayley and Pandit, JJ., considered the grounds for this view, and held, on the fuller materials produced before them, that the Dayabhaga Law governed the parties. There is one passage in the judgment which may usefully be recalled here:

"The plaintiff has clearly shewn by the evidence of kins and relatives, that in the family of the parties before the Court, in several cases where succession, according to the Bengal Law, was to go to one, and according to the School of Mitakshara to another, the succession was according to the former or Bengal School. It is proved that the ancestors of these parties migrated into this country about twelve or thirteen generations ago, with a few of their own priests. It is quite natural that some among them may still have for their priests descendants of the original family priests; as the descendants of these priests cannot find it convenient to attend upon and accompany all the numerous descendants of the original emigrants scattered by degrees in different places from time to

(3) 29 I. A. 82; 29 C. 433; 6 C. W. N. 490; 4 Bom. L. R. 365; 8 Sar. P. C. J. 205 (P. C.).
(4) 3 Ind. Cas. 563; 31 A. 477; 6 A. L. J. 591.
(5) 7 Ind. Cas. 459; 34 B. 553; 12 Bom. L. R. 545.
(6) 24 M. 650; 11 M. L. J. 309.
(7) 17 Ind. Cas. 257; 40 C. 407 at p. 416; 16 C. L. J. 311; 17 C. W. N. 102.
(8) 2 W. R. 197 at pp. 202, 203.
(9) (1862) W. R. F. B. 67; 2 Hay 534.

time, to many of the later generations, it is only left to accept the Bengalee priests available. Thus, too, the descendants of the family priests by degrees, after a few generations, acquiesce in performing the external ceremonies (or *kriá*) according to the Bengal School. In such cases the Nagree character is abandoned for Sanskirt writing after 5 or 6 generations; old habits and customs fall one by one, and the priests and their *jujmans* both gradually become Bengalees in every sense. In this state of change for a long time, even after a complete conversion, the priests and their *jujmans* remain in theory a separate class, though for all other practical purposes either of ceremonies, or of succession, they have long adopted the Bengalee School of the Hindu Law.

"Such emigrants may become Bengalees in their ceremonies, but cannot and would not be allowed to intermarry with Bengalees of their own class. The fact, therefore, of want of proof of intermarriage with Bengalees, or the fact of some families of the decendants of these original emigrants having still for their priests some of the descendants of the priests that had accompanied their ancestors, does not afford proof in support of the fact of the original laws and customs being still observed by these people as a class and tribe. The witnesses for the plaintiff distinctly state that the necessary rites in the families of both the parties are now performed according to the Bengalee School; and what is more important, they distinctly swear to the fact that within their knowledge, succession is guided by the same school. The evidence given by the defendant to counteract this case of the plaintiff is the deposition of two witnesses who are not of the family or of the tribe to which both the parties belong, and who distinctly admit that they are ignorant of the school of the Hindu Law under which succession is guided in the family. It is to be borne in mind that the fact of some members of the family having Bengalee priests is by itself a strong proof of all having adopted Bengalee ceremonies for all essential ceremonies, though it is admitted that these persons of different branches of the original family intermarry only among themselves. It is clear that generally there can be no intermarriage between two classes of people who perform their essential rites, such as marriages, funerals, tonsure, &c. under two different schools of Hindu Law. When these people are found to have lived here so long as to have by degrees adopted the language, the dress (particularly for women) and the ordinary food for the people of Bengal—the two last of which are materially different in the two countries among such people, when all intercourse and intermarriage with the parent country has long ceased—it is nothing surprising that they should be proved, as deposed to by competent witnesses, to have by degrees been compelled to abandon their old forms of ceremonies now impracticable, and what is of more importance of having—whenever such a contingency arose that one more nearly allied was not the heir by their old law—allowed him or her to succeed according to the Laws of Bengal.

"The cases of succession quoted by the witnesses of plaintiff do not, as to the rights of the daughter's son, shew sufficiently clear proof of the statement of the plaintiff with regard to the application of the Law of Bengal, as these witnesses were not made to state that, when such succession took place to the deceased, he was a member of a joint family. There cannot, however, be any mistake regarding the succession of a sister's son. He has no right to succeed except under the Law of the Bengal School. [This was understood to be the law before the decision of the Judicial Committee in *Gridhari Lall Roy* v. *The Bengal Government* (10) and of the Full Bench in *Amrita Kumari Debi* v. *Lakhi-Narayin Chuckerbutty* (11), which explained away the contrary decision of the Judicial Committee in *Thakoorain Sahiba* v. *Mohun Lall* (12).] It is important that more than two instances of such succession were pointed out by the witnesses. The defendant has not contradicted the fact, or proved

(10) 12 M. I. A. 448; 1 B. L. R. P. C. 44; 2 Suth. P. C. J. 159; 2 Sar. P. C. J. 382; 3 Mad. Jur. 386; 10 W. R. (P. C.) 31; 1 Ind. Dec. (N. S.) 21; 20 E. R. 408.

(11) 2 B. L. R. (F. B.) 28; 10 W. R. F. B. 76; 1 Ind. Dec. (N. S.) 592.

(12) 11 M. I. A. 386; 7 W. R. P. C. 25; 2 Suth. P. C. J. 681; 2 Sar. P. C. J. 289; 20 E. R. 146.

that, in any other similar cases of succession, any other rule of succession was adopted. The instances given by the witnesses took place in the class to which both the parties belong, and the statement of the plaintiff is corroborated by the fact of Soobhadra's undisputed succession in that very branch of the family of which Tota Ram and his brother were the members. Some attempt was made to raise doubts regarding the correctness of the claim of the plaintiff, on the ground that he asserted wrong facts in the case, and did not venture to bring his claim for more than 10 years after the death of Soobhadra, and that he had pleaded otherwise in the other case brought against Nobeen. But in the face of such clear proof of the law of succession applicable to the family as now found by evidence, we cannot attach any importance to this objection. It is not at all surprising to find that plaintiff at first entertained doubts regarding his ultimate success, and so delayed to sue for that or other reasons."

These observations may be taken along with the apt comment of Babu Kishen Kishore Ghose, who argued on behalf of the respondent in the case of *Ootum Chunder Bhuttacharjee* v. *Obhoy Churn Misser* (9) that families situated like that of the defendant commonly use the customs of Bengal for every day purposes and produce the law of Mithila for their law suits. The wieght of the decision in *Chundro Seekhur Roy* v. *Nobin Soondur Roy* (8) was fully realised by the legal advisers of the defendant, and an endeavour was accordingly made to minimise its effect by the contention that it is at best a decision merely that the family of the maternal uncle of Chandra Sekhar was governed by the Dayabhaga Law. In support of this position reference has been made to a passage in the judgment of O'Kinealy and Hill, JJ., in the case of *Parbati Kumari Debi* v. *Jagadis Chunder* (3), which was ultimately affirmed by the Judicial Commitee, and, which, it was suggested, indicated the possibility of marriages between the members o two families, one governed by the Dayabhaga, the other governed by the Mitakshara. We need not consider, whether, even if permissible, this is probable; the fact remains that in the suit of Chandra Sekhar, no such distinction was made between the families of his paternal and maternal ancestors. The judgment of the High Court makes it abundantly clear that evidence was adduced to prove that both the families had abandoned the Mitakshara in favour of the Dayabhaga, and this evidence was accepted by this Court as reliable. It may be observed parenthetically that the contrary view might lead to unforeseen complications. The principle of mutuality applies in the determination of the question of heirship between a maternal uncle and his nephew, and if one of them were governed by the Mitakshara and the other by the Dayabhaga, the result would be very different from what would be the case if both were governed by the Dayabhaga. The appellant has contended that the recitals and findings in the judgment of this Court in the suit of Chandra Sekhar do not conclude him; the answer is that the respondents do not rely upon the judgment for such purpose. Assume for the moment that the principle recognised in *Basi Nath Pal* v. *Jagat Kisore Acharjee* (13) and *Tripurana Seethapati Rao Dora* v. *Rokkam Venkanna Dora* (14) applies, and the recitals in the judgment cannot be used as evidence; still, the judgment is evidence as a relevant fact in issue or as a transaction. The judgment so used shows that the question was raised and decided, whether the families of the paternal and maternal ancestors of Chandra Sekhar were or were not governed by the Dayabhaga Law. The evidence then accessible to the Court is no longer available, partly, by reason of lapse of time, partly from destruction of portions of the record in accordance with statutory rules. There can, in our opinion, be no room for doubt as to the propriety of the course adopted by the Subordinate Judge, when he attached great weight to the circumstances that, in 1865, this Court found that the Dayabhaga Law had been adopted in the

(13) 35 Ind. Cas. 298; 23 C. L. J. 583; 20 C. W. N. 643.

(14) 66 Ind. Cas. 280; 42 M. L. J. 324; 15 L. W. 316; 30 M. L. T. 160; (1922) M. W. N. 147; 45 M. 332; (1922) A. I. R. (M.) 71.

families of the parties and
[illegible]

Prasanna would be entitled to claim his interest by survivorship, if the family were held to be governed by the Mitakshara. In this connection, it cannot be ignored that he was an experienced member of the legal profession, while his brother and his step-brothers, four of whom were minors, were not familiar with the devious paths of law and lawyers. It is desirable to add that we are not now concerned with the validity of the settlement; the transaction is relevant, only upon the question, whether the family was governed by the Dayabhaga or the Mitakshara. Upon that point, as the Subordinate Judge has held it is relatively of little consequence, when contrasted with the lifelong and self-consistent conduct of Chandra Sekhara and Hari Prasanna. We pass on now to the conduct of Tara Prasanna himself. On the 3rd July 1914, he made a testamentary disposition of his properties, and gave directions consistent with the Dayabhaga and inconsistent with the Mitakshara. We need not, however, attach much weight to this fact, as this is the very disposition which has led up to the present litigations. There is no room for dispute that the conduct of the immediate ancestors of the appellant cannot be reconciled with the theory that the family was governed by the Mitakshara Law. But our attention has been drawn to three instances of succession in the family, which, it is alleged, do not support the position, that the Dayabhaga Law is applicable. On examination, however, each of these turns out to be of an inconclusive character. Kalikanand survived his father Gobinda Chandra for less than a month (A). After his death his widow Katyaini contended herself with an allowance and resided as is not uncommon, in her paternal residence. The income of her husband's share was very small and the amount paid as maintenance might have been regarded as an adequate substitute. Instances of exclusion are of value, only if there is proof of demand and refusal. The widow of Girijanand, another son of Gobinda Chandra, was excluded from inheritance by the Will of her husband, which is said to have contained a provision for her maintenance and she committed suicide within two or three years after she had become a widow (A). Nanibala, the widow of Saileswar, was a minor at the date of the present suit, and she had time yet to enforce her right of succession (A). On the other hand, there are instances of the grant of succession certificate and guardianship certificate, such as is inconsistent with the theory of the existence of a joint family governed by the Mitakshara Law: *Beejraj* v. *Bhyropersaud* (15), *Bissen Chand* v. *Chatrapat Singh* (16) and *Gharib Ullah* v. *Khalak Singh* (17); this happened in fact, with regard to the estates of Mahendra Nath and Hari Prasanna after their demise (A).

The conclusion, thus drawn by the Subordinate Judge from instances of succession in the family, has been fortified by him by references to evidence of the observance of rites and ceremonies at marriages, births, and deaths which indicate the relinquishment of Mitakshara Law and the adoption of the Dayabhaga Law in the family. The value of such evidence was emphasised by the Suddar Court in *Rajchunder Narain* v. *Goculchand* (18) and by the Judicial Committee in *Parbati Kumari Debi* v. *Jagadis Chunder* (3), but it was perhaps not fully appreciated in *Huro Pershad Roy Chowdhry* v. *Shibo Shunkuree Chowdhrain* (19). The evidence on this part of the case is conflicting but the Subordinate Judge has come to the conclusion that the balance of testimony is in favour of the plaintiffs. There is some indication that Sarada Prasad, since the death of his father in 1895, has endeavoured to conform to the Mitakshara rather than to the Dayabhaga; the evidence shows his scholarly attainments in Sanskrit and his acquaintance with authoritative works of both the schools. The evidence at the same time shows, however, that the officiating priests have not much of learning, and one of them, in the stress of cross examination, made the astonishing statement that his knowledge of Smriti of Mithila was derived

(15) 23 C. 912; 12 Ind. Dec. (N. S.) 605.
(16) 1 C. W. N. 32.
(17) 25 A. 407; 30 I. A. 165; 5 Bom. L. R. 478; 7 C. W. N. 681; 8 Sar. P. C. J. 483 (P. C.).
(18) (1801) 1 Mac. Sel. Rep. 56; 6 Ind. Dec. (O. S.) 42.
(19) 13 W. R. 47.

from Raghunandan (the authoritative exponent of the Bengal School of Hindu Law). The evidence further shows that the Maithili priests employed perform the *puja* in the same manner as Bengali priests. The inference is legitimate that the priests, like the members of the family, have adopted the Bengal system of rights and ceremonies, even though they were themselves Maithili in origin. The *sradh* ceremony is performed according to the system prevalent in Bengal; while the attempt to prove that the *sapindakaran* ceremony, in an exceptional case, was performed according to the Mithila school on the twelfth day and not according to the Bengal school on the thirteenth day, completely broke down when the fact was brought out in evidence that it was in fact performed on the anniversary of the day of death. Much stress was laid on the performance of the *tilak* ceremony prior to marriage; but it cannot be overlooked that it has a singular resemblance to what is known as the *asirbad* ceremony in Bengal. In our opinion, the Subordinate Judge has correctly held that as regards language, dress, food and rites and ceremonies, the members of the family have adopted the style prevalent in Bengal. This, indeed, was fully established more than half a century ago in the suit brought by Chandra Sekhar for recovery of the estate of his maternal uncle; this is manifested in the passage from the judgment of Bayley and Pandit, JJ., set out above.

We cannot leave this part of the case without some reference to the evidence which has been adduced to elucidate the history and status of what has been called connected famalies. Such evidence, where a family is one of a group, may be admitted under section 11 of the Indian Evidence Act, which lays down that facts not otherwise relevant are relevant, if, by themselves or in connection with other facts, they make the existence or non-existence of any fact in issue or relevant fact, highly probable or improbable; See *Mohesh Chunder Dhal* v. *Satrughan Dhal* (20), where Lord Macnaghten pointed out that the rule of the custom of lineal primogeniture obtained in all the Dalbhcom families though some of them were governed by the Mitakshara, others by the Dayabhaga, notwithstanding that there were intermarriages between them; See also *Shimbhu Nath* v. *Gayan Chand* (21), *Harnabh Pershad* v. *Mandil Da* (22). In the case before us, it is not necessary for the plaintiffs to establish that every one of the families which belong to the group that migrated towards the end of the sixteenth century, has abandoned the Mitakshara in favour of the Dayabhaga; the fact that some of them have done so may lend additional support to the allegations of the plaintiff, and can be used only to supplement direct evidence, for we cannot prove the unknown by doubtful or hypothetical analogies. One of the families mentioned is that of the Missirs of Santa (B. 2); a daughter of Mahendra married into that family, while two daughters of that family married Durganarda and Girijanarda, the nephews of Chandra Sekhar. In a litigation relating to that family, the question arose, whether the Dayabhaga or the Mitakshara was the governing law: *Sonatun Misser* v. *Ruttun Mallick* (23), Pandit, J., in remanding the case, referred to the decision in *Oolum Chunder Bhuttacharjee* v. *Obhoy Churn Misser* (9), and after remand, it was held by the District Judge, Mr. Rivers Thomson, on the 28th July 1864 that the family was governed by the Dayabhaga Law. Again in the case of the family of the Chaudhuris of Parchiota (B. 7) it was held, on the 27th June 1901, that the members were subject to the Dayabhaga and not the Mitakshara. The Subordinate Judge, Mr. Srigopal Chatterjee, pronounced an elaborate judgment and reviewed the result of litigations in connected families, including the suit of Chandra Sekhar previously mentioned. This judgment was affirmed by this Court on the 8th July 1904, by Rampini and Mitra, JJ., Patitpaban Chaudhuri, the plaintiff in that case, who unsuccessfully urged that the family was governed by the Mitakshara,

(20) 29 I. A. 62; 29 C. 343; 6 C. W. N. 459; 4 Bom. L. R. 372; 8 Sar. P. C. J. 238 (P. C.).

(21) 16 A. 379; A. W. N. (1894) 123; 8 Ind. Dec. (N. S.) 246.

(22) 27 C. 379 at pp. 386; 390; 14 Ind. Dec. (N. S.) 251.

(23) W. R. 1864. 95.

is a son-in-law of the appellant. In two subsequent suits, however, in 1905 and 1907 Patitpaban succeeded in securing a contrary verdict; but it is noticeable that the judgment of the High Court in the earlier suit was not produced in the first of these cases, while it was erroneously excluded from evidence in the second case. In the family of the Rays of Gangadharpore, it was found in 1915 that the members had adopted the Dayabhaga system; two of the daughters of the appellant have married into this family. Similar remarks apply to the Pradhan family of Samta (B. 3). In that family a Succession Certificate was taken out on the death of Pramatha by his mother Nistarini, such as is permissible only if the Dayabhaga applies. These Pradhans were the agnates of the maternal uncle of Chandra Sekhar; and a daughter of the appellant has married into that family, while a daughter of that family has married a son of Mahendra, the paternal uncle of the appellant. We do not overlook, however, that the Pradhans of Piplee (B. 5), the Rays of Beria (B. 6) and the Rays of Jahanabad appear to have adhered to the Mitakshara. It also appears that the Misras of Chatra belong to the same category (B. 4); the mother of the appellant was a daughter of this family. We need not deal in detail with other families, which are very remotely connected, such as the family of the Rays of Lalgola. In a litigation concerning the members of that family, the Mitakshara was assumed to be applicable in 1870: *Mookta keshee Debee* v. *Oomabutty* (24); but the real question in issue there, was, whether the family was joint or separate. On a review of the entire evidence on this part of the case, we agree with the Subordinate Judge that the preponderance is distinctly in favour of the view maintained by the respondents. It is not necessary to decide with regard to each of the individual families, whose cases are not really before us for adjudication, whether they are governed by the Daybhaga or the Mitakshara; it is sufficient to state that the impression left on our minds is that in the allied or connected families, the Dayabaga has been very widely adopted and the Bengal system of rites and ceremonies has been generally recognised. This renders it highly probable, within the meaning of section 11 of the Indian Evidence Act, that Tara Prasanna Ray, the grandson of Chandra Sekhar Ray was governed by the Dayabhaga like his two immediate ancestors.

We have indicated above that the appellant, since the death of his father, has made an attempt to revert to the Mitakshara which had been abrogated in the family for generations. This may raise the interesting question, whether an individual member of a family, which has migrated and adopted the law of what may be called its new domicil, nay, of his choice, revert any day to the law which governed the family in its original home. Neither authority nor principle has been invoked in favour of the possibility of such reverter, except by the growth of a new family usage. Where a Hindu family migrates from one province to another, the presumption is that it carries with it the laws and customs as to succession and family relations prevailing in the province from which it came; but this presumption may be rebutted by proof that the family has adopted the law and usages of the place to which it has migrated. The reason is that the Hindu Law is not a merely local law, but is essentially personal law, an integral factor of the status of every family which is governed by it. In its new domicil, the family may, by the reflex action of manners and customs prevalent in resident families, consciously or unconsciously modify its own governing rules; there may thus be an acceptance of a new law, not due to sudden change by choice or agreement, but by the gradual evolution of a family usage; see *Tara Chand* v. *Reeb Ram* (25), *Abaham* v. *Abraham* (26). When a new family usage has thus grown up in the course of generations, possibly with the concurrence or acquiescence of families of the same group, it further furnishes

(24) 14 W. R. 31; 8 B. L. R. 396 *note*.

(25) 3 M. H. C. R. 50 at p. 54.
(26) 9 M. I. A. 195 at pp. 199, 244, 246; 1 W. R. P. C. 1; 1 Suth. P. C. J. 501; 2 Sar. P. C. J. 101; 19 E. R. 716.

the governing law of the family. See *Rutcheputty Dutt* v. *Rajunder Narain* (27), *Rany Pudmavati* v. *Baboo Doolar Sing* (28), *Soorandronath Roy* v. *Heeamonee Burmoneah* (2), *Mohesh Chunder Dhal* v. *Satrughan Dhal* (20); *Parbati Kumar Debi* v. *Jagadis Chunder* (3), *Abdurahim Haji* v. *Halimabai* (29); *Balwant Rao* v. *Baji Rao* (30), *Sheonath Singh* v. *Badan Singh* (31); *Kulada Prosad Pandey* v. *Harpada Chattopadhyaya* (7); *Pitambar Chandra Saha* v. *Nishi Kanta Saha* (32)., When family usage has thus developed into a binding law, let it be conceded that it may be superseded by the growth of a contrary usage, by legislative enactmnt: *Hammerton* v. *Honey* (33). But it would obviously lead to much confusion and abundant litigation, if the law permitted arbitrary attempts to revive and give effect to the original usages, after they had been clearly abandoned, and the abandonment had been acted upon so long as to result in the adoption of new usages. The view cannot consequently be maintained that it is open to a member at any time to disclaim his personal law and adopt another at his choice; if this were permissible, chaos would be the only result; it is not necessary to discuss here whether a family custom can be put an end to by the consensus of opinion of all the members, or of the majority of the family: *Haji Abdula Haji Abdsatar* v. *Haji Ahmed* (34); *Rajkishen Singh* v. *Ramjoy Surma Mozoomdar* (35), *Sarabjit Partap Bahadur Sahi* v. *Indarjit Partab Sahi* (36); *Ayyakkutti* v. *Krishna Patter* (37). In the case before us, there is no evidence of discontinuity of the personal law adopted by the family in the course of generations and the growth of a new family usage, constituting its supersession and a reverter to the personal law of the family in its original domicil.

The second question we have to take up for consideration is, whether the appellant and his brother were joint or separate in estate. The Subordinate Judge has answered the question against the appellant We are of opinion that this conclusion cannot be successfully assailed. The award of the 25th December 1895 clearly effected a severance of interest amongst the eight sons left by Hari Prasanna Roy. The award was made pursuant to the *ekrarnama* of the 22nd December 1895, and was transformed into a decree of Court on the 10th February 1896. The contention that the arbitrators acted in excess of their authority is futile. The division they effected was within the scope of their authority; but if they really exceeded their powers the appellant should have objected when his step-brothers enforced the award under sections 525 and 526 of the Code of Civil Procedure, 1882. There was then not only no opposition on the part of the appellant, but the decree was in fact made with his consent; and it cannot now be impeached as irregularly or improperly obtained. The Subordinate Judge has further held, on the oral and documentary evidence, that the decree based on the award has been carried into effect. The appellant did not thereafter live with his brother or step-brothers as members of a joint family. The income has been separately enjoyed, in defined shares, though the properties may not all have

(27) 2 M. I. A. 132; 2 Suth P. C. J. 1; 1 Sar. P. C. J. 161; 18 E. R. 251.
(28) 4 M. I. A. 259; 7 W. R. P. C. 41; 1 Suth. P. C. J. 178; 1 Sar. P. C. J. 348; 18 E. R. 698.
(29) 32 Ind. Cas. 413; 43 I. A. 35; 30 M. L. J. 227; 20 C. W. N. 362; (1916) 1 M. W. N. 176; 18 Bom. L. R. 635 (P. C.).
(30) 57 Ind. Cas. 545; 47 I. A. 213; 25 C. W. N. 243; 39 M. L. J. 166; (1920) M. W. N. 483; 22 Bom. L. R. 1070; 3 N. L. J. 251; 28 M. L. T. 157; 18 A. L. J. 1049; 12 L. W. 679; 16 N. L. R. 187; 48 C. 30 (P. C.).
(31) 64 Ind. Cas. 194; 48 I. A. 466; 26 C. W. N. 226; 17 N. L. R. 128; 48 C. 997; 20 A. L. J. 443; (1922) A. I. R. (P. C.) 146 (P. C.).
(32) 55 Ind. Cas. 5; 31 C. L. J. 52; 24 C. W. N. 215.
(33) (1876) 24 W. R. (Eng.) 603.
(34) 10 B. 1; 5 Ind. Dec. (N. S.) 383.
(35) 1 C. 186; 19 W. R. 8; 3 Sar. P. C. J. 174; 3 M. L. J. 151; 2 Suth. P. C. J. 744; 1 Ind. Dec. (N. S.) 119 (P. C.).
(36) 27 A. 203; 2 A. L. J. 720; A. W. N. (1904) 244.
(37) 65 Ind. Cas. 942; 45 M. 394 at p. 407; (1922) M. W. N. 192; 43 M. L. J. 1; 15 L. W. 650 31 M L. T. 1; (1922) A. I. R. (M.) 274.

been partitioned by metes and bounds. The evidence has been placed before us, and has been minutely commented upon. We see no reason to doubt that the Subordinate Judge has correctly estimated the effect of the evidence on this part of the case. There is no room for controversy that according to the principle enunciated by the Judicial Committee in a long series of decisions, a severance was effected in this case; and there is neither allegation nor proof of a subsequent reunion. As stated by Lord Westbury in *Appovier* v. *Rama Subba Aiyan* (38), the true test of partition of property is the intention of the members of the family to become separate owners. Consequently, there may be partition, even though there be no actual division by metes and bounds. This has been repeatedly re-affirmed; see *Balabux* v. *Rukhmabai* (39), *Balkishen Das* v. *Ram Narain* (40) distinguished in *Durga Dei* v. *Balmakund* (41), *Parbati* v. *Naunihal Singh* (42); *Suraj Narain* v. *Eqbal Narain* (43); *Girja Bai* v. *Sadashiv Dhundiraj* (44); *Kawal Nain* v. *Budh Singh* (45); *Nageshar Bakhsh Singh* v. *Ganesha* (46), *Suraj Bansi Koer* v. *Sheo Persid Singh* (47), *Lakshmani Dada Naik* v. *Ramchandra Dada Naik* (48), *Mudit Narayan Singh* v. *Ranglal Singh* (49), *Ajodhya Pershad* v. *Mahadeo Pershad* (50), *Anand Kishore Chowdhury* v. *Daiji Thakurain* (51), *Rajaratnasami Mudaliar* v. *Anji Latchi Ammal* (52), *Palaniammal* v. *Muthuvenkatachala Maniagarar* (53).

The third question, which requires examination, is, whether the appellant and his brother were, in respect of the property known as Rautara, joint tenants with right of survivorship. The Subordinate Judge has answered this question against the appellant. He is clearly right as to the true construction of the Will of Chandra Sekhar. The property was given by Chandra Sekhar to his grandsons, Sarada Prasanna and Tara Prasanna, as Yatuk or affectionate, gift. This could not make the donees joint tenants with right of survivorship. We need refer only to the decision of the Judicial Committee in *Jogeswar Narain* v. *Ram Chandra Dutt* (54), where Lord Watson expressed his disapproval of the importation of an extremely technical rule of English conveyancing, because, first, the principle of joint tenancy is unknown to Hindu Law apart from the Mitakshara doctrine of survivorship and, secondly, even according to the law of England, a conveyance, or an agreement to convey his or her personal interest by one of the joint tenants operates as a severance. Reference may also be made to the text *Shambe Tashka* and also to the decisions in *Rewun Persad* v. *Radha Beeby* (55), *Navroji Manockji Wadia* v. *Perozbai* (56), *Bai Dewali* v. *Patel Becharda* (57), *Kishori*

(38) 11 M. I. A. 75: 8 W. R. P. C. 1; 2 Sar. P. C. J. 218; 1 Suth. P. C. J. 657; 20 E. R. 30.
(39) 30 C. 725; 7 C. W. N. 642; 30 I. A. 301; 5 Bom. L. R. 469; 8 Sar. P. C. J 470 (P. C.).
(40) 30 I. A. 139; 30 C. 738; 5 Bom. L. R. 461; 7 C. W. N. 578; 8 Sar. P. C. J. 489 (P. C.).
(41) 29 A. 93; 3 A. L. J. 683; A. W. N. (1906) 287.
(42) 3 Ind. Cas. 195; 36 I. A. 71; 31 A. 412; 10 C. L. J. 121; 6 A. L. J. 597; 5 M. L. T. 427; 13 C. W. N. 983; 11 Bom. L. R. 878; 19 M. L. J. 517 (P. C.)
(43) 18 Ind. Cas. 30; 40 I. A. 40; 35 A. 80; 17 C. L. J. 288; 13 M. L. T. 194; 17 C. W. N. 333; 11 A. L. J. 172; (1913) M. W. N. 183; 24 M. L. J. 345; 15 Bom. L. R. 456; 16 O. C. 129 (P. C.).
(44) 37 Ind. Cas. 321; 43 I. A. 151; 43 C. 1031; 24 C. L. J. 207; 20 C. W. N. 1085; 14 A. L. J. 822; 20 M. L. T. 78; 12 N. L. R. 113; (1916) 2 M. W. N. 65; 18 Bom. L. R. 621; 4 L. W. 114; 31 M. L. J. 455 (P. C.).
(45) 40 Ind. Cas. 286; 44 I. A. 159; 39 A. 496; 26 C. L. J. 101; 15 A. L. J. 581; 2 P. L. W. 57; 21 C. W. N. 986; 33 M. L. J. 42; 19 Bom. L. R. 642; (1917) M. W. N. 514; 6 L. W. 330.
(46) 56 Ind. Cas. 306; 47 I. A 57; 42 A. 368; 7 O. L. J. 48; 2 U. P. L. R. (P. C.) 37; 38 M. L. J. 521; 23 O. C. 1; 18 A. L. J. 532; 22 Bom. L. R. 596; 28 M. L. T. 5; 13 L. W. 622 (P. C.).
(47) 6 I. A. 88; 5 C. 148; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 4 C. L. R. 226; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705 (P. C.).
(48) 7 I. A. 181; 5 B. 48; 4 Sar. P. C. J. 173; 3 Suth. P. C. J. 778; 3 Shome L. R. 217; 4 Ind. Jur. 472; 7 C. L. R. 320, 3 Ind. Dec (N. S.) 34 (P. C.).
(49) 29 C. 797.
(50) 3 Ind. Cas. 9; 14 C. W. N. 221.
(51) 28 Ind. Cas. 580; 21 C. L. J. 296.
(52) 10 Ind. Cas. 103; 10 M. L. T. 529.
(53) 43 Ind. Cas. 833; 33 M. L. J. 759.
(54) 23 C. 670; 23 I. A. 37 at p. 44; 7 Sar. P. C. J. 13; 6 M. L. J. 75: 12 Ind. Dec. (N. S.) 445 (P. C.).
(55) 4 M. I. A. 137; 7 W. R. (P. C.) 35; 1 Suth. P. C. J. 172; 1 Sar. P. C. J. 327; 18 E. R. 651.
(56) 23 B. 80; 12 Ind. Dec. (N. S.) 53.
(57) 26 B. 445; 4 Bom. L. R. 102.

Duban v. *Mundra Dubain* (58), *Har Prasad* v. *Sukhdevi* (59), *Karuppai Nachiar* v. *Sankaranarayana Chetty* (60), *Chakkara Kannan* v. *Kunhi Pokker* (61), *Bhobe Tarlai Debya* v. *Peary Lall Sanyal* (62). We hold accordingly that the interest of Tara Prasanna in Rautara did not pass by survivorship to the appellant, independently of the question, whether the parties are governed by the Dayabhaga or the Mitakshara.

After the most careful consideration of all the materials on the record, we see no escape from the conclusion that the Subordinate Judge has rightly decreed the suits and that the appeals must be dismissed with costs.

Appeals dismissed.

Z. K.

(58) 10 Ind. Cas. 565; 33 A. 665; 8 A. L. J. 757.
(59) 28 Ind. Cas. 561; 37 A. 241; 13 A. L. J. 263.
(60) 27 M. 300; 13 M. L. J. 398.
(61) 30 Ind. Cas. 755; 39 M. 317; 18 M. L. T. 255; 29 M. L. J 481; (1915) M. W. N. 740 (F. B.).
(62) 24 C. 646; 1 C. W. N. 578; 12 Ind. Dec. (N. S.) 1100.

A
RAGHUNATH ROY,
(died 1809)

- Kartic Chandra, (died 1825)
  - Kalikishore, (died 1846)
    - Ashootosh, (born 1844)
      - Anadinath, (born 1882).
- Radha Mohun, (died 1827) =*Musammat* Padmabati, (died 1814)
  - Chandra Sekhar, (died 1868)
    - Hariprasanna, (died 1895)
      - (Second wife) Amarabati
        - Saroda Prasanna.
        - Tarayrasenna died 3-10-1914 =W. Tiriloke Mohini Debi.
      - (Fourth wife) Bidhumukhi
        - (Sons) 1. Guru Prasanna
          2. Jyoti Prasanna
          3. Jagat Prasanna
          4. Lalgopal
          5. Joygopal
          6. Bejoy Gopal.
    - Joytrara =*Musammat* Mritunjoy Chowdhury
      - Panchanan
        - Surendra.
    - Mahendra Nath, (died 1898) W. Khirodebasini
      - Sital Chandra.
      - Nilkanta.
  - Gobind Chandra, (died 1852)
    - Kalikananda, (died 1852) =Widow Katyani Debi, (died 1893-95)
      - Jagatmohini.
    - Durgananda =M. Mohamaya
      - Siddheswar
        - Shaileswar, (died 1909) =W. Nanibala.
        - Nalinakhya.
        - Ramprasanna.
    - Girijananda, (died 1878) =W. Benoda (died 1880-81.)
  - Sibamohini =*Musammat* Mrityunjay Pande
    - Bireswar Pande
      - Monmohan Pande.

SARADA PRASANNA ROY *v.* UMA KANTA HAZARI.

B (1)
Family of Chandra Sekhar.

Ramdhon Prodhan

- Totaram, (died 1825) =*Musammat* Subhadra (died November 1851).
- Baidyanath, (died 1815)
  - Daughter
    - Janardan.
    - Abhoy Charan.
  - Chandi Charan, (died 1825 after Totaram) =*Musammat* Dinamani
    - Nilkamal, (born 1824 died 1847)
      - (Adopted son). Nabin Sundar Roy.
- Padmabati=*Musammat* Radhamoni
  - Chandra Sekhar.

B (2)
Misra family of Samta.

Debnarayan

- Srinath
  - Bisseswar
    - Rajani.
    - Chandra.
- Pitambar
  - Mahavarata =wife Ratnaamala
    - Daughter Hansa (=*Musammat* Gopal Chaudhury)
      - Daughter Ramlata (wife of Guru Prasanna).
    - Son Keshub.
- Sanatan
  - Batuknath
    - Satinath (Brother-in-law of Sital) Cousin of Saroda.
  - Daughter Mahamaya (wife of Durganandan)
  - Daughter Thaka (=*Musammat* Kali Prasanna Prodhan).
    - Binodini, Sarat Prodhan. (wife of Girijanandan.)

B (3)
Prodhan family of Samta.

Dwarka Nath Prodhan =*Musammat* Nistarini

- Aditya
  - Sashama *Musammat* Nilkantha (Mahendra's son).
- Pramatha, (died 1892.)
  - Bhutnath =*Musammat* Sarada's daughter.

B (4)
Misra family of Chatra.

Kasi Nath Misra

- Rup Narain Misra =*Musammat* Saramangala (plaintiff in suit of 1866)
  - Priyanath.
- Jay Narain Misra
  - daughters
    - Tripura =*Musammat* Gobordhan.
    - Mongola.
    - Amarabati =*Musammat* Hariprasanna
      - Sarada (App.)

RAMACHANDRA *v.* NARAYANRAO.

B (5)
Prodhan family of Piplee.

Ramchandra Prodhan
Sarbamangala.

Mudhusudan Prodhan.

B (6)
Roy family of Beria.

Gobordhan
=*Musammat* Tripura,
plaintiff in 1875.

Jogneswar.

Romes
Akshoy.

B (7)
Chowdhury family of Panchpota.

Golak Chowdhury

Nabin

Patitpaban
Musammat
Ramasundari
(eldest daughter of
Saroda).

Ramgopal
=*Musammat* Akhoy
Kumari.

Ambicka

Gopal

Ramlata=*Musammat*
Guruprasanna
(Step-brother of Saroda).

Harinath.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 781 OF 1921.
February 1, 1923.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

RAMACHANDRA MAHADEO NAYAGAOKAR—PLAINTIFF—APPELLANT

versus

NARAYANRAO BHAGWANTRAO GOSAVI—DEFENDANT—RESPONDENT.

Hindu Law—Religious endowment—Alienation by manager—Gift in perpetuity, validity of.

The manager of a temple has no power to make a gift in perpetuity out of temple funds.

An alienation made by the manager of a temple cannot extend beyond his lifetime.

Second appeal against the decision of the District Judge, Nasik, in Appeal No. 1250 1921.

Messrs. *D. C. Virkar* and *S. S. Patkar*, for the Appellant.

Mr. *G. S. Rao*, for the Respondent.

JUDGMENT.—The plaintiff sued for Rs. 235 payable out of the estate of the late Damodar Timaya in the defendaat's hands, or out of the Sansthan of Shri Vyankatesh Balaji at Nasik. On the 20th January 1850, Damodar who was then the owner and manager of the Sansthan gave to Sitaram, the plaintiff's grandfather, a *sanad* purporting to make an allowance of Rs. 235 yearly from generation to generation out of the Sansthan funds. It is difficult to see on what possible ground the plaintiff could support his suit. The *sanad* in effect is a gift in perpetuity by a manager of the temple out of the temple funds. In the first place, gift in perpetuity would be bad. In the second place, the manager could not make such an alienation out of the temple property. In any event an alienation made by him could not extend beyond his lifetime. Both the lower Courts have dismissed the plaintiff's claim and we think very rightly.

There was an alternative claim that an annuity should be paid out of the estate of Damodar, the original grantor. But he was careful enough to charge that portion of the revenue of the *inam* property which was to provide maintenance for the Gosavi family managing the temple, and that portion of the

income could not be rendered in any event liable to plaintiff's claim. Therefore, the appeal must be dismissed with costs.

Appeal dismissed.

Z. K.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 2031 OF 1920.

August 1, 1923.

Present:—Mr. Justice Odgers and Mr. Justice Hughes.

Sri Rajah DANTULURI DEVI PRASAD SATYANARAYANA VEERABHADRA VENKATA LAKSHMIKANTARAJU GARU—PLAINTIFF—APPELLANT

versus

Sri Rajah DANTULURI PEDA VENKATA JAGANNADHARAJU GARU AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 4—Appointment of officer of Court as guardian ad litem—Mother and uncle of minor alive—Absence of collusion between Court guardian and plaintiff—Appointment, if proper—Registration Act (XVI of 1908), s. 28—Mortgage of property not situated within territorial jurisdiction of Sub-Registrar—No collusion between mortgagor and mortgagee—Mistake—Registration, legality of—Amendment of plaint in second appeal.

In a suit to enforce a mortgage against the mortgagor and his minor son, the father was *ex parte* and was unwilling to act as guardian for his son in the suit. An *affidavit* was filed by the plaintiff's agent stating that there were "no other principal guardians for the said minor," and a Court guardian was thereupon appointed. The minor was living at the time with his uncle and his mother. But they made no attempt to intervene in the proceedings and never showed any interest. There was no allegation of collusion, between the plaintiff and the Court guardian:

Held, that the minor must be held to have been properly represented in the proceedings and that it was not open to him on attaining majority to have the decree set aside as not binding upon him. [p. 469, col. 1.]

Puppooth v. Vayisravanath Manakkal Raman Somayajipad, 74 Ind. Cas. 309; 32 M. L. T. 107 at p. 111; 44 M. L. J. 515; 17 L. W. 558; (1923) M. W. N. 301; (1923) A. I. R. (M.) 553; *Nachiappa Chetty v. Chinniah Ambalam*, 36 Ind. Cas. 794; 4 L. W. 362; *Bhagwan Dayal v. Param Sukh Dass*, 27 Ind. Cas. 623; 37 A. 179; 13 A. L. J. 179; *Ramaswami Chetty v. Doraiswami*, 73 Ind. Cas. 409; 44 M. L. J. 299; 17 L. W. 638; (1923) A. I. R. (M.) 465; *Rashid-un-nissa v. Muhammad Ismail Khan*, 3 Ind. Cas. 864; 31 A. 572; 13 C. W. N. 1182; 10 C. L. J. 318; 6 A. L. J. 822; 11 Bom. L. R. 1225; 6 M. L. T. 279; 19 M. L. J. 631; 36 I. A. 168 (P. C.); *Maruthamalai Gownden v. Palani Gownden*, 16 Ind. Cas. 182; 37 M. 535 and *Walian v. Banke Behari Pershad Singh*, 30 C. 1021; 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 822; 8 Sar. P. C. J. 512 (P. C.), considered.

The properties comprised in a mortgage were situated in one *taluk* and an acre of land described as Survey No. 458 in another *taluk* was also included and the mortgage-deed was registered in the Sub-Registrar's office in the latter *taluk*. Survey No. 458 did not in fact belong to the mortgagor and was a mistake for Survey No. 458 which belonged to him, but which was not within the territorial jurisdiction of that Sub-Registrar:

Held, that in the absence of any proof that there was any collusion between the mortgagee and the mortgagor or any intention on the part of the mortgagee to include a land not belonging to the mortgagor, the registration was not invalid though it had taken place in a Sub-Registry office in the jurisdiction of which none of the mortgaged properties were situated. [p. 468, col. 2.]

Harendra Lal Roy Chowdhury v. Hari Dasi Debi, 23 Ind. Cas. 637; 41 C. 972; 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L. T. 6; 18 C. W. N. 817; 19 C. L. J. 484; 16 Bom. L. R. 400; 12 A. L. J. 774; 1 L. W. 1050; 41 I. A. 110; (P. C); *Pahladi Lal v. Laraiti*, 48 Ind. Cas. 200; 41 A. 22; 16 A. L. J. 871; *Ramdei v. Chandra Bali Bibi*, 44 Ind. Cas. 399; 4 P. L. W. 237; and *Biswanath Prasad v. Chandra Narayan Chowdhury*, 63 Ind. Cas. 770; 48 C. 509; 48 I. A. 127 (P. C.), considered.

The High Court will not in second appeal allow a plaint to be amended so as to allow the plaintiff to impeach a previous decree on allegations of irregularities not mentioned in the original plaint. [p. 469, col. 2.]

Second appeal against a decree of the District Court, Godavari, in A. S. No. 1 of 1918, preferred against a decree of the Court of the Temporary Subordinate Judge, Rajahmundry, in O. S. No. 11 of 1916.

Messrs. *S. Srinivasa Aiyangar, C. V. Ananthakrishna Aiya, V. S. Narasimhachariar* and *K. Venkatarama Raju*, for the Appellant.

Messrs. *T. Ramachandra Rao, A. Krishnaswamy Aiyar* and *K. Ramamurti*, for the Respondents.

DEVI PRASAD *v.* JAGANNADHARAJU.

JUDGMENT.

Odgers, J.—This is a suit arising out of a mortgage effected on the 15th April 1896 on the Gundapalli estate. The suit on the mortgage itself was numbered as O. S. No. 25 of 1910, and will be referred to in this judgment by that designation. We are also concerned with a later mortgage but an earlier suit (O. S. No. 21 of 1910) relating to the same property. The plaintiff in this suit and the defendants Nos. 1, 2 and 3 belong to the same family, *i. e.*, the family originally owning the Gundapalli estate. Fifth defendant is the decree-holder both in O. S. No. 25 of 1910 and O. S. No. 21 of 1910. Sixth defendant is alleged to be the stranger auction-purchaser of the mortgaged property in O. S. No. 25 of 1910. So as matters stand at present as to 25 of 1910, sixth defendant is the purchaser from the decree-holder, 5th defendant; in O. S. No. 21 of 1910, 5th defendant has obtained a decree but the properties remained unsold. The suit from which this appeal arises is O. S. No. 11 of 1916 in the Temporary Sub-Judge's Court of Rajahmundry in which the plaintiff, the son of the 1st defendant, claims a declaration that the auction sale of the Gundapalli estate in O. S. No. 25 of 1910 and all execution proceedings relating thereto are null and void as against him and also to declare the decrees in O. S. Nos. 21 of 1910 and 24 of 1910 (we are not concerned in this appeal with the latter) are not valid and binding against him and his share. As originally framed the suit was based for the most part on immoral consideration for the mortgages. This was found against in both the lower Courts and has now been given up before us.

Three points are urged in Second appeal.

(1) That the plaintiff who was a minor in 1910 was not properly represented in O. S. No. 25 of 1910,

(2) that the guardian *ad litem* was guilty of negligence in that the following valid defences were not set up on behalf of the minor,

(*a*) that the mortgage was not valid as not having been legally registered.

(*b*) that the Court had no jurisdiction under the circumstances to pass the mortgage decree;

(3) That an amendment should have been allowed to repudiate the 6th defendant's plea that he is a *bona fide* purchaser for value without notice.

(1) The point of respresentation in O. S. No. 25 of 1910 :—The plaintiff who was in that suit the 3rd defendant was at first sued along with his father and guardian, the 1st defendant. The father was apparently unwilling to act, and the Court clerk, Mr. C. Gopala Rao, was appointed guardian on the 21st February 1911. He was appointed on an affidavit sworn by one Sangavarapu Venkataratnam, who said he had been conducting the suits and all other affairs of the plaintiff as his "*Tanedar*" or Manager. "I believe there are no other principal guardians for the said minor defendants. It is, therefore, necessary that the appeal clerk of this Court, Mr. C. Gopala Rao, should be appointed guardian of the said minor, 3rd defandant." The appeal clerk was appointed as stated. The guardian on 30th November 1911 filed a memorandum asking that it should be recorded that he had no instructions whatever on behalf of the minor 3rd defendant.

However on the 25th November 1911 the guardian put the plaintiff to proof of the claim. The Vakils for defendants Nos. 1, 2, and 4 said that they had no instructions. Fifth defendant was absent and the result was a decree for plaintiff for Rs. 82,000 odd with costs. It is contended on this state of things that the affidavit of Venkataratnam was clearly false as the minor was living with his uncle at the time and also had a mother alive. Reliance is placed on the deposition of D. W. No. 2 in the suit. His name is Kapilavaya Padamanaghaswami. He says he was managing 5th defendant's affairs that he had known the uncle of the minor for some time and the father of the minor for 25 years and knew the existence of the plaintiff's mother. The point to be borne in mind is that this witness, D. W. No. 2, is a different person from the *Tanedar* who swore the affidavit that no other principal guardian was available.

DEVI PRASAD v. JAGANNADHARAJU.

In the guardian's evidence as D. W. No. 2 in the O. S. he states that the father refused to be guardian and did not appear in response to notice. He did not try to get any information from anybody else, but sent a notice to the father, but it was not served. He did not apply for copies of the documents etc., as he was not put in funds by anybody. It is pointed out that under rule 118 of the Civil Rules of Practice the Court might have ordered the plaintiff to provide funds for the guardian to carry on the defence of the minor. This, however, was not done. Reliance is placed on a case reported as *Puppoth* v *Vayisravanath Manakkal Rimin Somayjipad* (1) where the affidavit filed stated that besides the 2nd defandant the plaintiff had no next of kin. The statement was false as there was at least one person known to the 1st defendant and his brother who was the plaintiff's next of kin. Yet this information was suppressed. I find it extremely difficult to say that because P. W. No. 2 knew the mother and the uncle of the present plaintiff it must be held that the plaintiff in O. S. No 25 of 1910 and his *Tanedar* who swore the affidavit must have had the same knowledge. It is nowhere alleged that either of the persons had such knowledge and I am quite unable to see how under these circumstances it can be said to have been proved that the affidavit of Venkataratnam must have been false to his knowledge. It may here be pointed out that it is not as if the appointment of a Court guardian was *prima facie* illegal. Order XXXII, r. 4(4), authorises the Court to appoint any of its officers as guardian where there is no other person fit and willing to act as guardian for the suit Neither the mother nor the uncle came forward on behalf of the minor and it is to my mind impossible to say that either the plaintiff in O. S. 25 of 1910 or the Court had reason to believe that there was any other person fit and willing to act. In *Nachiappa Chetty* v. *Chinniah Ambalam* (2) Mr. Justice Srinivasa Aiyangar sitting alone, laid down that in the case of a contemplated appointment of a Court guardian, notice must always go to the natural guardian (as it did in this case according to P. W. No. 2) or the person with whom he lives. It is not brought to our notice that the Court guardian knew that the minor was in 1910 living with his uncle. Another case relied on is *Bhagwan Dayal* v. *Param Sukh Dass* (3) which to my mind is a much stronger case than this because the uncle who was originally named as a guardian *ad litem* in refusing to act said that the minors lived with their mother. No notice was served upon the mother and a Court guardian was appointed. The judgment seems to have relied largely on the fact that there was a decree without notice to the minors. This, as pointed out, is not now necessary. [See *Ramaswami Chetty* v. *Doraiswami* (4)]. As pointed out there, the absence of notice to the father of the appointment of the Head clerk was only an irregularity which would not affect the validity of the proceedings in the absence of fraud or gross negligence on the part of the person appointed (See p. 302*). The case cited in *Rashid-un-nissa* v. *Muhammad Ismail Khan* (5) was a case where minors were held not to have been represented at all, one being represented by a married woman, which was illegal and the other being represented by a person whose interest was manifestly adverse to that of the minor. In *Maruthamalai Gownden* v. *Palani Gownden* (6), the plaintiff asked that the father should be appointed guardian *ad litem*. He refused. The Head clerk was thereupon appointed. The fraud charged was that the plaintiff knew very well that the minor was living with his mother under the protection of his maternal grandfather and the latter ought to have been appointed guardian. The learned Judges held that the statement in the affidavit amounted to no

(1) 74 Ind. Cas 309; 32 M. L. T. 107 at p. 111; 44 M L. J. 515; 17 L. W. 558; (1923) M. W. N. 301; (1923) A I. R. (M.) 553.

(2) 36 Ind. Cas. 794; 4 L. W. 362.

(3) 27 Ind. Cas. 623; 37 A. 179; 13 A. L. J. 179.

(4) 73 Ind. Cas. 409; 44 M. L. J. 299; 17 L. W. 638; (1923) A. I. R. (M.) 465.

(5) 3 Ind. Cas. 864; 31 A. 572; 13 C. W. N. 1182; 10 C. L. J. 318; 6 A. L. J. 822; 11 Bom. L. R. 1225; 6 M. L. T. 279; 19 M. L. J. 631; 36 I. A. 168 (P. C.).

(6) 16 Ind Cas. 182; 37 M. 535.

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more than that in the view of the deponent there was no fit and proper person to be appointed. They point out that the Court may have been under the duty of making further enquiry before acting on the affidavit, but that the appointment was the result o a judicial order based on evidence which the Court considered sufficient. It was not alleged that there was any collusion between the Head clerk and the plaintiff in pursuance of which the latter applied for the appointment of that officer as guardian. Nor is there any proof of any such collusion here. In *Ramaswami Chetty* v. *Doraiswami* (4), the case already referred to, it was held that the plaintiff was not bound to make exhaustive enquiries. The learned Judges say at page 301* "Putting a reasonable construction on the rule, we are not prepared to say that the plaintiff in this case failed in his duty, especially as there is nothing (so far as we have been shown..) regarding the uncle of the minors, his residence, the plaintiff's knowledge of his existence, his interest in the minor's affairs or, what is more important, regarding any subsequent attempt by him to protect their interest." In *Wallin* v. *Binke Behari Pershad Singh* (7) their Lordships held that although there was no formal order appointing a guardian *ad litem* and no notice to the mother who was so appointed or to an adult male member o their family, these facts were nothing but irregularities which did not affect the validity o the proceedings. On this state o the authorities I am of opinion that the appellant has not succeeded in making out a case of non-representation in Suit No. 25 o 1910. Assuming that the same state of things prevailed in 21 of 1910, as to which I am not quite certain for reasons to be stated later on, the same argument applies there also.

Point 2.—The case relied on with regard to the negligence of the guardian generally in this case is *Chunduri Ponnayya* v. *Rajan Viranna* (8), where it was held that it was gross negligence not to defend the suit if there was a valid defence available. In that case the mortgage was by a guardian of the immoveable property of a minor for the purpose of lending money to another for carrying on a trade not ancestral on behalf of the minor. It was held that the guardian *ad litem* ought to have resisted the suit brought on the transaction on the ground that it was not for the minor's benefit. Ought the guardian *ad litem* to have set up either of the suggested defences in this case? and could he have hoped to succeed if he had done so? To consider the point of registration first :—

(*a*) The mortgage, Exhibit IX, comprises the whole of the estate of Gundapalli in the sub-district of Yernagudam, Yernagudem *Taluk*, Godavari District to which is added 1 acre of wet land on the eastern side in Jivroyiti No. 458 in the village of Katrenikona in the sub-district of Mummidiveram Godavari District. The mortgage was registered in the sub-district of Mummidivaram in which the 1 acre was situated. It is alleged that this latter was included in the mortgage for the very purpose of its being registrable in this Sub-Registry and this is, very likely the fact. It turns out that the mortgagor though he owns something like 300 acres in Katrenikona does not own No. 458 and never did. It is therefore, said that the whole mortgage is invalid as the mortgagor had no title to this Mummidiveram 1 acre of land. The allegation contained in paragraph 12 of the plaint is that the mortgagor had no interest in the said 1 acre, which was known to all the parties to the mortgage at the time of the registration, to which the defendants Nos. 6 to 10 reply in paragraph 13 of their written statement that the 1 acre belongs to the mortgagors and that it was intended to be mortgaged and was not illegally included. For this part of the case the appellant relies on *Harendra Lal Roy Chowdhury* v. *Hari Dasi Debi* (9). That was a well-known case of an attempt to mortgage a property absolutely non-

(7) 30 C. 1021; 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 822; 8 Sar. P. C. J. 512 (P. C.)

(8) 70 Ind. Cas. 658; 45 M. 425; 15 L. W. 427; (1922) M. W. N. 213; (1922) A. I. R. (M.) 273; 42 M. L. J. 429.

(9) 23 Ind. Cas. 637; 41 C. 972; 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L. T. 6; 18 C. W. N. 817; 19 C. L. J. 484; 16 Bom. L. R. 400; 12 A. L. J. 774; 1 L. W. 1050; 41 I. A. 110 (P. C.).

* 215 of 41 M. L. J.—[*Ed.*]

existent, there being no such house as 25, Guru Das Street Their Lordships held that "that prarcel was in fact a fictitious entry and represented no property that the mortgagor possessed or intended to mortgage or that the mortgagee intended to form part of his security." In this case the evidence is that the mortgagor himself verbally mentioned this 1 acre when the mortgage deed was being drawn up and that, as a matter of fact, it is a mistake for 548 which admittedly belongs to the family of the defendants No. 1 and 2 in 25 of 1910. The cases on this subject show that in order to nullify a registration on this ground the parties must have colluded. If the cases support this view, as I shall show presently, it must be said that there is no evidence whatever to show that the mortgagee knew that the mortgagor possessed no such land as No 458. *Pahlad Lal* v. *Laraiti* (10) lays down, following the Privy Council case in *Harendra Lal Roy Chowdhury* v. *Hari Dasi Debi* (9). "It is really a question of fact....whether.... the parties have intentionally by a mutual collusive arrangement inserted in the deed property which either does not in fact exist or which, while in existence is not intended by either of the parties to the suit to be a part of the security." A Bench of the Patna High Court in *Ramdei* v. *Chanda Bali Bibi* (11) have come to a similar conclusion. If there is no collusion, the circumstances are not sufficient to invalidate registration. In a recent case in *Biswanath Prasad* v. *Chanda Narayan Chowdhury* (12) the defendant asserted that the statement in the bond that it comprised a certain share in property was to the knowledge of both parties, a mere fiction introduced for the purpose of getting registration in the Muzaffarpore District. There it was held that "none of the parties ever intended that the share should vest in Udit or pass by the mortgage from him to the mortgagee. This case differs *toto cælo* from the case suggested in argument of a mere failure to make a good title to property dealt with by the instrument, and which both parties had intended should form part of the security." It appears to me that in the absence of evidence of participation by the mortgagee either as regards the insertion of the item in the deed or of intention that the 1 acre should not form part of the security, this point must be decided against the appellant. It was contended that the ground of mistake was not open to the defendant here as the only plea raised by the pleadings was with regard to title. It does not matter whether No. 458 was in fact a mistake for No. 548; since, as pointed out above, unless it can be proved that the mortgagee was a party to the fraud (putting it at the highest) it cannot affect the validity of the registration. It is, therefore, clear that with regard to registration no valid defence was open to the Court guardian which he could have set up in favour of the minor.

(*b*) It was faintly argued that there was no jurisdiction in the Sub-Court to pass the decree or order for sale, as Exhibit IX was not validly registered, and that the Court that had territorial jurisdiction over the Gundapalli estate was the Ellore Sub-Court and not the Godavari District Court. This can be shortly disposed of by reference to section 21 of the Civil Procedure Code which shows that it is too late to take this objection in second appeal.

Point 3:—When the appeal first came before the District Judge, Mr. Fernandez, that learned Judge remitted certain issues to the lower Court for findings and "such other issues as the Court may deem it necessary to frame after hearing the parties again." We are only concerned with the first which was settled before the vacation *viz.*, "Whether the 6th defendant is a stranger *bona fide* purchaser for value of the Gundapalli estate in execution of the decree in O. S. No 25 of 1910 on the file of this Court and such purchase of his is valid against the plaintiff in spite of any defects of the kind alleged attaching to the suit and execution proceedings which culminated in that purchase." The vacation then supervened and when the appeal

(10) 48 Ind. Cas. 200; 41 A. 221; 16 A. L. J. 87.
(11) 44 Ind. Cas. 399; 4 P. L. W. 237.
(12) 63 Ind. Cas. 770; 48 C. 509; 48 I. A. 127 (P. C).

came on for hearing again after the re-opening of the Court this issue was modified after hearing Counsel on both sides as follows:—"In spite of any defects of the kind alleged in the plaint as attaching to the suit in which that decree was passed." There is thus a distinct omission in the new issue as finally settled to be remitted to the lower Court of *any defects attaching in execution proceedings*. The appellant wishes us to revise that amended issue and restore the issue as originally framed as he desires to be heard to say that it was only in execution proceedings when Exhibit XX was produced (*i.e.*, the sale certificate under O. XXI, r. 94, Civil Procedure Code), that he learnt that he was described therein as being still a minor and still represented by the Court guardian. The Sub-Court on the amended issue went into the various grounds which were alleged against the *bona fides* of the purchase of the 6th defendant and found that the 6th defendant was a stranger purchaser for value but that he was not a *bona fide* purchaser, in that he was either aware or (should be?) presumed to have been aware that the plaintiff was a major at the auction, though not by reason of his knowledge of defects in the decree itself. As the learned Judge, Mr. Thiagaraja Aiyar, justly observes "the lower Court was wrong in having gone into this question as the lower Court after hearing both sides clearly intended to limit the enquiry to the defects of the kind alleged in the plaint and not to extend it to an irregualrity in the execution proceedings of which there is absolutely no allegation in the plaint." I entirely agree with this view. Mr. V. S. Narasimhachari, who argued this part of the appeal, frankly admitted that what he was asking for was really an amendment of the plaint at this stage. In this view it is not necessary and in fact it is impossible to come to any conclusion as to whether the plaintiff who became a major in 1913, the sale being in 1915, was not actually aware of what was going on. The matter was carefully gone into by Mr. Fernandez, and the question of defects in execution proceedings was expressly eliminated by him after hearing both sides Speaking for myself I am entirely opposed to re open the question in second appeal by allowing the appellant to amend the plaint in the suit o 1916. I would, therefore, find the third point also against the appellant.

I have assumed throughout, as stated above, that the Suit No. 21 of 1910 is governed by the same considerations as 25 of 1910. As Mr. A. Krishnaswami Aiyar for the 5th respondent (4th defendant) points out with regard to the mortgage involved in the former suit the question of the invalidity of the registration does not arise, so that no defence was available as to this. He contends that according to the plaint only immoral debts incurred by the 1st defendant are pleaded and this has gone. This is not perfectly clear although I am disposed to think that the learned Vakil's view is right. But if in 21 of 1910 the question of representation is involved, then in my view it stands exactly in the same position as the question dealt with above with regard to 25 of 1910.

In my view the second appeal fails and must be dismissed with costs two sets (5th respondent one set and 7th and 10th respondents one set).

On the point of partition of the other properties not subject to these alienations which was raised by Mr. Ananthakrishna Iyer alone, I agree with the order proposed by my learned brother.

Hughes, J.—The suit was for partition and incidently for declaration of invalidity of the decrees in O S Nos. 25 of 1910, 24 of 1910, and 21 of 1910, on the file of the District Court of Godavari. In this appeal we are not concerned with the decree in O. S. No. 24 of 1910.

In the plaint, it is not alleged that plaintiff was not properly represented in O. S. No. 21 of 1910 and it has been suggested on behalf of the respondents that the reason is that the defence as to defective registration was not available in that suit. However, that may be, I am satisfied that the plaintiff was properly represented in both the suits. The contention is that the Court guardian was appointed by reason of a false affidavit, and further that there was gross negligence on his part because he did not in O. S. No. 25 of 1910 set up the

defence that the mortgage deed was invalid on account o defective registration. I do not think it can be said that there was a false affidavit. It was stated therein "I believe there are no other principal guardian for the said minor defendant." It is not clearly what exactly is meant by "principal guardians" but very likely it means nothing more than "fit and proper guardians." The minor was living at the time with his uncle and there was also his mother. But the mother and uncle made no attempt to intervene at any time on the minor's behalf and never showed any interest. There is no allegation of collusion between the plaintiff and the Court guardian. The facts o the case are similar to those in *Maruthamalai Gownden* v. *Palani Gownden* (6), where the propriety of the appointment of the Court officer as guardian *ad-litem* was upheld. The case in *Puppooti* v. *Vayisravanath Manakkal Raman Somayajipad* (1) (relied on by the appellant) was a case in which there was a deliberate misstatement of fact in the affidavit.

The plaintiff, therefore, was properly represented in both suits, O. S. No. 25 o 1910 and 21 of 1910. With regard to the suit O. S. No. 25 o 1910, it has to be considered whether there was a valid defence for the minor and the guardian was, therefore, guilty of gross negligence in not raising it. My learned brother has dealt with this point in full and I agree with him. The finding o the District Judge is that there was no collu ion between the mortgagee and the mortgagors and there was no intention on the part of the mortgagee to include a land not belonging to the mortgagors. This being so, the registration is not vitiated. This defence was not open to the minor and there was no negligence on the part o the Court guardian.

The decrees in question are binding on the plaintiff. It is, however, contended that the plaintiff became a major while execution proceedings were in progress but w s still treated as a minor, and, therefore, the purchase by 6th defendant is invalid. This is a contention not raised in the pl int and cannot be entertained now. I should mention that this point was only raised by way of answer to the 6th defendant's contention that he was any how a *bona fide* purchaser. That question does not arise in view of our finding that the decrees are not liable to be set aside.

I agree that so far as the main contentions of the appeal are concerned the appeal must be dismissed with costs. It is, however, argued that in any event a decree for partition must be passed with regard to properties that have not been alienated. With regard to this I find that the Subordinate Judge in paragraph 30 of his judgment states "no decree can be passed as the plaint has not been properly stamped, and there is no evidence to show what the stamp required is. It is not known which properties have been sold and what properties have not been sold. The plaintiff cannot get the decree. The suit is dismissed." In the grounds of appeal to the District Court this point was taken but I cannot find that the District Judge has anywhere dealt with it except that in the original judgment framing issues and calling for findings it is stated in paragraph 3 that the contesting respondents did not press the objection that the Court-fee paid was insufficient; and finally in paragraph 28 of the judgment of Mr. Thiagaraja Aiyar, it is stated that "no other question was urged at the hearing of the appeal." It is probable that he meant that no other question relating to the substantial contested matters was urged. In fact the prayer in the plaint for partition seems to have been lost sight of by everybody. There appears to be no contest so far as the partition of properties not alienated is concerned; and no objection has been raised before us. I would, therefore, send back the suit to the original Court with instructions to take it on the file again and after the enquiry to decide the claim in paragraph 21 clause 3 of the plaint so far as it relates to the partition of properties other than those that have been alienated. The appeal as against the contesting respondents must be dismissed with costs. I agree with the order of my learned brother as to costs.

V. N. V.

S. D. *Appeal dismissed.*

SHAMS-UD-DIN v. DEVI DAS.

LAHORE HIGH COURT.

CIVIL REVISION NO. 509 OF 1922.

February 14, 1923.

Present:—Mr. Justice Moti Sagar.

SHAMS-UD-DIN—PLAINTIFF—PETITIONER

versus

DEVI DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of plaint, when to be allowed.

No hard and fast rule can be laid down that an amendment of a plaint must, as a general rule, be allowed wherever a refusal to amend would be likely to result in hardship to the plaintiff. The test to be applied is whether the amendment would or would not occasion injury to the opposite party such as cannot be recouped by costs, and leave to amend should generally be refused if it would.

The mere fact that the suit is on behalf of a religious institution is no ground for departing from the general rule.

Civil revision against an order of the Sub-Judge, First Class, Lahore, dated 15th June 1922.

Mr. *Barkat Ali*, for the Petitioner.

Mr. *Jagan Nath*, for the Respondents.

JUDGMENT.—This was a suit for the issue of a mandatory injunction and for the possession of some land which the plaintiff alleged had been encroached upon by the defendants and included by them in their house which they had constructed some twelve years ago. The suit was on behalf of a mosque and instituted in May 1920 shortly before the period of limitation was going to expire. After the settlement of the issues, the plaintiff made an application to the Court below for leave to amend his plaint in certain respects. Several amendments were applied for out of which only one was allowed and the others refused.

The plaintiff has now come up on revision to this Court and it has been strenuously urged by Mr. Barkat Ali, on his behalf th t the learned Subordinate Judge has not exercised his discretion in a proper manner and that he has committed a material irregularity in disallowing the amendments prayed for. A great deal has been made of the point that the suit is on behalf of a religious institution, and that the amendments if disallowed would in a l probability result in a dism ssal of the suit, as no suit for possession lies, and that a new suit for the reliefs claimable by the plaintiff would now be barred by limitation. On behalf of the respondents a preliminary objection is raised that there is no question of jurisdiction involved in this case, and that an improper exercise of discretion by the Court below is not a good ground for revision. I have been referred to a large number of authorities by Mr. Barkat Ali in which orders have been set aside by the High Courts on revision where the lower Courts have acted with material irregularity, but after carefully reading those authorities I have come to the conclusion that each case must be decided on its own merits, and that no hard and fast rule can be laid down that an amendment must, as a general rule, be allowed wherever a refusal to amend would be likely to result in hardship to the plaintiff. The test, in my opinion, to be applied is whether the amendment would or would not occasion injury to the opposite party such as cannot be recouped by costs, and leave to amend should generally be refused if it would. At page 417 of Mulla's Civil Procedure Code the rule on this point has been thus laid down: "Leave to amend will be refused where the amendment would cause injustice to the opposite party such as cannot be compensated for by imposing terms as to costs or otherwise." This rule is based on a large number of English authorities which, in my opinion, lay down a very wholesome principle of law, and no satisfactory reason has been shown why it should not be followed in the present case. The mere fact that the suit is on behalf of a religious institution is no ground at all for departing from the general rule, and as to the other ground alleged that if the amendments are disallowed the suit will be dismissed and a new suit barred, the learned Subordinate Judge has fully gone into the matter and, after a careful consideration of all the authorities cited before him by the learned Vakil, for the plaintiff, has come to the conclusion that the amendments, if allowed, will prejudice a right that has already accrued to the defendants on the pleadings as they now stand, and that it would be most unjust to deprive them

of this valuable right by acceding to the plaintiff's prayer. I entirely concur with this view and hold that the amendments were rightly disallowed.

As for the prayer that the plaintiff should be allowed to add an alternative relief to his plaint that he is entitled to a right of way through the defendant's property even if his suit for possession fails, the learned Judge has held that it cannot be allowed inasmuch as the prayer is too vague and no grounds have been alleged on which this right is claimed. In my opinion the learned Subordinate Judge was right in the conclusions at which he has arrived and I do not see any grounds for interference on the merits even if a revision on the ground of improper exercise of discretion is maintainable.

I dismiss the petition with costs.

Petition dismissed.

Z. K.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 824 OF 1917.

November 8, 1922.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

MAHADEO RAMCHANDRA PATKAR AND ANOTHER—APPELLANTS

versus

RAGHOJI JIJVAJI RAJE SHIRKE AND OTHERS—RESPONDENRS.

Evidence Act (I of 1872), s. 90—Document thirty years old—Presumption—Execution—Conduct of parties.

Where a document which i more than thirty years old is produced apparently from proper custody, the Court may presume its due execution, but it is open to the Court to hold from the circumstances of the case that the document was not acted upon.

Second appeal against the decision of the Assistant Judge, Ratnagiri, in Appeal No. 114 of 1912.

Mr. *K. N. Koyajl*, for the Appellants.

Mr. *P. B. Shingne*, for the Respondents.

JUDGMENT.—The question in this appeal is whether the lower Court was wrong in holding that the permanent lease granted to defendart No. 38 had not been proved by evidence. Both Courts have come to the conclusion that the lease has not been proved. Some of the grounds on which that conclusion was arrived at may not be altogether justified, but we are asked in second appeal to reverse the decision of two Courts with regard to an alleged fact which undoubtedly is surrounded with doubt and suspicion. Assuming that this document, which is produced apparently from proper custody, was executed, still there are circumstances which show that it was not acted upon as one would have expected a document of that nature to be acted upon. The property is included in a mortgage of 1868 from which one might conclude that this particular *thikan* was in the possession of the mortgagors instead of being in possession of defendant No. 38, who alleges that he was a permanent lessee. Then the Judge says that that Exhibit only shows possession of defendant 38 as mortgagee. Various documents appeared to the Courts below to be entirely opposed to defendant No. 38's contention. Nothing that has been urged before us on second appeal would be sufficient to upset the conclusion of the Courts below on a question which is mostly a question of fact, and only very incidentally a question of law. If as a matter of fact the 38th defendant has been a permanent lessee, he would, in the ordinary course, have been in management, cultivating the suit land and it would have been an easy matter for him to prove possession as tenant. That possession as tenant is the very thing which he failed to prove in the lower Courts. This appeal must be dismissed with costs.

Appeal dismissed.

Z. K.

BAJ SINGH v. PARTAP SINGH.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 524 OF 1920.

February 17, 1923.

Present:—Mr. Justice Broadway and Mr. Justice Moti Sagar.

BAJ SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

PARTAP SINGH—PLAINTIFF—RESPONDENT.

Custom—Adoption, proof of—Execution of deed, coupled with long course of treatment—Appeal, second—Finding of fact, conclusions drawn from, whether can be challenged—Registration Act (XVI of 1908), s. 17 (1) (b)—Deed declaring appointment of heir, whether compulsorily registrable.

According to the Customary Law of the Punjab a sonless proprietor has the power to appoint one of his kinsmen to succeed him as his heir, but the appointment, in order to be valid, must be made in some unequivocal and customary manner and the execution of a deed coupled with a long course of treatment is one of the modes of manifesting such an appointment. [p. 473, col. 2; p. 474, col. 1.]

Budh Singh v. *Mula Singh*, 40 P. R. 1905; 18 P. L. R. 1905, ; 46 P. W. R 1905, *Thamman Singh* v. *Jit Singh*, 9 P. R. 1893, *Jeram* v. *Manphul*, 4 P. R. 1892, *Parman* v. *Gian Singh*, 94 P. R. 1893, *Girdhari Lal* v. *Dala Mal*, 3 P. R. 1901; P. L. R. 1900, p. 297, followed.

Although in second appeal findings of fact cannot be impugned, it is nevertheless open to a party to challenge the correctness of the conclusions drawn from such findings. [p. 474, col. 1.]

A document declaring the appointment of an heir under the Customary Law of the Punjab does not fall within purview of section 17 (1) (*b*) of the Registration Act and does not, therefore, require registration. [p. 474, cols. 1 & 2.]

Second appeal from a decree of the District Judge, Gurdaspur, dated the 9th January 1920.

Messrs. *B. D. Qureshi* and *B. A. Cooper*, for the Appellants.

Mr. *Shaukat Ram*, for the Respondent.

JUDGMENT.—The facts of the case out of which this second appeal has arisen are very simple and are shortly these. The plaintiff Partap Singh and Baj Singh, defendant No. 1, are real brothers. Buta Singh, defendant No. 2, is a *pichhlag* of Baj Singh, but has been brought up by him as his son since his very infancy. Shortly before the institution of the suit Baj Singh made a gift of the land in dispute in favour of Buta Singh and had a mutation in respect thereof sanctioned on the 9th of December 1918. The plaintiff thereupon brought this suit for a declaration that the said gift was invalid and that it would not affect his reversionary interests after the death of Baj Singh. The suit was resisted on the ground that Buta Singh was the appointed heir of Baj Singh and that the gift in his favour was merely an act of acceleration on the part of the donor to which there could be no legal objection on behalf of the plaintiff. It was further contended that Baj Singh had executed a document D-1 in favour of Buta Singh on the 15th of February 1911, declaring him to be his heir that the plaintiff Partap Singh was also a party to this document and that in these circumstances he was estopped from maintaining the suit. The Trial Court found in favour of the defendants on all these points and dismissed the plaintiff's suit.

On appeal, however, the learned District Judge, differing from the findings of the Trial Court, held that Buta Singh's appointment as an heir had not been established and that the document relied on was not admissible in evidence for want of registration.

Against this decision the defendant has lodged a second appeal to this Court through Mr. Qureshi, and it has been contended on his behalf that the findings of the learned District Judge on both the points are erroneous and that the decree of the Trial Court should be restored. This contetion, in our opinion, is well-fonded and must prevail. It is not denied that, according to the Customary Law of this Province, a sonless proprietor has the power to appoint one of his kinsmen to succeed him as his heir. It is admitted that Buta Singh is not only a *pichhlag* of Baj Singh but is also a collateral related to him in the fourth or the fifth degree. No special custom prescribing a particular mode of making such an appointment has been set up by the plaintiff in this case, and the only question for our decision, therefore, is whether a written declaration by Baj Singh such as contained in the document D. 1, dated the 15th of February 1911, coupled with a

long course of treatment evidenceing an intention on his part to appoint Buta Singh as his heir, is sufficient to support the appointment. In our opinion there can be no doubt that it is. There is ample authority for holding that the appointment in order to be valid must be made in some unequivocal and customary manner and the execution of a deed coupled with a long course of treatment has always been recognised as one of the modes of manifesting such an appointment. *Thamman Singh* v. *Jit Singh* (1), *Jeram* v. *Manphul* (2), *Parman* v. *Gian Singh* (3), *Girdhari Lal* v. *Dala Mal* (4) and *Budh Singh* v. *Mula Singh* (5). Bollowing the principle laid down by these authorities, we hold that the execution of the deed coupled with Baj Singh's declaration in Court and his continuous treatment of Buta Singh as a son were quite sufficient to show that the latter was appointed an heir by the former. It has been contended that the finding that Buta Singh was not appointed an heir is a finding of fact and that it cannot be questioned in second appeal. We are unable to agree with this contention. Although in second appeal findings of fact cannot be impugned, it is nevertheless open to a party to challenge the correctness of the conclusions drawn from such findings. In the present case we are of opinion that the learned District Judge has drawn entirely wrong conclusions from the proved facts on the record and that, therfeore, the findings arrived at by him cannot be bindig upon this Court.

On the question of the admissibility of the document D-1 in evidence also we are unable to agree with the opinion of the Court below. The document in question does not in any way purport or operate to create, declare or assign in present or in future, any right, title or interest to or in any immoveable property of the value of more than Rs. 100 but merely declares Buta Singh to be an heir of Baj Singh and does not, tnerefore, fall within the purview of section 17 (1) (*b*) of the Indian Registration Act. As to the latter portion of the document also there can be no doubt that it does not in any way, extinguish plaintiff's rights in any immoveable property within the meaning of this section. It only recites an agreement on his part to the effect that he will not object to Buta Singh succeeding to the property of Baj Singh. The document, therefore, is clearly admissible in evidence and can be used for the purpose of showing Baj Singh's intentions in respect of Buta Singh's appointment as his heir.

We accordingly accept the appeal and setting aside the order of the Court below, dismiss the plaintiff's suit with costs throughout.

z. K.

Appeal accepted.

(1) 9 P. R. 1893.
(2) 4 P. R. 1892.
(3) 94 P. R. 1893.
(4) 3 P. R. 1901; P. L. R. 1900, p. 297.
(5) 40 P. R. 1905; 18 P. L. R. 1905; 46 P. W. R. 1905.

BOMBAY HIGH COURT.

CIVIL REFERENCE NO. 22 OF 1922.

January 30, 1923.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

HUSENUDDIN NURDDIN—PLAINTIFF

versus

DULAKSHIDAS KSSHAVLAL—DEFENDANT.

Limitation Act (IX of 1908), Sch. I, Art. 177—Limitation and Code of Civil Procedure (Amendment) Act (XXVI of 1920), s. 2—Appeal—Death of respondent—Substitution, application for—Limitation.

The period of limitation provided in Art. 177 of Schedule I to the Limitation Act for making an application for the substitution of the legal representatives of a deceased defendant or respondent has by virtue of section 2 of the Limitation and Code of Civil Procedure (Amendment) Act, 1920, been reduced from six months to ninety days.

Civil reference made by the Sub-Judge of Broach on the point arising out of Suit No. 131 of 1921.

Mr. *M. B. Dave*, for the Plaintiff.

Mr. *R. J. Thakore*, for the Defendant.

JUDGMENT.—In Act IX of 1908, the period of limitation against Art. 175 was six months. Against Arts. 176, 178 and 179 in the column of "period of limitation" was the word "Ditto" which meant the period of limitation was the same as the last period of limitation mentioned above in the same column. By Act XXVI of 1920, in Art. 176 the period of limitation was reduced to 90 days. No amendment of Art. 177 was made and the words "Ditto" then meant that the period of limitation was the same as that appearing next above it in the column provided for the period of limitation "namely" 90 days. In Art. 178 the word "Ditto" became changed to "six months" because if the word "Ditto" had remained the period of limitation would necessarily be altered to 90 days. If it was intended that no alteration should take effect in the period of limitation for Art. 177 then that Article would have been amended in the same way as Art. 178.

The question proposed is whether the period of limitation under Art. 177 is now 90 days or still continues to be six months and the answer to that is that the period of limitation is now 90 days.

Z. K. *Order accordingly.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1253 OF 1920.

March 9, 1923.

Present:—Mr. Justice Scott-Smith and Mr. Justice Fforde.

Musammat BASANTI—DEFENDANT—APPELLANT

versus

CHANDA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation — Necessity — Antecedent debts—Waiver of right to object—Presumption—Waiver, whether binding on son—Appeal, second—Finding of fact—Misreading of Trial Court's judgment.

It is unnecessary for an alienee from a male proprietor paying off debts actually due by the alienor to third persons to enquire into the nature of those debts. [p. 476, col. 1.]

Devi Ditta v. *Saudagar Singh*, 65 P. R. 1900; P. L. R. 1900, p. 322, followed.

The fact that a reversioner of the alienor takes over the alienation on payment of full consideration to the original alienee amounts to a waiver of his own claim to sue to challenge the alienation and is presumptive evidence that the alienation was not bad for want of necessity. [p. 476, col. 1.]

Labh Singh v. *Gopi*, 15 P. R. 1903; 55 P. L. R. 1903, *Lakha Singh* v. *Jota Singh*, 35 P. R. 1907; 14 P. L. R. 1908; 154 P. W. R. 1907, referred to.

But the waiver does not bind the son of the reversioner. [p. 476, col. 1.]

A finding of fact based on a misreading of the First Court's judgment and without taking into consideration a point specially raised in the grounds of appeal is not binding on the High Court in second appeal. [p. 476, col. 1.]

Second appeal from a decree of the District Judge, Ludhiana, dated the 25th February 1920.

Mr. *Gullu Ram*, for the Appellant.

Mr. *Des Raj Sawhney*, for the Respondents.

JUDGMENT.—In the suit out of which the present second appeal arises, Chanda Singh, plaintiff sued for a declaration that the sale effected by his uncle Kaula Singh of ancestral land for a consideration of Rs. 800 to Ram Singh, dated the 6th July 1910 should not affect his reversionary rights after the death of the alienor. At the time of the sale Daula Singh, the father of the plaintiff, was absent on service in the army. On his return he is said to have objected to the sale and was allowed to buy back the land for the full price from Ram Singh and from one Harlal Singh to whom Ram Singh had sold a portion of the land. The consideration for the sale was made up as follows:—

(1) Rs. 300 due to Salamat Rai, (2) Rs. 175 due to Buta Mal, and (3) Rs. 325 paid in cash before the Sub-Registrar.

The First Court found that consideration was fully proved and that the sums of Rs. 300 and 175 were actually paid to the antecedent creditors and that receipts were taken. It went further, however, and said that the accounts of Salamat Rai and Buta Mal had not been produced and that it was impossible to say why those loans had been taken and when and for what purpose. These debts, however, were due to third persons and it was unnecessary for the subsequent alienee to enquire

into the nature of those debts [see *Devi Ditta* v. *Saudagar Singh* (1)]. There is no suggestion that Ram Singh acted dishonestly in paying them off. The learned District Judge towards the end of his judgment says "I agree with the lower Court in holding that the existence of the previous debts due to Buta Mal and Salamat Rai has not been proved." This, however, it did not hold. On the contrary it held that those debts had been proved. Moreover, the District Judge has not taken into consideration the fact that Daula Singh by taking over the sale and paying the full price waived his own claim to sue. Such action on the part of Daula Singh is presumptive evidence that the sale was not bad for want of necessity [see in this connection *Labh Singh* v. *Gopi* (2) and *Lakha Singh* v. *Jota Singh* (3) quoted in the admitting order]. We are, therefore, unable to agree with Counsel for the respondent that the finding of the District Judge that the sale was not for necessity is a finding of fact which cannot be contested in second appeal. It is based on a misreading of the First Court's judgment; and does not take into consideration a point specially raised in the grounds of appeal in his Court. At the same time we are unable to agree with Counsel for the appellant that the waiver of Daula Singh binds his son, the plaintiff. But the existence of the antecedent debts due to third parties constituted valid necessity for the sale and to the extent of those debts at least the sale must be upheld. The amount of Rs. 325 which was taken before the Sub-Registrar is said to have been spent by the alienor on making a trip to America. This was not a purpose justifying an alienation of ancestral land under the Customary Law. We, therefore, accept the appeal, and, modifying the order of the lower Courts, grant the plaintiff a decree that the sale should not affect his reversionary rights after the death of the alienor except to the extent of Rs. 475, and under all the circumstances of the case, we direct the parties to bear their own costs throghout.

Z. K.

Decree modified.

(1) 65. P. R. 1900; P. L. R. 1900, p. 322.
(2) 15 P. R. 1903; 55 P. L. R. 1903.
(3) 35 P. R. 1907; 14 P. L. R. 1908; 154 P. W. R. 1907.

BOMBAY HIGH COURT.

CIVIL APPLICATION No. 136 OF 1922.

March 9, 1923.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

CHANBASAPPA MALLAPPA WARAD—APPLICANT

versus

MALKAPPA LINGAPPA SURPUR—DEFENDENT—OPPONENT.

Civil Proccdure Code (Act V of 1908), O. XXX, r. 1—Limitation Act (IX of 1908), s. 6—Suit brought in name of shop—Minority of plaintiff—Extension of limitation.

Where a suit is filed on behalf of a minor plaintiff describing him as the owner of a shop and claiming extension of limitation on the ground of the plaintiff's minority, the suit is not liable to be dismissed on the ground that it is brought by the shop and not by the plaintiff personally.

Civil application for reversal of the decree passed by the First Class Sub-Judge, Bijapur, in S. C. S. No. 827 of 1921.

Mr. *N. V. Gokhale*, for the Applicant.

Mr. *S. B. Jathar*, for the Opponent.

JUDGMENT.—The plaintiff brought this suit through his guardians appointed by the District Court of Sholapur. He was described in the title of the plaint as "owner of the shop Chanbasappa Basappa Warad." It was stated in paragraph 4 of the plaint, "As the plaintiff, the owner of the shop is a minor, this suit is not barred by limitation." In the written statement the defendant said:—"Plaintiff is a minor and trustees have been appointed for him by the District Court of Sholapur. Therefore the *Vahiwatdar* of plaintiff's shop cannot bring this suit." The defence is unintelligible. The following issues were raised:—(1) Whether the *khata* is proved? and (2) whether the suit is in time? The learned Judge found on the second issue

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in the negative and said that all the debit items were more than three years old at the date of the suit. Then he said that the suit was brought in the name of the plaintiff's shop and not its owner personaly and so the suit was dismissed. That order of dismissal is also unintelligible. As the plaintiff is clearly named in the plaint he is entitled to have the suit decided on the merits. Whether there was any defect in the verification of the plaint is another matter on which there was no issue raised and on which we have not got a decison of the learned Judge. The suit was dismissed because the plaintiff was the "shop" and not the minor. That decision, in our opinion, is wrong and, therefore, the suit will be remanded for trial on the merits. Defendant should pay costs of the Rule.

Costs in the lower Court to be costs in the cause.

The same order will govern Civil Extraordinary Application No. 139 of 1922.

Appeal allowed; Case remanded.

Z. K.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL NO. 62 OF 1922.

July 20, 1922.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Abdul Qadir.

GOPAL DAS—JUDGMENT-DEBTOR—APPELLANT

versus

Musammat ZAINALA BIBI—DECREE-HOLDER—RESPONDENT.

Letters Patent (Lah), cl. 10—Judgment refusing to entertain appeal—Respondent, whether can appeal.

A person cannot be said to be aggrieved by a judgment dismissing an appeal preferred against him and is not, therefore, entitled to prefer an appeal against the judgment under the Letters Patent.

SHIDAPPA *v.* SANTAWA.

Letters Patent Appeal from an order, dated the 24th January 1922 (passed in Civil Revision No. 78 of 1922, formerly Civil Appeal No. 543 of 1921), reversing that of the District Judge, dated the 17th December 1920.

Messrs. *Badri Das* and *Amar Nath Chona*, for the Appellant.

Mr. *Niaz Muhammad*, for the Respondent.

JUDGMENT.—It is quite clear that the order disposing of the revision is not appealable under the Letters Patent. It is true that the judgment in appeal is appealable, but that judgment only decided that the appeal preferred by the respondent was not competent and consequently no appeal was entertained. The present appellant is, however, not aggrieved by the judgment dismissing the appeal against him and he is not entitled to prefer an appeal against it.

We accordingly dismiss the appeal with costs.

Appeal dismissed.

Z. K.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 173 OF 1922.

January 12, 1923.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

SHIDAPPA—DEFENDANT—APPELLANT

versus

SANTAWA *kom* BHOJAPPA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Construction of deed—Adoption—Recital that adopted son shall be owner of property, effect of—Hindu Law—Adoption—Execution of deed, whether sufficient.

In 1912 one *B* executed what purported to be an adoption deed which recited that *B* had adopted the defendant in 1898. The deed went on to say that the defendant was the full owner of *B*'s moveable and immoveable property. It was found that as a matter of fact defendant had never been adopted by *B*;

Held, that the recital in the deed that defendant was the owner of *B*'s property merely expressed *B*'s idea of the result which followed from defendant's antecedent adoption and did

RADHAKISHAN v. KHUSHI RAM.

not operate to convey *B*'s property to the defendant.

Even in communities where an orphan adoption is recognised as valid, such an adoption cannot be effected by the mere execution of a deed.

Second appeal against the decision of the Assistant Judge, Belgaun, in Appeal No. 222 of 1920.

Mr. *A. G. Desai*, for the Appellant.

Mr. *G. N. Thakore* (with him Mr. *H. B. Gumaste*), for Respondent No. 1.

JUDGMENT.—Plaintiff No. 1 is the widow and plaintiff No. 2 is the daughter of one Bhojappa who died in 1918. They sued to recover possession of the suit property on the death of Bhojappa, their claim being resisted by the seventh defendant who set up an adoption alleged to have taken place at the instance of Bhojappa in 1898. Both the lower Courts have found that the adoption alleged by the first defendant did not, as a matter of fact, take place. But a document was executed by Bhojappa in 1912 which purports to be an adoption deed, and refers to the adoption of the first defendant when he was a minor in 1898. The defendant No. 1 has an alternative claim for a decree under the deed, relying upon the following words "you alone are the full owner of my moveable and immoveable property." I think if the first defendant wishes to rely upon the deed of 1912 as evidence of the transfer to him of all property of Bhojappa, then he must confine himself to the strict construction of the deed. It cannot be contended for a moment that Bhojappa in executing the deed, which was to evidence the adoption of 1898, intended to transfer thereby all his immoveable and moneable properties unless he used in the document words of conveyance or transfer. These words which are relied upon by the first defendant merely expres the result which followed on the adoption according to Bhojappa's idea, namely, that on his recognition of the first defendant as an adopted son, he would become under Hindu Law equally entitled to Bhojappa's property as Bhojappa himself was. I do not think, therefore, that there is anything in the point on which I admitted the appeal. When the appeal came up for admission, the 1st defendant suggested that, as a matter of fact, the adoption had taken place in 1912 by virtue of the execution of the adoption deed by Bhojappa because the first defendant was an orphan at that time. So there could be no giving or taking and, therefore, on the execution of the deed he obtained the status of the adopted son. No doubt if the first defendant could establish that events had occurred which could constitute an adoption, apart from any question of the competency of the person alleged to be adopted then under the decision in *Chimabai Malgauda Patil* v. *Mallapa Piyappa* (1) the widow could not dispute such an adoption made by her husband Bhojappa. But the first defendant has failed to prove that anything has occurred which could be considered in Hindu Law as an adoption. Mere execution of a deed does not effect an adoption, and it has yet to be found in a Court of Law that in communities where an orphan adoption is recognised as valid, such an adoption could be made up by a deed alone. But it has not been even proved in this case that in the community to which the parties belong, orphan adoption is recognised. Therefore, the whole of the first defendant's case on this ground falls to pieces. The appeal, therefore, must be dismissed with costs.

Appeal dismissed.

Z. K

(1) 67 Ind. Cas. 654; (1922) A. I. R. (B.) 397; 46 B. 946; 24 Bom. L. R. 489.

LAHORE HIGH COURT.

CIVIL REVISION NO. 550 OF 1922.

March 13, 1923.

Present:—Mr. Justice Abdul Raoof.

RADHAKISHAN—PETITIONER

versus

KHUSHI RAM—RESPONDENT.

Guardians and Wards Act (VIII of 1890), ss. 34, 35, 45—Balance due from guardian—Order attaching property of guardian and security, legality of—District Judge, power of.

PANDURANG WASUDEO CHATE *v.* BASAPPA *bin* SHIDDAPPA GANIGER.

A District Judge has no power under section 34 (*d*) of the Guardians and Wards Act, to attach the property of a guardian or of his security for the purpose of realising the balance due from the guardian to the minor's estate. Section 35 of the Act provides the remedy for the realisation of the amount due from the guardian and ample powers are also given to the District Judge under section 45 of the Act.

Civil revision of an order of the Senior Sub-Judge, Ludhiana, dated the 19th June 1922.

Mr. *Kanwar Narain*, for the Petitioner.

JUDGMENT.—The Court below apparently made an order under section 34 (*d*) of the Guardians and Wards Act directing the guardian to pay into Court the balance due from him The guardian having failed to carry out the order, the Court made an order directing the attachment of the property of the guardian. By a separate order, dated the 22nd of May 1922, the Court had directed the attachment of the property of Raja Ram surety.

Both these orders are challenged by two petitions for revision before me, and it is contended that under the Guardians and Wards Act, the learned Judge of the Court below had no power to attach the property of the gurdian or his surety for the purpose of realising the balance. Section 35 of the Act provides the remedy for the realisation of the amount due from the guardian. Ample powers are also given under section 45 of the Act to the District Judge.

I accordingly accept both the petitions of revision and, setting aside the order of the Court below, send the case back to it to be dealt with according to law.

Petition accepted.

Z. K.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 731 OF 1921.

January 25, 1923.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

PANDURANG WASUDEO CHATE—PLAINTIFF—APPELLANT

versus

BASAPPA *bin* SHIDDAPPA GANIGER AND ANOTHER—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 90—Execution of decree—Delivery of possession—Receipt forty years' old—Presumption—Limitation Act (IX of 1908), Sch. I, Art. 141, applicability of—Adverse possession—Burden of proof.

Although it is possible that when a receipt evidencing delivery of possession is passed to an auction-purchaser in execution of a decree, physical possession of the land may not have been given to the purchaser, but when such a receipt is produced in evidence after the lapse of more than forty years the Court should presume, in the absence of evidence to the contrary, that possession was delivered to the purchaser. [p. 480, col. 1.]

Article 141 of Schedule I to the Limitation Act is inapplicable to a case where time had commenced to run against the last full owner, as in such a case, it continues to run and is not suspended or in any way affected by the mere circumstance that the owner is succeeded by a female entitled to a woman's qualified estate; after the statutory period has run out, all persons claiming through the owner are barred. [p. 480, col. 1.]

Where, however, defendant's possession commenced while a female was in possession, a reversioner of the last full owner has twelve years from the death of the female to establish his right as heir to the last full owner. In such a case the burden lies on the defendant to prove that he has a better title than the plaintiff. [p. 480, col. 2.]

Second appeal against the decision of the District Judge, Bijapur, in Appeal No. 57 of 1919.

Mr. *G. N. Thakor* (with him Mr. *R. A. Jahagirdar*), for the Appellant.

Mr. *A. G. Desai*, for the Respondents.

JUDGMENT.—In this suit the Trial Court passed an order that the plaintiff should recover from the defendants possession of the plaint land and costs. The Appellate Court reversed that decision and dismissed the suit on grounds which we think were wrong. Tamaji was the purchaser at a Court sale in 1875. The *kabja* receipt, Exhibit 85, has been produced from which the Court was entitled to presume

that Tamaji had obtained possession through the Court. That was a document over forty years old and although it is possible that when *kabja* receipts are passed, physical possession of the land may not always be given to the purchaser, there is no reason why the Court should presume that no possession was given in this case. In our opinion the *kabja* receipt raises a presumption in Tamaji's favour; and as far as the evidence goes, it has not been proved that Tamaji lost possession before his death. Laxmibai is said to have sold the lands by an oral sale to Basappa, the original mortgagor. Laxmibai died in 1905, and plaintiff claimed as the next reversioner of Tamaji. Although it was alleged that there had been an oral sale by Laxmibai, which would not be binding on the next reversioner, it does not appear that any sale was proved.

The question then arises whether the defendants could establish a title against the reversioner who was suing as the next heir of Tamaji, alleging that Tamaji was in possession until the date of his death. It is clear that if some one got into possession against the widow only, time will not be running against the reversioner. Article 141 is inapplicable when time has once commenced to run against the last full owner, as in such a case, it continues to run and is not suspended or in any way affected by the mere circumstance that the owner is succeeded by a female entitled to a woman's qualified estate; after the statutory period has run out, all persons claiming through the owner are barred. (See Rustomji's Limitation Act, 2nd Edition, page 449, and the cases which he has cited under note (4). Article 141 in the Second Schedule of the Indian Limitation Act makes it clear that the reversioner has 12 years after the death of a Hindu or Muhammadan female to establish his right as heir to the last full owner.

The learned District Judge seems to us to have placed the onus on the wrong party. He says "This is an action in ejectment, and the plaintiff suing as the next reversioner to Tamaji, must show, affirmatively, that his predecessor was in possession within the period of limitation; that is to say, in this case, that Tamaji, at the time of his death, was in possession of the land in suit. This he has failed to prove, and the suit is clearly time-barred."

We think the learned Judge has erred in two ways. He has drawn an inference, which he was not entitled to draw, against the plaintiff from the *kabja* receipt, and he had thrown the onus on the plaintiff, who was suing on title, to prove that the defendants had not acquired a title by adverse possession. No doubt if the plaintiff alleged that he had been dispossessed, and was suing for possession, then he must show that his cause of action had arisen within 12 years of the suit. But if he is suing on title, then Art. 141 applies, and it lies upon the party in possession to prove that he has got a better title. The defendants could not prove any possession further back than 1880 after the death of Tamaji, the Court ought to have held that Tamaji was in possession up to the date of his death. Therefore, time did not begin to run against the reversioner and would not begin to run during the widow's life time, and he is entitled to bring a suit against any body who is found in possession of the property after the widow's death within 12 years. The appeal must, therefore, be allowed, and the decree of the Trial Court restored with costs throughout.

Appeal allowed.

Z. K.

MADRAS HIGH COURT.

CRIMINAL APPEAL NO. 1545 OF 1922.

October 5, 1923.

Present:—Mr. Justice Odgers and Mr. Justice Wallace.

In re M. P. NARAYANA MENON—PRISONER—APPELLANT.

Criminal Procedure Code (Act V of 1898), ss. 154, 162, 196, 257, 428, 537—Order of Government sanctioning prosecution—Form of order—Rejection of application for summoning witnesses as being immaterial—Failure to record reasons—Illegality—Irregularity—S. 428, scope of—Word "necessary," meaning of—Section if confined to prosecution evidence or absence of evidence on formal point—Re-trial or taking fresh evidence—Statement to Police Officer wrongly signed—Admissibility in evidence.

No special mode is laid down in the Criminal Procedure Code whereby under section 196 the order or sanction of Government to prosecute for certain offences is to be conveyed to the officer who puts the law in motion. It need not contain the charge of the offence. All that the Court has to see is, whether the complaint was made by the order or under the authority of Government. [p. 482, col. 2.]

Queen-Empress v. *Bal Gangadhar Tilak*, 22 B. 112 at pp. 122, 150; 11 Ind. Dec. (N. S.) 656, *In re Subramania Siva* [*Chidambaram Pillai* v. *Emperor*], 1 Ind. Cas. 22; 32 M. 3; 5 M. L. T. 1; 9 Cr. L. J. 108, considered.

Section 257 of the Criminal Procedure Code is neither imperative nor exhaustive. It is a sufficient compliance with sub-section (2) of section 257 if a Magistrate in rejecting an application for summoning the defence witnesses states the facts which lead him to the conclusion that the application was for the purposes detailed in the section, namely, vexation, delay or defeating the ends of justice, although the Magistrate has not expressly recorded his reasons for his refusal in the words of the section, and in any case such a failure does not amount to an illegality vitiating the trial but is merely an irregularity curable by section 537, Criminal Procedure Code. [p. 483, cols. 1 & 2.]

Wahid Ali Khan v. *Emperor*, 11 C. W. N. 789; 6 Cr. L. J. 1, *Narayana Mudaly* v. *Emperor*, 31 M. 131; 7 Cr. L. J. 425, *Emperor* v. *Purshottam Kara*, 26 B. 418; 4 Bom. L. R. 38, *In re Ayarvali Pakkar*, 74 Ind. Cas. 952; 45 M. L. J. 305; (1923) M. W. N. 758; 18 L. W. 899; 24 Cr. L. J. 840, *In re Vyasa Rao*, 9 Ind. Cas. 897; 21 M. L. J. 283; 12 Cr. L. J. 150; 10 M. L. T. 84; (1911) 1 M. W. N. 327 and *Emperor* v. *Nandbasappa Basappa*, 15 Ind. Cas. 795; 14 Bom. L. R. 360; 13 Cr. L. J. 523; 1 Bom. Cr. C. 123, considered.

The word "necessary" in section 428, Criminal Procedure Code, does not import that it should be impossible to pronounce judgment without additional evidence. [p. 484, col. 1.]

Section 428, Criminal Procedure Code, which enables an Appellate Court to call for additional evidence is not rendered inapplicable merely because it is not the Court but the accused that considers such evidence to be necessary. Neither is the section confined in its operation to cases of absence of evidence on some formal point such as a sanction, nor only to evidence for the prosecution. [p. 485, col. 1.]

Jeremiah v. *Vas*, 12 Ind. Cas. 961; 36 M. 457 at pp. 458, 461; (1911) 2 M. W. N. 576; 10 M. L. T. 506; 22 M. L. J. 73; 12 Cr. L. J. 585, *Varadajulu Naidu* v. *Emperor*, 51 Ind. Cas. 343; 42 M. 885 20 Cr. L. J. 455; 37 M. L. J. 81; (1919) M. W. N. 669, Referred Trials Nos. 22 and 26 of 1923; Referred Trial No. 123 of 1922; and Criminal Appeal No. 1673 of 1922, followed.

Where all the necessary evidence is not before the Appellate Court, whether the proper course in any particular case is to order a re-trial or merely direct further evidence to be taken under section 428, Criminal Procedure Code, is a matter of discretion of the Court, apart from what the accused or the prosecution may desire. [p. 487, col. 2.]

Where the evidence not taken by the First Court on accused's behalf is so extensive or so directly bearing on the main issues in the case, the Appellate Court may order a re-trial; but where such evidence on a broad view of the case is comparatively unimportant or would have been of no assistance to the defence, the Court would merely direct additional evidence to be taken. [p. 487, col. 2.]

Where the accused strongly protests against additional evidence to be taken, he cannot be allowed merely to use the irregularity in procedure of the First Court in not taking all the evidence, in order to obtain a re-trial of the case. [p. 487, col. 2.]

Statements to a Police Officer in the course of an investigation are not rendered admissible in evidence under section 154, Criminal Procedure Code, by the mere fact that they were signed by the person in contravention of the provisions of section 168, Criminal Procedure Code. [p. 488, col. 2.]

Per *Wallace, J.*—There is little difference in effect between rejecting an application to summon a witness because his evidence, even though believed, would not affect the Judge's judgment in the case, and rejecting it because the application is vexatious. Whether an application deserves the epithet "vexatious" or not is a matter for the Judge to decide, and if he decides that the evidence of a witness to be summoned is not going to be of any use in the matter of helping him to decide the case, he in effect, if not in words, is deciding that the application is vexatious. [p. 485, col. 2; p. 486, col. 1.]

If the Magistrate is not satisfied that the evidence of a witness is material, he will be justified in law in dismissing the application as put in for the purpose of vexation or delay. [p. 486, col. 1.]

Appeal against an order of the Court of the Special Judge, Malabar at Calicut, in S. J. Case No. 128 of 1922.

Messrs. *K. P. M. Menon*, and *P. Govinda Menon*, for the Appellant.

The Public Prosecutor, for the Crown.

NARAYANA MENON, *In re*.

JUDGMENT.

Odgers, J.—In this case M. P. Narayana Menon has been convicted of waging war against the King under section 121, Indian Penal Code, by the Special Judge of Malabar in respect of a speech at Manjeri on the 24th August 1921. He was originally charged with having delivered three such revolutionary speeches. With regard to two he was acquitted. Consequently this appeal is only concerned with the speech alleged to have been made on the 24th August 1921 at the Nambudri Bank, Manjeri.

Two legal objections have been taken by Mr. Menon, the learned Counsel for the Appellant. It will be convenient to deal with them before I come to discuss the evidence. (1) It is said that charges under section 121 form one of a class of cases falling under section 196, Criminal Procedure Code, which provides that the complaint must be made by order of or under authority from the Local Government. Mr. Menon took a preliminary objection before us that the sanction (printed at page 50 of the printed papers) was so defective and insufficient as practically to amount to no sanction at all. Paragraph 1 of the Government Order dated 3rd May 1922 sanctions the prosecution of the accused for an offence under section 121, Indian Penal Code, in that he incited and encouraged the Moplahs of Wornad and Walluvanad to take up arms against the British Government and was closely associated with various active rebels before and after the commencement of the Moplah rebellion. Paragraph 2 also sanction his prosecution under section 124 (*a*), Indian Penal Code, in respect of five speeches delivered at various places from July to September 1921, extracts of which (or translations of certain passages of which) are set out in the order; and it is as to passages 3, 4 and 5 that the present charge was instituted on the form o the order. Mr. Menon contends that all that was sanctioned was the prosecution under section 124 (*a*), Indian Penal Code, though he admits that, i paragraph 1 of the order stood alone, evidence could have been given of the speeches in question as incitement and encouragement. The charge is quite specific and in paragraph 6 of the same the effect of the speech which is alleged to have been made by the accused on the 24th August 1921 is set out. No objection was taken in the lower Court. In *Queen-Empress* v. *Bal Gangadhar Tilak* (1) (*Tilak's case*), it was held that there was no special mode laid down in the Code whereby the order or sanction of Government is to be conveyed to the officer who puts the law in motion, not even on a charge under section 121. Even under section 124 (*a*) though the *complaint* must contain the article complained of to give information to the accused of the charge against him there is nothing in the Code to show that the written order—if a written order is required—must specify the exact article in respect of which the complaint is to be made. In a case of our own Court, *In re Subramania Siva* [*Chidambaram Pillai* v. *Emperor*] (2), also a case under section 124 (*a*), it was held that all that Court had to see was whether the complaint was made by the order or under the authority of Government. It was held there that even if the charge does not set out the speeches alleged to be seditious it would not vitiate the proceedings and that any objection on ground of such defect ought to be taken as early as possible. For these reasons I am quite clear that this objection must be overruled.

The second legal point advanced on behalf of the accused is that certain witnesses whom he desired to summon were not called by the learned Special Judge. These are (1) the Chief Secretary to Government (2) Mr. E. C. Smith I. C. S., Private Secretary to His Excellency the Governor and (3) Mr. Clements, Superintendent, Central Jail, Coimbatore. The first of these witnesses was required "to produce certain documents *i.e.*, letter written to him on or about 18th February 1922" (which was in fact produced through the Superintendent, Central Jail, Coimbatore) "and the Correspondence of the Government and Madras and the Advocate-General on the one side

(1) 22 B. 112 at pp. 122, 150; 11 Ind. Dec. (N. S.) 656.

(2) 1 Ind. Cas. 22; 32 M. 31 5 M. L. T. 11 9 Cr, L. J. 108.

and the District Magistrate on the other side to prove that the district authorities arrested me and detained me in the Jail till the rebellion was over" Mr. Smith, I. C. S., as stated by the learned Counsel for the accused would have spoken to the loyal character of the accused. Mr. Smith was the Sub-Divisional Magistrate of the District in February 1921, though he was very shortly afterwards transferred, and he signed Exhibit XXI which was an order under section 144, Criminal Procedure Code. Mr. Clements was to be called to prove that the accused protested to Mr. Knapp in January 1922 against his detention under the Moplah Act. In dealing with this application the learned Special Judge said as to (1) that he was not prepared to call for the correspondence mentioned as the accused did not know its contents, as to (2), the evidence of P. W. No. 14, Mr. Clements being only to prove a protest by the accused against his arrest and detention, it was not of sufficient importance to justify the summoning of such an officer as the Superintendent of the Coimbatore Jail; and as to (3) that the evidence of E. C. Smith was not sufficiently material to justify the summoning of this witness "at this stage at least." Though the learned Special Judge has undoubtedly not specifically recorded that he considered that any of these applications should be refused on the ground of vexation or delay, or as defeating the ends of justice, it is by no means clear that he did not intend to find (*sic*) by his recorded reasons. *Wahid Ali Khan* v. *Emperor* (3) is an authority for holding that it is a sufficient compliance with sub-section 2 of section 257, Criminal Procedure Code, if a Magistrate in rejecting an application for summoning the defence witnesses, states the facts which lead him irresistibly to the conclusion that the application was for purposes described in the section though he does not expressly say so. Mr. Menon cites in his favour *Narayana Mulaly* v. *Emperor* (4) where a conviction was set aside on account of the refusa of a Magistrate to issue process to the witnesses named by the accused. The Magistrate there rejected an application to examine all the 71 original defence witnesses as too late. The Court held that, as his refusal was not based on any of the grounds in section 257, Criminal, Procedure Code, his order was illegal. It may be noted in connection with this case that the question of the power of the Appellate Court to call for fresh evidence under section 428, Criminal Procedure Code, was not raised. Another case cited was *Emperor* v. *Purshotlam Kara* (5) where the Court found (page 421) that no reason at all had been assigned for the refusal to summon any particular witness. The Court said that, "although discretionary power of refusing to summon any particular witness is vested in the Magistrate the order of refusal must be such as to show in writing the ground of refusal as applied to each individual." That does not apply to the present circumstances. Again, the question of the power of an Appellate Court was not raised there. Further is the case, Referred Trial No. 16 of 1923 of this Court [reported in *In re Ayarvalli Pakker* (6)] where it was held that the Special Judge having illegally issued commissions for the examination of certain of the defence witnesses, who, however, elected to put interrogatories to the witnesses, was a material irregularity that vitiated the trial. The defence in that case (to which one of us was a party on appeal) was that the murder charged had been committed by some other person since dead, and the Court held that the matter was of such importance that the defence if believed, would form a complete answer to the case against the accused and the only course was to set aside the trial. It is to be remarked that this was a referred trial and that section 375, Criminal Procedure Code, applied. I am of opinion that nothing like such cogent reasons can be advanced in the case of the three witnesses not summoned by the Special

(3) 11 C. W. N. 789; 6 Cr. L. J. 1.
(4) 31 M. 131; 7 Cr. L. J. 425.
(5) 26 B. 418; 4 Bom. L. R. 38.
(6) 74 Ind. Cas. 952; 45 M. L. J. 305; (1923) M. W. N. 758; 18 L. W. 899; 24 Cr. L. J. 840.

Judge. We, however, held in our *interim* order delivered on 29th August 1923 that the Special Judge's procedure was irregular in that he had not set out his reasons in detail under section 257, Criminal Procedure Code, for refusing to summon the witnesses. We did not hold it illegal or incurable. We offered to call these witnesses in this Court under section 428, Criminal Procedure Code, and in addition to give the defence the opportunity by calling Mr. R. H. Hitchcock as he was at all material times the District Superintendent of Police of this district and also if necessary, to allow the defence to recall P. W. No. 1. The reason why we offered the opportunity to the defence in the case of Mr. Hitchcock and P. W. No. 1 will more clearly appear when I come to examine the evidence in the case. Mr. Menon for the accused has rejected our offer on the ground that we have no jurisdiction to call this evidence in an Appellate Court. The accused has thought fit by a petition to us dated 15th September 1923 to allege that Mr. Hitchcock bears personal enmity to himself and may support the false story of P. W. No. 1. As to the latter the accused alleges that he will not if recalled scruple to fabricate records and produce a connected statement as the statement sent up by him to the District Superintendent of Police. There is nothing before the Court to lead us it to give credit to either of these statements. Counsel for accused insists that the failure to call these witnesses is a material irregularity amounting to an illegality and claims a retrial of the accused in consequence. His argument in brief amounts to this, that in section 428, Criminal Procedure Code the word "necessary" imports that it is impossible to pronounce judgment without the additional evidence. I cannot accede to this. There may be many cases, as for instance the present, where judgment can be pronounced without any additional evidence but here we considered it was necessary as a general measure of justice that the defence should have every opportunity of putting forward anything that might help their case. I might here remark that Mr. Hitchcock's name originally appeared in the list of witnesses tendered by the accused (page 412) and was struck out. (Exhibit XXIII). Mr. Menon further contended that, by virtue of the wording of sub-section 3 of section 428, Criminal Procedure Code, the section can apply to evidence taken for the prosecution and that only formal proof, if any is allowed. He points to the distinction between section 375 (Referred Trials) and 428 (3), Criminal Procedure Code. It is true section 375 says that "additional evidence may be taken upon any point bearing upon the guilt or innocence of the convicted person," whereas all that section 428 (1) says is "in dealing with any appeal, the Appellate Court, if it thinks additional evidence to be necessary, etc." There is no restriction in the wording of the section either as to the nature of the evidence, or that it is to be taken for the prosecution only or that the provisions of the section are only to be invoked when formal proof for the prosecution is necessary. Mr. Menon has quoted to us *Varadarajulu Naidu* v. *Emperor* (7) and *Jeremiah* v. *Vas* (8). In the former of these cases it has held that the powers given by section 428, Criminal Procedure Code, to an Appellate Court to take additional evidence are perfectly general and are subject only to the condition that the Court should record its reasons. Undoubtedly, where additional evidence for the prosecution is admitted under this section, the jurisdiction should be exercised with great care. It is true that that was a case of supplying formal proof in the prosecution case. In *Jeremiah* v. *Vas* (8) the passage relied on by Mr. Menon is at page 467* where Mr. Justice Sundara Aiyar (whose views were disapproved by Wallis, C. J., in *Varadarajulu Naidu* v. *Emperor* (7) says, "section 428 is not applicable where the prosecution having had ample opportunities to produce the evidence has failed to do so." The learned Judge further stated that that case was not one in which he could say

(7) 51 Ind. Cas. 343; 42 M. 885; 20 Cr. L. J. 455; 37 M. L. J. 81; (1919) M. W. N. 669.

(8) 12 Ind. Cas. 961; 36 M. 457 at pp. 458, 461; (1911) 2 M. W. N. 576; 10 M. L. T. 506; 22 M. L. J. 73; 12 Cr. L. J. 585.

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that the interests of public justice would justify the use of the provisions of section 428. It will be observed that in neither of the cases just mentioned it is stated, or even suggested, that section 428 is confined to supplying proof of the prosecution case. On the other hand the learned Public Prosecutor draws our attention to the several recent cases of this Court in which evidence for the defence has been taken under the provisions of this section apparently without the jurisdiction ever being questioned. In Referred Trials Nos. 22 and 26 of 1923 and in Referred Trial No. 123 of 1922 and in Criminal Appeal No. 1673 of 1922 the evidence was taken by the Court itself. In Criminal Appeal No. 186 of 1922 the evidence was directed to be taken by the Court below. I am not prepared, without better authorities than have been cited particularly after the remarks of Wallis, C. J., in *Varadarajulu Naidu* v. *Emperor* (7) to limit the ambit of section 428 in the way contended for by Mr. Menon. I am, therefore, of opinion that this legal objection also fails. I must, therefore, hold that both these legal objections fail and overrule the contention that a re-trial should be allowed on the ground that the three witnesses mentioned were not called by the learned Special Judge.

[Hereafter discussing evidence His Lordship proceeded:—]

On a careful consideration of the evidence of P W. No. 1, I agree with the conclusion of the Special Judge that P. W. No. 1's statement is perfectly consistent except that in one place he speaks of sending "copies" and in the other of sending "abstracts" and appears to have used the word "superiors" for both the Magistrate and District Superintendent of Police. But to say that the evidence of P. W. No. 1 when he says he sent the reports as set out above, is entirely false and incredibe because those reports have not been found in the records of the District Magistrate whereas the records of the District Superintendent of Police remain unexamined is to my mind utterly preposterous. It may be remarked that the statement of P. W.s Nos. 3 and 4 if produced could have been filed by the prosecution under section 162, Criminal Procedure Code, though the accused could have made these statements available under the proviso to the section. The prosecution witnesses state that they signed their statements. Mr. Menon contends that, as they did so, the statements are made evidence under the provisions of section 154, Criminal Procedure Code. It is evident that the statements if signed were signed in contravention of section 162 and as such statements are not evidence under that section it appears absurd to say that they can be made evidence by the fact that the prosecution witnesses signed them contrary to the provisions of section 162, Criminal Procedure Code.

[After further discussing evidence His Lordship concluded:—]

The defence both as to concoction and *allbi*, therefore, fails. On accepting the prosecution evidence, as I do, the conviction and sentence must be confirmed and the appeal dismissed.

Accused has been in Jail since his conviction on 25th September 1922. Sentence will run from that date.

Wallace, J.—I agree entirely with the judgment of my learned brother whichhe has just read, but wish on certain aspects of the case, to put forward some additional remarks.

On the second legal point raised it is true that the Sessions Judge did not in words base his refusal to summon certain defence witnesses on any of the grounds set out in section 257 of the Criminal Procedure Code: but on the ground that the accused (the appellant), whom he questioned about it, had not satisfied him that the evidence was of material importance in the case. For my part there seems to me to be little difference in effect between rejecting an application to summon a witness because his evidence, even though believed, would not affect the Judge's judgment in the case, and rejecting it because the application is vexatious. Whether an application deserves the epithet "vexatious" or not is a matter for the Judge to decide, and if he decides that the evidence of

a witness to be summoned is not going to be of any use in the matter of helping him to decide the case, he in effect, if not in words, is deciding that the application is vexatious and I would hold that the application in this case was in substance rejected on one of the grounds stated in section 257, although the words of that section have not been used by the Judge.

Section 216 of the Criminal Procedure Code applicable to committing Courts, seems to me to elucidate this point, when it states that "if the Magistrate thinks that any witness is included in the list for the purpose of vexation or delay or of defeating the ends of justice, the Magistrate may require the accused to satisfy him that there are reasonable grounds for believing that the evidence of such witness is material." That seems to me to be tantamount to saying that, if the Magistrate is not satisfied that the evidence of a witness is material, he will be justified in law in dismissing the application as put in for the purpose of vexation or delay.

Various cases have been quoted to us as against this view. Those which take the most uncompromising view are *Narayana Mudaly* v. *Emperor* (4) and *Emperor* v. *Purshottam Kara* (5). The former gives no reasons and merely follows the latter. The latter proceeds on the footing that the language of section 257 is exhaustive and imperative. It seems to me clear that it is neither. Take for example, section 503 which permits the Court to refuse to issue a process to compel the attendance of any witness when it thinks that the expense, delay or inconvenience is unreasonable. If the Court follows that section, can it be said that it is thereby disobeying section 257, because the grounds of its refusal to compel personal attendance is not one of the grounds set out in section 257? Obviously it cannot be so held. Hence section 257 is neither imperative nor exhaustive, and the grounds on which these two reported cases proceed, it appears to me with due respect, are based on incomplete premises.

In *Emperor* v. *Purshottam Kara* (5) the Magistrate did not consider the case of each of the proposed witnesses individually or give any reason at all for not summoning them. In the case quoted in *In re Vyasa Rao* (9) it is merely laid down that every case under section 257 has to be decided on its own merits. The case in *Emperor* v. *Nandbasappa Basappa* (10) is not a case under section 257. That was a case where the Magistrate declined to examine witnesses already summoned and in Court. In the case in *Wahid Ali Khan* v. *Emperor* (3) it was held that, as the reasons given for refusal to summon show that in substance the refusal was based on one of the grounds stated in section 257, although not in the very words of that section, there was sufficient compliance with the section. This principle seems to me to apply to the present case.

In the present case, I would hold that, although there may be an irregularity in the trial because the Special Judge has not recorded his reasons for his refusal in the words of section 257, that section has been substantially complied with, and there is, therefore, no illegality vitiating the trial. At the most, since the exact terms of the section have not been followed, there would be an irregularity curable by section 537, and which can be cured here unless the accused's defence was seriously prejudiced thereby.

Now, it will be noted that the witnesses whom the lower Court refused to summon were cited to give evidence wholly on side issues—the Chief Secretary to Government, as to what information Government had and what opinion it had formed on the case before issuing the sanction order; Mr. Clemants, to prove the protest by the accused against his detention in Jail in February 1922; and Mr. E. C. Smith, I.C.S., to prove that upto February or March 1921, five months before the alleged offence, the appellant was a loyal subject. The Judge's reasons for refusing to summon these witnesses indicate very plainly that, even if they

(9) 9 Ind. Cas. 897 | 21 M. L. J. 283; 12 Cr. L. J. 150; 10 M. L. T. 84; (1911) 1 M. W. N. 327.
(10) 15 Ind. Cas. 795; 14 Bom. L. R. 360 | 13 Cr. L. J. 523 | 1 Bom. Cr. C. 123.

had given the evidence they were summoned to give, that evidence would not, in his view, have been relevant to the case, and his decision would not have been affected one way or the other by it; so that even if he had examined them the result of the case would have been just what it is now. In such circumtances it is difficult to see how the appellant's defence before the Trial Judge has been prejudiced.

Since, however, that evidence, although it would have weighed nothing with the Special Judge might in the appellant's Counsel's opinion, weigh with us to some extent, we thought it advisable to give the appellant an opportunity of having it taken under section 428, Criminal Procedure Code, and we added to this offer a further offer to the defence to call for and have produced before us the first report in the case by P. W. No. 1 to the District Superintendent of Police about which, as will be seen later, there was much discussion before us, and which the defence in the lower Court failed to call for. To this offer, the appellant has replied that this Court has no option to call for such additional evidence under section 428 and that the only course is to order a re-trial. I am unable to accede to this contention, since, in my opinion, section 428 clearly covers the case. The appellant argues that the section does not apply, first, because it must be the Court, and not the accused, that considers the evidence to be "necessary"; secondly because the section applies only to cases of absence of evidence on some *formal* point such as a sanction; and thirdly because the section applies to evidence for the prosecution only. As to the first point, it does not seem to me to make any difference how the Court arrives at its conclusion that the evidence is necessary—whether it is persuaded to that conclusion by the arguments advanced for the accused or whether it comes to that conclusion without the assistance of such arguments. If the Court finds that an appellant thinks the evidence necessary it cannot be seriously pleaded that the Court's agreement in the opinion or the acceptance of it deprives the Court of its jurisdiction under section 428. As to the second point, there is no authority whatever, the section makes no such restriction. The authorities quoted by the appellant are directly against him, namely, *Jeremiah* v. *Vas* (8) and *Varadarajulu Naidu* v. *Emperor* (7). As to the third point, the same argument applies. If section 428 was intended to be so restricted, it is framed in an extraordinarily careless fashion. An example or two will show the hollowness of the argument. Suppose an appellant before us had been convicted in a case in which his defence was insanity, and the Appellate Court, either *suo motu* or pursuaded by appellants' Counsel, thinks it advisable to have a further enquiry regarding his sanity. Is the only course open to that Court an order for re-trial? Again, if an appellant had been convicted of kidnapping a girl and the Appellate Court thinks it advisable to have expert evidence on the age of the girl, is the only course open to the Appellate Court to order re-trial? It is obvious that section 428 was conceived to meet just such cases and it is in practice used in such cases every day.

Whether the proper course in any particular case is a re-trial or taking further evidence is a matter of discretion—the discretion of the Court apart from what the appellant or the prosecution may desire. There are cases in which the evidence not taken by the Court on accused's behalf is so extensive or so directly bears on the main issues in the case that the Appellate Court thinks the best course is a re-trial, for example, Referred Trial No. 16 of 1923, [*In re Ayarvali Pakkar* (6).] There are cases again in which such evidence is on a broad view of the case comparatively unimportant or would have been of no assistance whatever to the defence; in such cases it would be absurd to waste time by ordering a re-trial. In this case the appellant, so far from wanting the additional evidence, strongly protests against its being taken here. From this it seems plain he does not regard that evidence as at all helpful to his defence but is merely using this irregularity in order to obtain a re-trial, hoping that on the re-trial, two years after the event, the

witnesses may have forgotten all the details of the crime. This is made particularly plain from the fact, that he rejected also the offer of this Court to have proved first report of P. W. No. 1 to the District Superintendent of Police, proferred by us, in order to test the truth of his contention that no report containing any abstract of the statements of P. Ws. Nos. 3 and 4 had been sent up to the District Superintendent of Police before March 1922. It is very clear that, if no such report had been sent, that would be a very strong point for the defence and shake the credibility of the P. Ws. Nos. 1, 3 and 4 very greatly, probably irretrievably. Even at the original trial, the appellant never called for that report or attempted to get it; and after citing the District Superintendent of Police in his list of witnesses, he struck him out; now when he is given by us an opportunity of calling that evidence which we note is not evidence shut out by the lower Court, and, therefore, not evidence the absence of which could possibly form a ground for a re-trial, but evidence never called for there at all, the appellant refuses to have it on the weak plea that the report will be tampered with, and he proceeds to allege that not only P. W. No. 1 but even the District Superintendent of Police himself will probably be prepared to perjure themselves about it. So from this attitude one is perfectly clear that the appellant does not regard the rejected evidence or the evidence now-offered regarding Police report as of the slightest help to his defence. That is, after endeavouring to persuade us that it was vital to him in order that he might press for a re-trial, he admits, when a re-trial is refused, that it is, useless to him. In such circumstances we cannot refrain from concluding that the Special Judge's refusal to take this evidence on the ground that it was of no use to the accused is amply justified and that his application to summon these witnesses was vexatious. In these circumstances it becomes unnecessary for us here and now to call for it or to waste further time in procuring it.

I come now to the merits of the case. I have nothing to add to my learned brother's discussion of appellant's political activities.

[After discussing evidence His Lordship observed—]

Of a piece with this is the defence omission to request the Court to look into the statements recorded by P. W. No. 1 from P. W's. Nos. 3 and 4.

It is quite clear from their evidence and P. W. No. 1's that P. W. No. 1 had heard already about the speech and had begun his investigation and that his examination of prosecution witnesses Nos. 3 and 4 was in the course of that investigation. Hence the prosecution was prohibited under section 162, Criminal Procedure Code, from putting these statements in evidence and appellant himself would have been the first to object had the prosecution attempted to file them in the lower Court. The appellant could have asked the lower Court under section 162, Criminal Procedure Code, to examine these statements. P. W. No. 1 said in the witness-box that he had them with him but the defence did not choose to ask for them. Yet it is now seriously argued before us that these statements ought to have been filed by the prosecution under section 154, Criminal Procedure Code. When it was pointed out by us that they were obviously statements taken in the course of Police investigation, the appellant's Counsel actually advanced the proposition that, since they are said to have been *signed* contrary to the provisions of section 162, they thereby became statements taken under section 154 *i. e.*, statements prior to investigation and were thereby rendered admissible under section 154. This seems to me a wholly untenable argument, namely, that the Police by violating the provisions of section 162 and thus committing an illegality can make admissible statements which are inadmissible under the law. The consistent evasion by the defence to call for the production of the very papers on the production of which alone its argument on this point of the case can be based can lead to no other conclusion but that its argument rests on no basis whatever, and that it hoped to persuade the Court to

accept speculative theories in the place of proved facts.

[After further discussing evidence His Lordship concluded:—]

I agree that the Special Judge's conclusions that the defence of *alibi* failed and that there was no sound reason for not accepting the evidence of P. W.s Nos. 3 and 4, are correct, and that the appeal must, therefore, be dismissed.

Appeal dismissed.

V. N. V.
S. D.

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 95 OF 1923.
March 12, 1923.
Present:—Mr. Justice Zafar Ali.
RAJINDAR SINGH—CONVICT—APPELLANT
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 304 II—Culpable homicide—Attack on old man with lathi—*Offence—Criminal Procedure Code (Act V of 1898), s. 172—Statements in Police diaries, use of.*

Accused attacked a weak old man violently with a *lathi* causing five fractures on different parts of his body as the result of which he died:

Held, that the accused must have known that the injuries caused by him were likely to result in death and he was, therefore, guilty of an offence under section 304 II of the Penal Code. [p. 490, col. 1.]

Statements embodied in Police diaries can be used in favour of an accused person but not against him. [p. 490, col. 1.]

Criminal appeal from an order of the Sessions Judge, Ludhiana, dated the 8th January 1923.

Mr. *Jai Gopal Sethi*, for the Appellant.

Mr. *Des Raj Sawhney*, for the Respondent.

JUDGMENT.—This is an appeal from a conviction and sentence under section 304 Part II of the Indian Penal Code. The learned Counsel for the appellant does not contest the finding that the deceased met with death at the hands of the appellant but contends that his offence falls under section 325 and not under section 304, Indian Penal Code, and that the sentence of seven years' rigorous imprisonment passed upon him is excessive. The facts are briefly as below:—

The appellant returned to his village from a journey at midnight and began to find fault with the watchmen there saying that they were not keeping vigil properly. He was not a *lambardar* or a village officer and had nothing to do with the *chowkidars*, but acted in a state of inebriety. At first he came upon Lehna *chowkidar* and Harnaman who were sitting in the verandah of his own *baithak* and challenged them and then struck them with a stick. Then he proceeded to the bazar and there called to Ganhra *chowkidar* who was on a roof. As he came down the accused began to quarrel with him saying why he was not patrolling. They both while quarrelling went to the head *chowkidar* who was in a *dharamsala* and there the accused struck down Ganhra, beat him with a stick and caused grievous hurts to him. Ganhra was a weak old man of 60 or 65 years of age. He was carried to the hospital where he succumbed to his injuries on the 3rd day. According to the medical evidence he bore the following injuries:—

1. Fracture of both the bones of the right leg.
2. Fracture of the right ulna in two places.
3. Fracture of right little finger; and
4. A number of contusions.

Death was stated to be the result of the cumulative effect of the injuries caused to him. Muhammad Din, Sub-Assistant Surgeon, who attended to the deceased on his admission into the hospital, deposed that ordinarily a man of the age of the deceased could not bear the effect of such injuries. Counsel for the appellant cites *Emperor* v. *Chagan Rajaram* (1), *Muhammad Ali* v. *Crown* (2) and *Gujan* v. *Queen-Empress* (3) in support of his argument that the offence fell under section 325 of the Indian Penal Code. But each case is to be decided by its own facts. In the present case the accused knew that the object of his

(1) 17 Ind. Cas. 62; 6 S. L. R. 116; 13 Cr. L. J. 750.
(2) 157 P. L. R. 1913.
(3) 18 P. R. 1893 Cr.

assault was a weak old man and in spite of that he attacked him most violently with a *lathi* causing no less than five fractures. This act of his leads to the inference that he knew that the injuries would likely result in death and, therefore, he was rightly convicted under section 304, Part II. One of the witnesses stated that it was the deceased who first inflicted a *lathi* blow on the accused. Even if this was so the deceased had full justification for striking him because he had without any cause picked up a quarrel with him. But he (accused) had no justification in running after him, knocking him down and beating him in the way in which he did. However as the accused is a young man of about 25 years of age, and was under the influence of liquor when he made the assault, I consider the sentence to be excessive and reduce it to rigorous imprisonment for five years.

Before concluding the judgment it may be remarked that the learned Sessions Judge made an improper use of the Police *zimnis* by referring to a statement therein of the prosecution witness, Umre Khan, in order to contradict his testimoney on the point that it was the deceased who gave the first blow. Statements embodied in Police diaries can be used in favour of an accused person, but not against him.

Z. K. *Sentence reduced.*

LAHORE HIGH COURT.

CRIMINAL REVISION CASE NO. 135 OF 1923.

May 1, 1923.

Present:—Sir Shadi Lal, KT., Chief Justice.

MAHTAB DIN—ACCUSED—PETITIONER

versus

EMPEROR THROUGH *Sheikh* MUHAMMAD ISMAIL—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 179, 181 (2)—Criminal breach of trust—Jurisdiction to try offence—Loss, whether "consequence" of offence.

The jurisdiction of a Court to try an offence of criminal misappropriation or criminal breach of trust is governed by section 181 (2) and not by section 179 of the Criminal Procedure Code. [p. 492, col. 1.]

Though loss to the complainant is the normal result of criminal misappropriation or criminal breach of trust, it is not an ingredient of those offences and cannot, therefore, be described as a "consequence", within the meaning of section 179 of the Criminal Procedure Code. [p. 492, col. 1.]

Accused was employed by a Lyallpur firm to sell goods at Karachi. The contract of employment was entered into at Lyallpur and the accused was bound to remit money and send his accounts to Lyallpur. He failed to account for some of the items received by him at Karachi and a complaint under section 408 of the Penal Code was preferred against him at Lyallpur;

Held, that the misappropriation, if any, had taken place at Karachi, and the Lyallpur Courts had no jurisdiction to try the accused. [p. 492, col 1.]

Emperor v. *Raghbir Singh*, 31 Ind. Cas. 375; 22 P. R. 1915 Cr.; 42 P. W. R. 1915 Cr; 16 Cr. L. J. 775, followed.

Case reported by the Sessions Judge, Lyallpur, with his No. 12 of 1923.

REPORT.—The complainant, Sheikh Muhammad Ismail, has his business at Lyallpur and he states that he employed Mahtab Din accused as an agent of his firm at Karachi. This engagement is alleged to have taken place at Lyallpur. The duty of the accused is said to be that he was to sell goods at Karachi and remit the proceeds thereof as well as account to the Head Office at Lyallpur. On the 3rd May 1922 the complainant instituted a complaint before the District Magistrate at Lyallpur to the effect that the accused had failed to remit the full amount of proceeds of the sale of goods realised by him at Karachi and thereby suspicions were roused and the accused was called to Lyallpur with the accounts; that on going through the accounts it appeared that the accused had committed criminal breach of trust in relation to a large sum of money and that thereupon the accused absconded and has not appeared again. The complainant prayed that the accused be punished in accordance with law.

Mr. S. David, exercising the powers of a Magistrate of the First Class in the Lyallpur District has, by order dated the 10th June 1922, taken cognizance of the case under section 408 of the Indian Penal Code.

GROUNDS.—On behalf of the accused objection is raised to the jurisdiction of the Magistrate in Lyallpur, but the Honorary Magistrate before whom the case has been pending, has held that as the accused did not refuse at Karachi to pay up the entire balance in hand as worked out by him in the account books and did so at Lyallpur, after the accounts were gone into, the Lyallpur Court has jurisdiction, for the offence was completed at Lyallpur on non-payment of the amount alleged to be in hand. This view of the case, however, is in direct conflict with the judgment of the Chief Court reported as *Emperor* v. *Raghbir Singh* (1). The facts of the present case are practically on all fours with those of the case before the Hon'ble Mr. Justice Rattigan and most of the authorities on the subject were reviewed in that case and the Court finally held that the Rawalpindi Court which was the Head Office of the complainant's firm, had no jurisdiction to try the case of criminal breach of trust which had been committed at Rurki. There is absolutely no allegation in the present case that the accused received any money from the complainant at Lyallpur and committed criminal breach of trust in relation to it in this district. All that is alleged is that the sale proceeds of goods, which the accused received at Karachi, were not remitted by him from there and on being recalled and the accounts being gone into he absconded and practically refused to pay up. It is obvious that the offence, if true, was completed at Karachi and the subsequent examination of accounts at Lyallpur does not make any difference. The learned Counsel for the complainant relied on *Ramratan Chunilal* v. *Emperor* (2) which no doubt seems to be in conflict with the decision of the Chief Court in the judgment already referred to above. The Bombay judgment, however, was issued under section 179 of the Criminal Procedure Code, the applicability of which to the cases of criminal breach of trust and misappropriation, which have been specifically provided for in section 181, clause (2) of the Code, seems to be doubtful. The Illustrations given in section 179 show to which class of cases the expression "or any such consequence has ensued" was intended to apply. The learned Judges of the Bombay High Court have differed from the view taken by the Calcutta and Madras High Courts in *Simhachalam* v. *Rati Kama Laha* (3) and *In re Rambilas* (4) in regard to the construction of this expression in its applicability to cases of misappropriation or criminal breach of trust. The reasoning of the learned Judges, based on that of the Allahabad High Court in *Queen-Empress* v. *O'Brien* (5), however, does not appear to be convincing. The offence of criminal breach of trust or criminal misappropriation is complete, when the accused has dishonestly committed the act, which constitutes the offence, irrespective of any subsequent consequences of it to the complainant. Moreover as indicated above the specific provision for such cases made in clause (2) of section 181 must overrides the general provision in section 179. At any rate, the Courts in this Province are bound by the view of law taken by the highest Court of the Province, to which they are subordinate.

For these reasons, I am of opinion, that the Magistrate, Lyallpur, has no jurisdiction to try this case and submit the case to the High Court with a request that the order of the Magistrate be set aside and he be directed to discharge the accused with a direction that the complainant would be free if so advised to prefer his complaint in the Court of the Magistrate at Karachi.

Dr. *Shuja-ud-Din*, for the Petitioner.

Mr. *Zafar-ullah Khan*, for the Respondent.

ORDER.—The complainant, Sheikh Muhammad Ismail, who carries on business at Lyallpur, employed the accused,

(1) 31 Ind. Cas. 375; 22 P. R. 1915; 42 P. W. R. 1915 Cr; 16 Cr. L. J. 775.

(2) 65 Ind. Cas. 637; 46 B. 641; 24 Bom. L. R. 46; 23 Cr. L. J. 173; (1922) A. I. R. (B.) 39.

(3) 41 Ind. Cas. 138; 44 C. 912; 21 C. W. N. 573; 25 C. L. J. 451; 18 Cr. L. J. 762.

(4) 26 Ind. Cas. 136; 38 M. 639; 16 M. L. T. 505; (1914) M W. N. 894; 15 Cr. L. J. 688; 29 M. L. J. 175.

(5) 19 A. 111; A. W. N. (1896) 191; 9 Ind. Dec. (N. S.) 72.

Mahtab Din, as an agent of his firm to sell goods at Karachi. The contract of agency was entered into at Lyallpur, and it appears that the agent was to remit the sale proceeds and to send his accounts to the complainant at Lyallpur.

The principal has preferred a complaint against the agent charging him with the commission of an offence under section 408, Indian Penal Code, and the question which has been referred to this Court by the Sessions Judge of Lyallpur is whether the Lyallpur Court has jurisdiction to entertain the complaint and to try the offence.

Now, section 181 (2) of the Criminal Procedure Code prescribes that the offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person or the offence was committed. Upon the facts as disclosed in the complaint and amplified by the complainant's statement, I concur with the learned Sessions Judge that the property was received or retained by the accused at Karachi and that the offence, if any, was committed at that place. In support of the jurisdiction of the Lyallpur Court the learned Counsel for the complainant invites my attention to section 179 of the Criminal Procedure Code which provides that when a person is accused of the commission of any offence by reason of any thing which has been done, and of any consequence which has ensued, such offence may be inquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done, or any such consequence has ensued. Now, there is a divergence of judicial opinion on the question whether this section governs the jurisdictions of a Court to try the offence of criminal misappropriation or of criminal breach of trust for which a special provision is to be found in section 181 (2), and the balance o the opinion is in favour of the view that the jurisdiction in such cases is governed by section 181 (2) and not by section 179. Further, it must be remembered that loss though a normal result in the case of criminal misappropriation or criminal breach of trust, is not an ingredient of those offences and cannot, therefore, be described as a consequence within the meaning of section 179.

The judgment of the Punjab Chief Court in *Emperor* v. *Raghbir Singh* (1), appears to me to be on all fours with the present case, and following that authority I hold that the Lyallpur Court has no jurisdiction to entertain the complaint. It is argued that the accusation in the present case relates, not to any specific item, but to the general balance which may be found against the accused, but the facts on the record do not support this contention. There can be no doubt that the misappropriation, if any, was committed at Karachi, and that the offence was completed at that place, and on principle I see no real difference between a case involving one item and that relating to the result arrived at by taking several items into consideration.

I accordingly direct that the record be returned to the Magistrate at Lyallpur with the direction that the accused be discharged and that the complainant be informed that, if so advised, he can bring his complaint in a Court of competent jurisdiction at Karachi.

Z. K. *Record returned.*

PATNA HIGH COURT.

CRIMINAL REVISION NOS. 15, 16 AND 50 OF 1922.

March 2, 1922.

Present:—Mr. Justice Jwala Prasad.

Musammat RAM RATAN KUAR AND OTHERS—2ND PARTY—PETITIONERS

versus

TARAK NATH BHATTACHARJI AND OTHERS—1ST PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 148—Local inspection, object of.

The object of local inspection is to understand and appreciate the typography of the land in dispute in order to aid the Magistrate in

appreciating the evidence offered in Court; but the local inspection cannot take the place of legal evidence, much less the result thereof can be used as a basis for the decision. [p. 494, col. 2.]

Ram Sahai Singh v. *Dwarka Singh*, 61 Ind. Cas. 712; 1 P. L. T. 569; 22 Cr. L. J. 424, referred to.

Criminal application against the order of the Sub-Divisional Magistrate, Dinapur, dated the 7th January 1922.

Messrs. *Manuk, S. K. Banerji, S. C. Bose, K. N. Chaudhury, J. P. Singh* and *Sultanuddin Hussain*, for the Petitioners.

The Government Advocate and Mr. *G. C. Pal*, for the Opposite Party.

JUDGMENT.—This is an application against an order of the Sub-Divisional Magistrate of Dinapore, dated the 7th January 1922, passed under section 145 of the Code of Criminal Procedure declaring the 1st party in possession of the land in dispute. The 2nd party are petitioners before us.

It appears that a proceeding under section 145 was originally drawn up mentioning 1100 *bighas* as the subject-matter of dispute and 15 persons as members of the 1st party. Under the orders of the Magistrate, on behalf of the 1st party names of 72 persons, with the lands and the boundaries thereof, claimed by each of them, were filed in separate sheets of paper. They were printed and were attached to an amended proceeding. The amended proceeding, however, omitted to mention all the 72 persons as members of the 1st party, wherein the names of 15 persons as originally stood, continued. The total of the area claimed by each member of the 1st party, as mentioned in the aforesaid sheets of paper attached to the amended proceeding, comes to about 800 odd *bighas*, whereas the amended proceeding continued to mention 1100 *bighas*. There was no dispute with respect to the remaining 300 *bighas* which has neither been expunged from the proceeding, nor has any order been passed with respect thereto in the final order of the Magistrate, dated the 7th of January 1922. The amended proceeding was, therefore, incorrect and irregular with respect to the names of the parties and the subject-matter in dispute.

Out of the 800 odd *bighas* claimed by the members of the 1st party, eleven of them Basdeo, Sheo Tahal, Saducharan, Sukhdeo, Ramunandan, Danukhdhari Rasdhari, Saudagar, Tilak, Bali Ram and Bipat relinquished their claims as set forth against their names in the sheets of paper attached to amended proceeding with respect to the land aggregating to 115 *bighas* and the Magistrate, therefore, declared the possession of the 2nd party with respect thereto, and we are now not concerned with it. Magistrate passed the following order:

"The other lands in dispute less 115 *bighas* Surrendered of Sheo Tahal, Basdeo Saducharan, Sukhdeo, Ramunandan Dhanukhdhari, Rasdhari Saudagar Tilak Baliram and Bipat I hold to be in the possession of the 1st party tenants."

Mr. Manuk contends that this order evidently relates to 1100 *bighas* which was in the proceeding, minus 115 *bighas*, and is therefore, wrong inasmuch as the area claimed by the members of the 1st party in the sheets of paper attached to the proceeding amounted only to 800 odd *bighas*. This contention appears to be substantial. It has not even been refuted by Mr. Sultan Ahmad who appears on behalf of the 1st party. The mistake apparently arose on account of not having amended the proceeding in which 1100 *bighas* occurred in view of the claims of the 1st party which disclosed that only 800 odd *bighas* was in dispute.

Mr. Manuk further contends that the Magistrate has not based his finding of possession in favour of the 1st party upon any legal evidence, nor was there such evidence to justify his finding. The contention is that 8 of the claimants out of a large body of about 60 to 72 persons gave their evidence in Court. There was no evidence except of a vague character as regards the lands claimed by the rest of the members of the 1st party. They themselves have not come forward to depose in Court. The *kucha* receipts relied upon by the Magistrate relate only to a few of the claimants and cannot be any evidence of possession, as regards possession of the large body of the remaining members of 1st party claiming a specific and separate lands in dispute. Herein also the contention is well founded. The Magistrate has not referred to the oral evidence offered on behalf of the 1st party to prove their

possession, and we do not know whether he was satisfied with the oral evidence adduced on their behalf. It is also true that the receipts are only with respect to a few of the claimants about 8 in number who gave evidence. Therefore, even if the Magistrate had acted upon the evidence offered on behalf of the 1st party, it was not sufficient to hold the possession of all the members thereof with respect to the particular plots of land claimed by them. The Magistrate has treated the members of the 1st party as one body, and has apparently taken the evidence offered to prove the possession of some of them with respect to the particular plots of land claimed by them as sufficient for finding possession with respect to all the members of the 1st party. In this he is in error, for there is no community of interest among the members of the 1st party, except that they claim to be the tenants of the land in question; but each of them claims separate parcels of land as set forth in the sheets of paper attached to the proceeding; so that whereas one of the members of the 1st party might be in possession of the land claimed by him the other members might not be in possession of the lands claimed by them.

The Magistrate has referred to the *chaukidari* assessment list in support of the claims of the 1st party. He has very rightly taken this evidence as only corroborating the general case of the members of the 1st party that they held some lands in the village. He says: "If these tenants had not been in cultivating possession of the lands in August 1920, the *sirpanch* and *ralpanches* could not possibly have prepared such an assessment list and have given *chaukidari* receipts for these holdings on payment by the tenants." Both the parties prepared and filed before me a comparative statement showing the areas claimed by the members of the 1st party and those mentioned in the *chaukidari* assessment. They largely differed and, therefore, the *chaukidari* assessment could not possibly be evidence of possession of the specific lands claimed in the present case, and the Magistrate also has not treated it as such.

It appears that the Magistrate has mainly proceeded upon the result of his local inspection. He says that he had examined a number of persons on the spot and had asked the tenants to point out the respective lands to him. As to the local inspection he says "Most of them (tenants) who were examined by me had from 15 to 20 plots in twelve to fifteen widely scattered *khandas*. They were tested searchingly in regard to in each case not less than six or seven of their holdings, etc." Then he gives the names of the 17 tenants examined by him. The evidence of these people could not be acted upon without giving proper opportunity to the other side to cross-examine these. The real scope and object of holding local inspection was pointed out by this Court in the case of *Ram Sahai Singh* v *Dwarka Singh* (1). The object of local inspection is to understand and appreciate the typography of the land in dispute in order to aid the Magistrate in appreciating the evidence offered in Court, but the local inspection cannot take the place of legal evidence, much less the result thereof can be used as a basis for the decision. The Magistrate has, as a matter of fact, solely relied upon his local inspection and the statement of witnesses made to him at the inspection for the purpose of holding possession of the lands in dispute with the 1st party. His entire order is, therefore, vitiated. The Magistrate has not acted upon any definite legal evidence on behalf of the members of the 1st party in support of their possession over the lands claimed and included in the proceeding. The order on this ground alone is liable to be set aside.

Mr. Manuk has also pointed out to me that the learned Magistrate has vitiated his inquiry and order by mis-stating the evidence on the record. For instance, the Magistrate says: 'The 1st party have claimed that they were never dispossessed, that they were permitted to remain on in their old holdings on payment of *salami*." There is no "evidence for or against this assertion." At another place, he repeats it in the following words: "These original holdings were sold up in auction and delivery of possession was

(1) 61 Ind. Cas. 712; 1 P. L. T. 569; 22 Cr. L. J. 424.

obtained by Narain Dutt, whether he actually dispossessed those tenants from their particular lands there is no evidence for or against." Mr. Manuk says that evidence was given on behalf of the 2nd party to disprove the above claim of the 1st party, and that the Magistrate is wrong in saying that there is no evidence against the assertion of the tenants.

Again, the Magistrate says. "There is no evidence to disprove their (tenants' 1st party) statements that "besides these lands they have no other means of livelihood." Mr. Manuk says that the evidence both on behalf of the 1st and the 2nd parties shows that the tenants have other lands besides the disputed lands, and he refers to the statements of Bahori (witness No. 1 for the 1st party) and Sukhari (witness No. 15 for the 2nd party). There are other passages also pointed out in the judgment of the Court showing that the remarks made by the Magistrate were against the evidence on the record. This also largely takes away the value of the decision of the Magistrate in the present case.

I, therefore, hold that the order of the Megistrate in the present case must be vacated; but as there is a serious dispute between the parties tending to a breach of the peace, the proceeding should not be dropped once for all, but that the proceeding instituted by the Magistrate should be thoroughly enquired into. I, therefore, direct that the case be remanded for an enquiry under section 145 of the Code after amending the proceeding stated above and on giving full opportunity to the parties to give any additional evidence they like in support of their respective claims. The parties agree that the evidence already on the record may be used in the case but that they may be permitted to give additional evidence. The course suggested by the parties appears to be reasonable and I accept it, because I fully appreciate the remark of Sultan Ahmad that the attention of the parties mostly directed in the present case to the trial of the issue as to whether the 2nd party had made settlements of the lands with new tenants after the *dakhadehani* in 1904, or that the old tenants such as the members of the 1st party were allowed to hold possession of the lands either by some arrangement or by fresh settlement. The parties therefore, did not direct their attention to the principal issue in the case, namely, as to which party was in possession of the specific lands claimed in the case. The lands in the present case are parcels claimed by several persons, each tenant claiming right to hold the land for himself. The evidence of the claim of each of the tenants was, therefore, necessary. In order to avert the danger to a breach of the peace, the lands in the present case should be attached under clause (4) of section 145 and Magistrate upon the evidence in the case will dispose of the proceeding in accordance with law.

In the circumstances of the case and in view of the opinion expressed by the Magistrate the parties propose that the case be tried at Patna. I am told that the Magistrate is under orders of transfer and will be succeeded by another Magistrate. In that case, the case will be heard by the successor of the present Magistrate, otherwise it will be transferred to Patna. The matter should be expedited.

N. H. *Case remanded.*

LAHORE HIGH COURT.

CRIMINAL REVISION CASE NO. 380 OF 1923.

May 12, 1923.

Present:—Mr. Justice Zafar Ali.

ALLAH BAKHSH—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Punjab Municipal Act (III of 1911), s. 155, applicability of—Long user of premises for a particular purpose, whether can be objected to.

Section 155 of the Punjab Municipal Act contemplates only recent and temporary breach of the rules and a person prosecuted thereunder can successfully plead that he has been using the premises for the purpose objected to for a long period. [p. 496, col. 1.]

Case reported by the Sessions Judge, Gurdaspur, with his letter No. 131 of 16th February 1923.

ALLAH BAKHSH *v.* EMPEROR.

REPORT.—The Municipal Committee of Dera Baba Nanak filed a complaint against Allah Bakhsh Khoja, under section 219, Municipal Act, alleging that the accused had collected a store of raw hides in his house situate within the local limits of the Municipality which storage of raw hides emitted bad odour and was dangerous to public health.

That the accused in spite of several notices having been served upon him failed to comply with the directions of the said Municipal Committee to remove the offensive material from his house.

The accused, on conviction by Pandit Siri Kishan exercising the powers of a Magistrate of the First Class in the District, was sentenced, by order dated September 15th, 1922, under section 219, Punjab Municipal Act, to a fine of Rs. 20 or in default to undergo simple imprisonment for a week.

GROUNDS.—Various points have been raised in this application but the main ground is that no valid direction was given, disobedience to which would be punishable under section 219 of the Act. The applicant was given a notice, which purported to be issued under section 155, calling upon him to remove some raw hides from a certain building within two days. The applicant might have been liable to punishment under section 155 for keeping the raw hides in the building, and he might also possibly have been liable to punishment under section 121, but section 155 does not authorise a Committee to issue a notice for the removal of any offensive material. I have been referred to section 115 of the Act, but I think it is very doubtful whether any notice of the kind could legally be issued under that section. The section appears to relate to an act which has to be done to the material of the building or to the land.

The case is very similar to *Abdul Razak* v. *Queen-Empress* (1) and it is clear that if the notice was unlawful no conviction can be maintained. I recommend that the conviction and sentence be set aside.

Lala *Jotl Sarup*, for the Petitioner.

Mr. *Shamair Chand*, for the Municipal Committee, for the Respondent.

(1) 4 P. R. 1894 Cr.

ORDER.—This is a reference by the learned Sessions Judge, Gurdaspur, under section 438, Criminal Procedure Code.

The accused Allah Bakhsh has been convicted and fined Rs. 20 under section 219 of the Punjab Municipal Act, 1911, on the finding that he kept in a building within the limits of the Dera Baba Nanak Municipality raw hides which emitted offensive smells. Though the complaint as well as the conviction was under section 219 the notice that had been issued to the accused before filing the complaint purported to be under section 155. It is conceded that the accused could not be convicted under section 219 as it is not applicable to the facts of the case and the notice issued was not of the description provided by it. It is, however, urged on behalf of the Municipal Committee that the conviction can be altered to one under section 155. But the Committee had no power, nor was it necessary to issue a notice under that section according to which the act of keeping offensive materials in a building or land renders the owner or occupier thereof liable to the punishment of a fine. Further, section 155 occurs under the heading "Scavenging and House Scavenging" and is intended to impose on all owners or occupiers of buildings or lands within a Municipality the duty of keeping the same in a sanitary condition on pain of fine. No notice is necessary as a condition precedent for prosecuting those who violate ordinary rules of sanitation but the section contemplates only recent and temporary breach of the rules and the person prosecuted thereunder can successfully plead that he had been using the premises for the purpose objected to for a long period. The accused in the present case is a Khoja by caste and states that he deals in raw hides and had been using the building in question for many years for storing the same therein. If this were true, section 155 would not be applicable. I am, therefore, of opinion that the view taken by the learned Sessions Judge is correct and the conviction and sentence are, accordingly, set aside.

Conviction & sentence set aside.

Z. K.

BOMBAY HIGH COURT.

CIVIL APPEAL NO. 60 OF 1921.

September 29, 1922.

Present:—Mr. Justice Pratt and Mr. Justice Marten.

THANA ZALAJI SHET MARWADI—APPELLANT

versus

THE SHOP "DHANA JAWHRJI"—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 181, applicability of—Civil Procedure Code (Act V of 1908), O. XX, r. 12 (1) (c)—Decree directing payment of mesne profits—Application for ascertainment of mesne profits—Limitation.

The Limitation Act does not apply to all applications. The applications specifically described in the third division of the First Schedule to the Limitation Act are all applications under the Civil Procedure Code, and Art. 181 of the Schedule must also be similarly limited. Unless an application falls under some specific provision of the Civil Procedure Code, Art. 181 will not apply. [p. 497, col. 2.]

Case-Law discussed.

A decree in a suit for possession directed the defendant to give to the plaintiff subsequent mesne profits under O. XX, r. 12 (1) (c) of the Civil Procedure Code. More than three years after the date of the decree plaintiff applied for mesne profits to be ascertained under O. XX, r. 12 (1) (c):

Held, that the application was not by way of execution but an application to the Court to proceed from the stage of preliminary decree to a final decree and was not governed by Art. 181 or any other Article of Schedule I to the Limitation Act. [p. 498, cols. 1 & 2.]

Second appeal against the decision of the District Judge, Thana.

Mr. *S. Y. Abhyanker*, for the Appellant.

Mr. *G. S. Rao*, for the Respondent.

JUDGMENT.

Pratt, J.—The only point that arises in this appeal is one of limitation. On the 16th June 1915 the plaintiff in this suit got a decree for possession and mesne profits since the institution of the suit. As to mesne profits the actual words of the decree were:—"And the defendant should give to the plaintiff the subsequent mesne profits under O. XX, r. 12, (1) (c)". This rule provides that the Court may pass a decree directing an inquiry as to rent and mesne profits from the institution of a suit. The decree was in effect a preliminary decree directing an inquiry as to future mesne profits. The decree was confirmed in appeal on the 30th November 1916 and the plaintiff applied for execution as regards possession of the immoveable property on 6th June 1918. Subsequently he applied for mesne profits to be ascertained under the inquiry under O. XX, r. 12 (1) (c) and this application was made on 1st February 1920.

It is contended that this last application was barred under Art. 181 of the Limitation Act as it was not made within three years of the time when the right to apply accrued *i.e.*, on 16th June 1915 when the decree order was made. The short answer to this objection is, I think, that the application was not an application made under the Code of Civil Procedure nor was it an application in execution. There were conflicting decisions under the old Code as to whether the mesne profits should be ascertained in a suit or in execution proceedings. This point has now been set at rest by O. XX, r. 12 (2) under which there is a preliminary decree directing an inquiry as to mesne profits and a final decree in respect of the mesne profits after that inquiry. The application was not by way of execution but an application to the Court to proceed from the stage of preliminary decree to a final decree.

Moreover, the Code does not provide for such an application. Order XX, r. 12 (1) (c), provides that the Court should hold that inquiry and should pass a final decree, There are no words such as those in O. XXXIV, r 5, sub rule 2, under which a final decree for sale of the mortgage property cannot be made except on application made in that behalf by the plaintiff.

The Limitation Act does not apply to all applications. The applications specifically described in the third division of the First Schedule of the Indian Limitation Act are all applications under the Civil Procedure Code and under those Art. 181 must be so limited. This has been expressly decided in this Court in the case of *Balmanekbai* v. *Manekji Kavasji* (1) where Sir M. R. Westropp, Kt., C. J., said: "An examination of all the other

(1) 7 B. 213; 4 Ind. Dec. (N. S.) 141.

Articles in the Second Schedule relating to 'applications' that is to say, of the third division of that Schedule, shows that the applications therein contemplated are such as are made under the Civil Procedure Code. Hence it is natural to conclude that the applications referred to in Art. 178 are applications *ejusdem generis, i. e.*, applications under the Code of Civil Procedure." This was followed in Calcutta High Court in *Tluck Singh* v, *Parsotein Proshad* (2) where it was held that an application under section 89 of the Transfer of Property Act, to have a mortgage-decree for sale made absolute was not governed by Art. 178, Schedule II of the Limitation Act, 1877. There is a more recent decision in *Datto Atmaram* v, *Shankar Dattatraya* (3) where it was held that a similar application for decree absolute for sale of mortgage charge being now governed by O. XXXIV, r. 5 of Civil Procedure Code was subject to limitation under Art. 181 of the Limitation Act. Scott, C. J., expressly based his decision on the fact that since the transfer of certain sections of the Transfer of Property Act to O. XXXIV of the Code of Civil Procedure the application was governed was Art. 181.

Mr. Abhyankar refers to a judgment of this Court in *Bhagawan Ramji Marwadi* v. *Ganu* (4) where one of the Judges expressed his opinion that an application by plaintiff mortgagor for an order for sale under section 89 of the Transfer of Property Act would be governed by limitation under the Limitation Act. But this is only an *obiter dictum*, Parsons, J., said that the application would not be time-barred even if that Article were held to apply. This case, therefore, is not an authority for the proposition that Art. 181 would apply to applications which are not made under the Code of Civil Procedure.

Lastly Mr. Abhyankar refers to a recent case of *Vasudev Vishnu Hasabnis* v. *Gopal Parashram Kulkarni* (5). But there is nothing in that case which assists his contention. There the plaintiff-mortgagor applied for further time for the payment of the mortgage-debt and Shah, J., held that the application could not be considered as an application in suit to extend time and then to execute the decree on such extended time, but must be treated as an application falling presumably under O XXXIV, r. 8 and that being so Art. 181 applied.

Another case which illustrates the same point is *Rahmat Karim* v. *Abdul Karim* (6) where it was held that Art. 181 did not apply to an application made by a mortgagee for a supplemental decree against the personal estate of the mortgagor as it was an application made not under the Code of Civil Procedure but under section 90 of the Transfer of Property Act.

I would confirm the decree and dismiss this appeal with costs.

Marten, J.—I agree. Under the preamble of the Limitation Act it appears that the Act is only intended to apply to "certain applications." Then when one turns to the third division of the First Schedule of the Act, one finds that the applications set out there under Arts. 158 to 180 are what I will call specific applications, that is to say, applications expressly provided for under the Code. It has accordingly been held—and if I may say so with respect, rightly so held—that Art. 181 which is in general terms only applies to applications *ejusdem generis*. In other words, one must find some specific provision in the Code for the application in question.

Turning next to the order made by the Court of first instance. I agree with my brother Pratt that it must be construed as a decree directing an inquiry as to mesne profits under O. XXI, r. 12 (1) (*c*) and directing the defendants to pay what should be found due on making such inquiry. The order has not been drawn up in the proper form, but in substance that is what it amounts to. It should also be borne in mind that under the new

(2) 22 C. 924; 11 Ind. Dec. (N. S.) 612.
(3) 21 Ind. Cas. 318; 38 B. 32; 15 Bom. L. R. 841.
(4) 23 B. 644; 1 Bom. L. R. 136; 12 Ind. Dec. (N. S.) 430.
(5) 51 Ind. Cas. 924; 43 B. 689; 21 Bom. L. R. 687.
(6) 34 C. 672; 6 C. L. J. 119; 11 C. W. N. 674.

Code there is a substantial alteration made in the procedure. Under the Code of 1882 the amount of mesne profits was to be determined in execution proceedings. But under the present Code mesne profits must be determined by the decree and not in execution proceedings. That being so, under the present Code there is no express provision for any application to be made by any of the parties for an inquiry or for payment. It is really the duty of the Court to hold the inquiry, and one may compare it to a part-heard suit. That being so, it seems to me that there is no "application" here, within the meaning of Art. 181 of the Indian Limitation Act.

I am not familiar with the procedure actually adopted in the Mofussil Courts, and, therefore I am unable to say whether the appellant's Counsel is correct in telling the Court that normally when an inquiry of this nature has been directed, it would be the duty of the Nazir or the Special Commissioner appointed under decree to ask the Court to issue the necessary summons. If that is so, then it emphasises what I have already pointed out, that this matter is really in the nature of a part-heard case, and is not an application by any of the parties to do any particular matter.

Counsel for the appellant has argued that if we hold, as we do hold, that the application is not barred by the Limitation Act, then there is no limit of time whatever to taking proceedings in a case like this. Whether that is so under the Mofussil procedure I do not know. But on the original side there is an express provision in the rules for what is to take place when an inquiry has been directed before the Commissioner, namely, that it is the duty of one of the parties to take out a warrant before the Commissioner to fix a day and so on for hearing the inquiry. (See New Rule 393: old Rule 390). In substance that is the same procedure as in the Chancery Division, where normally it is the duty of a person having the conduct of the suit to take out a summons to proceed, when there has been a decree ordering an inquiry. On the original side delay is provided for by rule 409 which is as follows:—"In any case in which no proceedings have been taken in the office of the Commissioner for a period of one year in any reference pending before him, he shall certify the same to the Prothonotary, and remove the reference from his file, and the reference shall not be restored without an order of the Court or a Judge." So it there is any flaw, as to which I say nothing, in the Mofussil procedure that is a matter to be provided for by their rules, and it affords no reason why we should put a false construction on the Limitation Act.

As regards *Vasudev Vishnu Hasabnis* v. *Gopal Parashram Kulkarni* (5) with which we are pressed, I need only say that Mr. Justice Shah who gave judgment in that case is the same learned Judge from whose order this present appeal under the Letters Patent is made. I regret we have not had the advantage of any judgment from him in the present case, but I think it stands to reason that he would not have summarily dismissed the present second appeal, if he had thought the present suit in any way depended on his decision in *Vasudev Vishnu Hasabnis* v. *Gopal Parashram Kulkarni* (5). That case, as my brother Pratt points out, has no application here, and I will draw attention to what Mr. Justice Heaton said at page 689*. "But even before the end of 1910, three years after the date fixed for payment, a final decree had become impossible, an application for a final decree having become time-barred to both parties." It is clear to me that the existing authorities are entirely opposed to the appellant's contention. I agree that this appeal must be dismissed with costs.

Z. K. *Appeal dismissed.*

* Page of 21 Bom. L. R.—[*Ed.*].

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREES NOS. 297 TO 299 OF 1921.

June 13, 1922.

Present :—Mr. Justice Coutts and Mr. Justice Das.

Musammat BHAGJOGNI—DEFENDANT—APPELLANT

versus

SAKHI MAHTON AND ANOTHER—PLAINTIFFS AND *Musammat* SONPI—DEFENDANT—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. II, r. 2, scope of—Different causes of action—Separate suits.

Order II, r. 2, Civil Procedure Code, requires that every suit shall include the whole of the claim arising from the one and the same cause of action and not that every suit shall include every claim and every cause of action which the plaintiff may have against the defendant. Consequently if the cause of action in the subsequent suit is different from that in the first suit the subsequent suit is not barred.

Second appeal against the decision of the Officiating District Judge, Shahabad, dated the 20th November 1920.

Mr. *Shiveshwar Dayal* for Mr. *G. C. Pal*, for the Appellants.

Mr. *Kailashpati*, for the Respondents.

JUDGMENT.

Das, J.—The only question in these appeals is whether the suits out of which these analogous appeals arise fall within the mischief contemplated by O. II, r. 2 of the Civil Procedure Code. The learned Subordinate Judge in the Appellate Court has answered the question in the negative. In my opinion the view taken by the learned Subordinate Judge is right and ought to prevail.

Now O. II, r. 2, Civil Procedure Code, requires that every suit shall include the whole of the claim arising from the one and the same cause of action and not that every suit shall include every claim and every cause of action which the plaintiff may have against the defendant. Consequently if the cause of action in the subsequent suit is different from that in the first suit, the subsequent suit is not barred. The whole question for our investigation, therefore, is whether the cause of action in the subsequent suits is the same as that in the first suits. Now the cause of action in the first suits was the refusal of *Musammat* Sonpi, the defendant in the action, to register the documents which she had executed in favour of the plaintiffs. That was the plaintiffs' cause of action in the first mentioned suits. The cause of action in the present suits is the order passed by the Criminal Court under section 146 of the Code of Criminal Procedure. In my opinion, it is impossible to say that there was any cause of action which was in the plaintiffs in the previous suits to ask for possession of the disputed land. In the first place, since we must accept the allegation made by the plaintiffs in the plaint to be correct, the plaintiffs were not entitled to ask for possession of the disputed land at the time when they instituted their suits for compulsory registration of the *rehan* deeds. In the second place, the order by the Criminal Court under section 146 of the Code of Criminal Procedure clearly gave the plaintiffs a fresh cause of action. In my opinion, it is impossible to say that the cause of action in the present suits is the same as that in the first mentioned suits.

I would dismiss these appeals with costs.

Coutts, J.—I agree.

N. H. *Appeals dismissed.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 243 OF 1921.

February 9, 1923.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

CHHOTABHAI HIRACHAND—PLAINTIFF—APPELLANT

versus

MAGANABHAI NAGINBHAI—DEFENDANT NO. 1—RESPONDENT.

Specific Relief Act (I of 1877), s. 14—Agreement to sell—Burden subsequently imposed on property—Specific performance with compensation—Compensation, assessment of.

Plaintiff agreed to purchase certain property from defendant but before the sale-deed could be executed defendant's brother's widow obtained a decree for maintenance against the defendant charging the property in dispute with the payment of maintenance. In a suit by the plaintiff for specific performance of the agreement of sale [

CHHOTABHAI HIRACHAND v. MAGANABHAI MAGANBHAI.

Held, (1) that the plaintiff was entitled to compensation for the burden which had been imposed upon the property which he had contracted to buy owing to the decree passed in favour of the widow, and that he was entitled to be indemnified against any claim the widow may make against him for maintenance;

(2) that the compensation should take the form of a sum of money to be deducted from the price to be paid by the plaintiff sufficient to purchase an annuity equal to the amount of annual maintenance awarded to the widow.

First appeal against the decision of the Additional First Class Subordinate Judge at Surat, in Suit No. 146 of 1920.

Mr. *G. N. Thakor* (with him Mr. *R. J. Thakor*), for the Appellant.

Mr. *M. B. Dave*, for the Respondent.

JUDGMENT.— On the 22nd January 1918 the plaintiff entered into an agreement with the first defendant to buy certain property. Rs. 201 were paid as earnest-money and the sale-deed was to be executed within two months. Owing to various circumstances, which it is not necessary to mention in detail, the time for the execution of the sale-deed was extended. Meanwhile, the widow of the first defendant's brother filed a suit to establish her right to maintenance against the first defendant and her step-son and obtained an injunction in that suit against the first defendant absolutely restraining him from selling the suit property to the plaintiff. Eventually, it was decided in that suit that the widow had the right to maintenance against her step-son and her husband's brother and the maintenance was made a charge on the immoveable property. The result was that, when the plaintiff called upon the first defendant to execute the sale-deed in respect of the suit property, it was charged with the maintenance in favour of the widow. The widow was originally a party to this suit filed by the plaintiff for specific performance, but defendant No. 1 thought that she was not a necessary party and she was ordered to be struck off, for what reasons we do not know. But although the second defendant, the widow, was struck off certain issues were raised on the question (1) whether plaintiff entered into the plaint agreement with notice of the widow's right, (2) whether the plaintiff purchased the property subject to the widow's right, and (3) whether the plaintiff's claim for specific performance was with a variation. The learned Subordinate Judge found that the plaintiff had notice of Bai Ratan's right when he entered into the agreement, and that he purchased the property subject to Ratan's right. He passed a decree for the plaintiff ordering defendant No. 1 to pass the sale-deed of the suit property to the plaintiff and give him possession thereof, the first defendant being entitled to the money deposited by the plaintiff in that Court. The result of that decree would be that the plaintiff took the property subject to the burden of the charge in favour of the widow, while the first defendant would be entirely free from any liability to maintain her.

We cannot agree with the learned Judge's conclusion that the plaintiff entered into the agreement for the purchase of property subject to Ratan's right of maintenance. Even if he knew that Bai Ratan had a claim against the first defendant for maintenance, there would be nothing in that fact to put the plaintiff on notice that there was an incumbrance on the suit property, and even if the first defendant sold the property he would still be liable to maintain the widow of his brother out of the sale-proceeds, which would, in spite of the sale, retain the character of ancestral property. It seems to us that this case now comes within section 14 of the Specific Relief Act, and that the plaintiff is entitled to compensation for the burden, which is imposed upon the property he contracted to buy owing to the decree passed in favour of the widow. What the amount of compensation would be must be decided by the Trial Court. The plaintiff is entitled to be indemnified against any claim the widow may make against him for maintenance, and the compensation in the ordinary course would take the form of a sum of money sufficient to purchase an annuity equal to the amount of annual maintenance awarded to her.

The appeal must be allowed and directions should be given that the first defendant cannot be paid the amount deposited by the plaintiff in Court. The

lower Court is to decide what sum should be set apart out of that money in order to compensate the plaintiff for the burden that is cast upon him of satisfying the charge on the property in favour of the widow.

Appellant is entitled to his cost.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 201 OF 1921.
March 28, 1922.
Present:—Mr. Justice Walsh and
Mr. Justice Stuart.
GAJADHAR—APPLICANT—APPELLANT
versus
MEGHA AND ANOTHER—OPPOSITIE PARTIES—RESPONDENTS.

Succession (Property Protection) Act (XIX of 1841), s. 18—Appeal.

No appeal lies under the provisions of section 18 of the Succession (Property Protection) Act from the decision of a District Judge.

First appeal from an order of the District Judge, Allahabad, dated the 18th of November 1921.

Pandit *K. N. Laghate*, for the Appellant.

Munshi *Shiva Prasad Sinha* (with him Munshi *Jang Bahadur Lal*), for the Respondent.

JUDGMENT.—The learned Counsel for the respondents takes a preliminary objection that no appeal lies under the provisions of section 18 of Act XIX of 1841. This objection must prevail. The appeal is dismissed with costs.

J. P. *Appeal dismissed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 653 OF 1921.
November 10, 1922.
Present:—Mr. Justice Marten and
Mr. Justice Fawcett.
KRISHNALAL CHUNILAL MAJUMDAR
—PLAINTIFF—APPELLANT
versus
DHIRAJLAL NAVNITLAL JHDVERI
DEFENDANT—RESPONDENT.

Landlord and tenant—Rent—Abatement, uniform and constant—Presumption—Apportionment of abatement.

A Court is always anxious to find a legal origin for acts when it finds that they have been consistently spread or exercised over a long series of years. [p. 503, col. 1.]

Where it is found that there has been a constant and uniform deduction from the rent of certain holdings on the ground of loss of pasturage, the Court may presume a legal origin for the deduction. In such a case there is nothing illegal on splitting up the holdings for the landlord and the tenant to agree to an apportionment of the deduction to different holdings. [p. 503, col. 2.]

Second appeal against the decision of the Acting District Judge, Broach, in Appeal No. 43 of 1917.

Mr. *G. N. Thakor* (with him Mr. *R. J. Thakor*), for the Appellant.

Mr. *H. V. Divatia*, for the Respondent.

JUDGMENT.—The point on this appeal is whether the defendant is entitled as of right to deduct Rs. 3 from his assessment payable to the plaintiff *inamdar*. The lower Appellate Court differing from the Judge of first instance has found that the abatement claimed by the defendant has not been fluctuating but was uniform throughout, and that it has been uniformly allowed every year since 1868, that is, for a period of 53 years, and that it is not a deduction allowed to the old *khatedars* personally, but is allowed to particular holdings.

Mr. Divatia has put before us very clearly the material facts, and it will be found that looking at the material exhibits for the years 1867, 1906 and 1908, *viz.*, Exhibits 125, 122 and 128, there was a consistent deduction of Rs. 8 in respect of the suit and other lands. Further, it is described as a deduction in respect of loss of pasturage. We thus get a constant deduction for some 41 years on this alleged ground, and after his lapse of time, no explanation is forthcoming from the *inamdars* as to why it has been allowed, apart

from the ground stated in the receipts themselves.

Stopping there one would think that that would be a good reason for inferring a legal origin to that consistent deduction, for, as the learned Judge has pointed out, the Court is always anxious to find a legal origin for acts, when it finds that they have been consistently spread or exercised over a long series of years.

Then when we come to 1908, a change comes over the scene, because some of the original lands were then parted with by the *khatedars*. Accordingly we get the area of the land reduced first of all from 52 *bighas* of land, to say 32 *bighas* of land and the deduction comes down to Rs. 6. Similarly, if we look at Exhibits 129 and 99 for the years 1910 and 1911, we find the deductions are of Rs. 6 only.

In 1912 there was a formal transfer to the defendant of the suit land which in fact he had purchased in 1905, and then we find that there is a remission made to him of Rs. 4-5-0. That was the *Sambat* year 1968, and the point made by the appellant is that the deduction allowed for that year was not Rs. 4-5-0 but only Rs. 3. However, there is another book for that year or another account for that year, Exhibit 149, which shows the remission as being Rs. 4-5-0. Then when we come to 1913, we find Rs. 4-5-0 is in fact deducted in Exhibit 100 so I am disposed to think that there is some mistake about Exhibit 91. The probabilities are that Exhibit 149 is correct.

Next we find that in 1915—that is an important date—the two *inamdars* came to a partition, and the suit Survey Numbers 19 and 33 fell to the share of the plaintiff, and Survey No. 102 to the share of Motilal. Further, on that occasion a document, Exhibit 97, was prepared of a formal nature, in which the deductions are shown. They are shown no doubt not in respect of particular fields but as against the names of the *khatedars*. I think that makes no substantial difference. As regards the *khatedars* in question, we find the total allowance of Rs. 4-5-0 of which Rs. 3 is apportioned to the plaintiff and Rs. 1-5-0 is apportioned to Motilal.

Accordingly in effect we get this that landlords partitioning property amongst themselves are admitting that there is a certain deduction in respect of the rents, otherwise payable to them. We further find that this particular deduction has been agreed to by the defendant, and that in 1915 (Exhibit 16) the amount of Rs. 14-2-11 was paid by the defendant, which payment is on the assumption that Rs. 3 was to be deducted. It is now said that the balance of Rs. 3 was carried forward in the plaintiff's accounts, and that, therefore, this receipt should be disregarded. That argument seems to me to be one which is not well-founded. The defendant is naturally entitled to rely on the receipt which he obtained from the *inamdar*.

On those facts, what error of law has the learned Judge made in arriving at the conclusion which he has made. In the first place, I do not think it can be said that there is no evidence here to warrant the learned Judge in arriving at the decision which he did. As I have already pointed out, down to 1908 we get long uniform deduction of Rs. 8. Then as regards the later years, I personally consider that it was open to the learned Judge on the evidence to arrive at the decision which he did. In effect the decision amounted to this. He finds a deduction not in respect of all the lands but in respect of certain particular lands, and then when those particular lands are split up the find the parties agreed to apportion this deduction amongst the lands, giving at any rate a specific sum to the suit lands. What is wrong in that? If I may make the matter clear, supposing there was a deduction in respect of ten particular holdings down to 1910 of say Rs. 10, and then some of these holdings are split up, what is there illegal in the landlord and tenant agreeing to apportion this deduction in respect of three of the holdings at a particular sum? What would be the result if a law suit were brought to have this deduction apportioned? The argument presented to us is really this that because this apportionment is not made for 60

years, there is no evidence of user or custom. In my opinion that argument is not well-founded. Until 1908 or thereabout it had never become necessary to apportion the deduction of Rs 8.

I accodingly think that nothing has been showa here which would lead me to the conclusion that the learned Judge has committed any such error either of law or otherwise, as would justify us in second appeal in reversing or altering the decision which he has arrived at.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

Z. K.

MADARS HIGH COURT.

FULL BENCH.

LETTERS PATENT APPEALS NOS. 10, 11 AND 12 OF 1922.

October 25, 1923.

Present:—Sir Walter Schwabe, KT., Chief Justice, Mr. Justice Coutts-Trotter and Mr. Justice Ramesam.

VENKATARAMA AIYAR—APPELLANT

versus

A. V. RANGIYAN CHETTY AND OTHERS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 52—Lis pendens, doctrine of, applicability of—Mortgage decree—Subsequent decree for maintenance—Purchaser in execution of later decree, whether entitled to redeem purchaser in execution of earlier decree.

The principle that the right of a second mortgagee to redeem the first mortgage is not extinguished by proceedings in a suit on the first mortgage to which the second mortgagee is not a party is inapplicable to a case where the second mortgage did not exist either at the time of the suit or at the date of the decree or even at the time of the sale in execution of the decree. [p. 505, cols. 1 & 2.]

Mulla Veetil Seethi v. *Achuthan Nair*, 9 Ind. Cas. 513; 21 M. L. J. 213; (1911) 1 M. W. N. 165; 9 M. L. T. 431 (F. B.), referred to.

In a suit for maintenance by a Hindu widow, a mortgagee decree-holder against the family properties was impleaded as a party. The widow obtained a decree for maintenance which was made a charge on the interests in the properties of the mortgagor subject to the lein claimed by the mortgagee decree-holder. In execution of the mortgage decree, the properties were brought to sale and purchased by, and delivery of possession made to, the decree-holder. In execution of the decree for maintenance the same property was again sold and the auction-purchaser therein contended in execution proceedings that his purchase was valid subject to the mortgage which he claimed to be entitled to redeem:

Held, (1) that the charge created by the maintenance decree came into existence only on the date of the decree and not earlier and the mere fact that the widow was not impleaded in the sale proceedings in execution of the mortgage decree did not give her or the purchaser in execution of her decree any right to redeem the mortgage; [p. 505, col. 1.]

(2) that the rights of the mortgagee decree-holder having been expressly saved by the maintenance decree, the doctrine of *lis pendens* did not affect the rights of the mortgagee in the case so as to prevent him from proceeding in execution against the property, merely because the maintenance decree gave a charge to the widow on the interest of the mortgagor. [p. 505, col. 2.]

Kunhi Umah v. *Ahmed*, 14 M. 491; 1 M. L. J. 476; 5 Ind. Dec. (N. S.) 343 and *Dose Thimmanna Bhutta* v. *Krishna Tantri*, 29 M. 508; 16 M. L. J. 413, referred to.

Letters Patent Appeal against an order and judgment of the High Court in C. M. A. No. 11 of 1921 preferred against that of the District Court, Trichinopoly, dated the 25th November 1920, in E. A. No. 498 of 1920, in O. S. No. 1 of 1889.

Mr. *K. V. Krishnaswami Iyer*, for the Appellant in all the appeals.

Mr. *K. R. Rangasami Iyengar*, for the Rospondent in L. P. A. No. 10.

Mr. *T. V. Muthu Krishnier*, for the Respondent in L. P. A. No. 11.

Mr. *C. V. Ananta Krishnier*, for the Respondent in L. P. A. No. 12.

JUDGMENT.—On 6th October 1888 a suit (O. S. No. 1 of 1889) was filed by a Hindu widow for maintenance. As to one of the defendants (14th) impleaded in that suit, she alleged that he held a mortgage over a portion of the property sought to be charged with the maintenance and that the said mortgage was obtained fraudulently and without consideration, was not for family benefit and could not affect her right to charge the maintenance on the mortgaged property. The 14th defendant pleaded that he held two hypothecation bonds from the 1st defendant and that he had sued on the latter in O. S. No. 16 of 1887, and obtained a decree (on 28th September 1887).

The District Judge found that the plaintiff had no cause of action against the 14th defendant. He gave a decree for maintenance which was made a charge against the *interests of defendants Nos.* 1 *and* 2 *in the plaint properties* subject to the lien claimed by the 14th defendant among others (22nd September 1890).

Meanwhile in execution of O. S. No. 16 of 1887 the mortgaged property was sold on 28th November 1889 and the decree-holder purchased it and obtained delivery on 25th December 1889. The respondents before us are his assignees.

In execution of the maintenance decree the same property was sold on 10th March 1920 and the purchaser obtained delivery on 19th July 1920. He is the appellant before us. Objection was made by the respondents to the delivery and the matter came up to this Court under section 47, Civil Procedure Code, in C. M. A. No. 11 of 1921. The two learned Judges who heard it having differed, the appeal was dimisssed under section 98, Civil Procedure Code. Hence this Letters Patent Appeal.

The appellant, while conceding that his purchase was subject to the mortgage of the 14th defendant in O. S. No. 1 of 1889, claims that he can ignore the sale in execution of O. S. No. 16 of 1887 and contends that his purchase is valid subject to the mortgage which he is entitled to redeem. This contention is raised in two forms:—

That the decree-holder in O. S. No. 1 of 1889 was in the position of a second mortgagee and that the first mortgagee not having impleaded her in the sale proceedings of O. S. 16 of 1887, he is still liable to be redeemed by the second mortgagee or by the appellant who is subrogated to the second mortgagee's rights. It is true that, when a first mortgagee sues on his mortgage without making the second mortgagee a party, brings the property to sale and purchases it in execution, the right of the second mortgagee to redeem the first mortgage is not extinguished by the proceedings in such a suit to which he was not a party. *Mulla Veettil Seethi* v. *Achuthan Nair* (1). But the principle cannot apply in this case as the so called second mortgage did not exist either at the time of the suit or decree (O. S. No. 16 of 1887) or even at the time of the sale in execution of the decree. The charge granted by the maintenance decree in O. S. No. 1 of 1889 came into existence only at the date of the decree and not earlier. The charge can be made use of as if it existed at the date of the plaint only by the principle of *lis pendens*. This leads to the next contention.

(2) By the doctrine of *lis pendens*, the 14th defendant in O. S. No. 1 of 1889 was prohibited from dealing with the property [or selling it in execution: *Kunhi Umah* v. *Ahmed* (2),] which was the subject of the maintenance suit [*Dose Thimmanna Bhutta* v. *Krishna Tantri* (3)], so as to affect the rights of the plaintiff under the decree therein. The appellant contends that the sale in execution of O. S. No. 16 of 1887, if upheld, will so affect the plaintiff's rights under the decree in O. S. No. 1 of 1889. This contention cannot be accepted. In O. S. No. 1 1889 it was held that the plaintiff had no cause of action against the 14th defendant, that his mortgage was perfectly valid and the charge given to the plaintiff was subject to his rights. The decree used the word 'lien' but as the judgment made no distinction between the mortgage and the decree (which was also known to the Court) obviously all the rights of the 14th defendant under his decree were intended to be saved. This is the natural and proper construction of the decree in the light of the findings in the judgment and the pleadings. That being so, it cannot be said that the sale in execution of O. S. No. 16 of 1887 affects the rights of the plaintiff in O. S. No. 1 of 1889 under the decree which saved the rights of the decree-holder in O. S. No. 16 of 1887. The consideration that

(1) 9 Ind. Cas. 513; 21 M. L. J. 213; (1911) 1 M. W. N. 165; 9 M. L. T. 431 (F. B.).

(2) 14 M. 491; 1 M. L. J. 476; 5 Ind. Dec. (N. S.) 343.

(3) 29 M. 508; 16 M. L. J. 413.

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the effect of this conclusion is to make the lien obtained by the decree-holder in O. S. No. 1 of 1889 illusory so far as the property mortgaged to 14th defendant was concerned, cannot affect the construction of the decree which *expressly* saved the rights of the 14th defendant and cannot, by *implication*, adversely affect such rights simply because it purported to give a charge to the plaintiff on the interests of defendants Nos. 1 and 2 which had ceased to exist.

The appeal is dismissed with costs.

Letters Patent Appeals Nos. 11 and 12 follow and are dismissed. Letters Patent Appeal No. 12 with costs.

V. N. V.

Appeals dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 716 OF 1921.

November 15, 1922.

Present:—Mr. Justice Marten and Mr. Justice Fawcett.

KASHINATH GYANOBA KIKLE—APPELLANT

versus

GANESH SITARAM KULKARNI AND ANOTHER—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 142, 144—Possession and dispossession—Adverse possession—Burden of proof—Limitation—Partition—Suit to recover excess area.

Where a plaintiff's case is based on the allegation that he is the owner of the land in dispute, and was in possession of it till he was dispossessed by the defendant, it is incumbent on him, under Art. 142 of Schedule I to the Limitation Act, to prove that he has been in possession of the land within twelve years of the suit. When he comes to prove such possession his paper title would come to his aid with greater or less force according to the circumstances established in evidence. If, on the other hand, the suit comes under Art. 144 of Schedule I to the Limitation Act, it is for the defendant to establish adverse possession as against the plaintiff. [p. 507, col. 1.]

Fakl Abdulla v. *Babaji Gungaji*, 14 B. 458; 7 Ind. Dec. (N. s.) 767, *Tarubai* v. *Venkatrao*, 27 B. 43 at p. 66; 4 Bom. L. R. 721, *Rani Hemanta Kumari Debi* v. *Maharaja Jagadindra Nath Roy*, 8 Bom. L. R. 400; 10 C. W. N. 630; 3 A. L. J. 363; 1 M. L. T. 135; 16 M. L. J. 272 (P.C.), followed.

Rajkumar Roy v. *Gobind Chunder Roy*, 19 C. 660; 19 I. A. 140; 6 Sar P. C. J. 140; 9 Ind. Dec. (N. s.) 883 (P. C.), distinguished.

Plaintiff and defendant agreed to divide a certain Survey Number in equal moieties, and after the division each obtained possession of the area allotted to him. More than twelve years after the division it was discovered that defendant was in possession of a larger area than the plaintiff. The latter thereupon brought a suit to recover the excess on the allegation that he had been in possession of it but had been dispossessed from it by the defendant four years prior to the suit:

Held, that it was incumbent on the plaintiff to prove that he had been in possession of the area claimed by him within twelve years of the suit. [p. 509, col. 1.]

Second appeal against the decision of the Assistant Judge, Satara, in Appeal No. 151 of 1920.

Mr. *K. N. Koyaji*, for the Appellant.

Messrs. *S. Y. Abhyanker* and *G. S. Mulgaonkar*, for the Respondents.

JUDGMENT.

Marten, J.—The plaintiff's case is based on the allegation in his plaint that he is the owner of the land in dispute, and in possession of the same till dispossessed by the defendants about four years ago. That being so, it is incumbent on him under Art. 142 of the Limitation Act to prove that he has been in possession of the property within twelve years from the suit. Accordingly as held in *Fakl Abdulla* v. *Babaji Gungaji* (1) and *Tarubai* v. *Venkatrao* (2) he must prove that possession, and cannot rely merely on his paper-title. If on the other hand the suit comes under Art. 144, then it is for the defendants to establish adverse possession as against the plaintiff. This is roughly speaking the effect of those two decisions.

Now in the present case, as far as the paper-titles go it would appear that the plaintiff on the one hand and the defendants on the other hand were to devide Survey No. 58, which is now Survey No. 62 and consists of 24 acres 10 *gunthas*, into equal moieties of 12 acres and 5 *gunthas* each. But it is plain that in 1915 when a survey party came to measure the fields, it was found that the defendants were in actual possession of more than one moiety of

(1) 14 B. 458; 7 Ind. Dec. (N. s.) 767.
(2) 27 B. 43 at p. 65; 4 Bom. L. R. 721.

KASHINATH GYANOBA KIKLE *v.* GANESH SITARAM KULKARNI:

the land, *viz.*, about one acre and 10 *gunthas* in excess of the moiety s' own under the paper-title. The findings of the lower Appellate Court are: "It seems clear that either the number was not correctly divided into halves at the original partition, or that at some subsequent period encroachments were made by the occupants of the northern (defendants') shares but there is no evidence at all to show at what period the discrepancy in area between the title-deeds and the actual occupation crept in. In order to succed plaintiff must prove that the discrepancy arose within the last twelve years and this he has failed to do indeed all the probabilites in the case point to the presumption that the discrepancy is of long standing."

The main argument of the appellant is that it is incumbent upon us to presume that possession went with the paper-title, and that it continued with it down to 1915 in the absence of evidence to the contrary. But if this proposition was accepted without any qualification, it would seem to negative the propositions which are clearly laid down in *Faki Abdulla* v. *Babaji Gangaji* (1) and *Tarubai* v. *Venkatrao* (2). It would only be necessary, if that argument was correct, for the plaintiff to prove his paper-title, and then ask the Court to presume possession as from the date of that paper-title, and further that possession continued down to the material date. If so, there would be no substantial difference between Arts. 142 and 144. On the other hand, their Lordships of the Privy Council have pointed out in *Rani Hemanta Kumari Debi* v. *Maharaja Jagadindra Nath Roy* (3) that when the plaintiff comes to prove his possession under Art. 142 his paper-title comes to his aid with greater or less force according to the circumstances established in evidence. That proposition I respectfully accept, but it seems to me to be far removed from an absolute presumption that possession always follows the paper-title.

Similarly in one other case which was relied on by the appellant *viz.*, *Rajkumar Roy* v. *Gobind Chunder Roy* (4) in support of the propcsition that the legal presumption is that possession follows the title, there was a very material difference between the facts of that case and the facts of the present. In *Rajkumar Roy* v. *Gobind Chunder Roy* (4) it was clear that the plaintiff or his predecessors had obtained physical possession in 1857. Accordingly the decision of the Board amounted to this that there was a presumption that that possession continued with the title down to the material date. There again I quite appreciate that proposition. If once you could find it definitely established here that the plaintiff or his predecessors-in-title had obtained physical possession of the disputed land, I agree that one would infer that that possession continued until it was shown to have ceased.

But that is not the only distinction between the present case and *Rajkumar Roy* v. *Gobind Chunder Roy* (4). After the date in 1857 when the land was shown to have been taken possession of by the plaintiff in that case, it appears to have become largely sub-merged, and at other times portions of it were wild jungle land. Further there were peculiar circumstances connected with the fact of establishing possession on the one side or the other, and under the circumstances of the case the Court held there was no reliable evidence to prove possession either the one way or the other in the later years. But in the present case we have the parties enjoying two portions of one field and cultivating their land side by side, and the fact as to who was in physical possession of any particular portion of the land must have been within the clear knowledge of both parties.

It is clear that in 1915 when the measuring party came, the parties were in possession of unequal shares and personally I think that that fact cannot be ignored in considering whether the plaintiff has satisfied the *onus* of proof as to possession in the

(3) 8 Bom. L. R. 400; 10 C. W. N. 630; 3 A. L. J. 363; 1 M. L. T. 135; 16 M. L. J. 272 (P. C.).

(4) 19 C. 660; 19 I. A. 140; 6 Sar. P. C. J. 140; 9 Ind. Dec. (N. S.) 883 (P. C.).

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present case. I further think that an inspection of the plan of this property affords some possible clue to the division which was found to be in existence in 1915. It is an irregular four-sided plot of land, and if one takes what I will call the top portion and the bottom portion it will be seen that the actual division adopted divided those boundaries, *viz.*, the top boundary and the bottom boundary of the whole Survey Number very nearly into two equal portions, and that what is alleged to be the true division line does not appear to be so as far as those top and bottom boundaries are concerned; therefore, as far as merely the eye is concerned the parties may easily have accepted this particular division either for the sake of convenience or even possibly by mistake. It is only when one sees the physical configuration of the right hand half and the left hand half of the land, that one realizes that the mode of division actually found in 1915 resulted in the one half getting a larger area of land. However, that is largely guess work based on the plan, and not having seen the property I only mention it as being a possible clue to the actual facts. Personally I entirely agree with the learned Appellate Judge that all the probabilities in the case point to the presumption that the discrepancy is of long standing. I think the probabilities are that but for the measuring party both parties would have remained quite happily in possession of the land which they were actually in possession of in 1915.

Taking all the facts of this particular case into consideration, and after giving due weight to the paper-title, I am of opinion that the plaintiff has not satisfied the burden of proof which lies on him to prove his possession of the disputed land within twelve years of the suit, and that consequently his suit was rightly dismissed by the learned Judge.

Under these circumstances it is unnecessary for me to consider the appellant's second point, which was based on the question of adverse possession, and on the allegation that the defendants not having intentionally taken possession of the land in dispute, it could not be adverse possession within the meaning of Art. 144 of the Limitation Act.

In my judgment, the appeal should be dismissed with costs. Only one set of costs allowed.

Fawcett, J.—I do not think that the decision of the lower Appellate Court is shown to be erroneous on the facts of this case. The main contention of the appellant's Pleader is that the Court should presume that the plaintiff having the title also had possession. No doubt there are cases where such a presumption can properly be made. One is that of jungle or waste land where there is either no proof of or very title proof of acts of ownership having been exercised on either side. Another case is where the evidence as to such acts of ownership is very nearly equal.

The case relied upon by Mr. Koyajee in *Rajkumar Roy* v. *Govind Chunder Roy* (4) is one of the former class of cases, and as pointed out in the judgment of their Lordships, the condition of the land was such as to create great difficulty in the proof of possession. Also in that case there was an admitted possession of the plaintiff in 1857. It is, therefore, a very different case from the present. And in the case at *Rani Hemanta Kumari Debi* v. *Maharaja Jagadindra Nath Roy* (3) their Lordships were careful to say that this presumption came to the aid of the plaintiff with greater or less force according to the circumstances established in evidence. In other words, it is not an absolute presumption of law but a purely discretionary one depending upon the particular circumstances of each case. This conforms with the provisions of the Evidence Act, for though section 110 recognises a presumption that a person in possession also has a good title, there is no corresponding section saying that the person with title should be presumed to be in possession. This presumption is one that can only come under section 114 of the Evidence Act, which allows the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, etc. In this particular case the circumstances are such that it is not at all improbable that the mistake dis-

covered in 1915 was first made at the time of the original partition, and I do not agree with Mr. Koyaji's contention that the Court should also draw in his favour a presumption that his predecessors-in-title then got possession. It is possible that each of the two parties partitioning the land did then obtain an equal half and that the discrepancy came into existence later on. But the probabilities in favour of that view are not sufficient to justify the Court in presuming that it was actually so. And the fact that in 1915 the defendants were in possession of the land in suit is a very cogent circumstance against raising the presumption that this Court is asked to draw.

I agree, therefore, in holding that the learned Appellate Judge was correct in his view that it was incumbent on the plaintiff in the first place to show possession within 12 years; and as he has failed to do so, this suit must be dismissed. As the onus of proving adverse possession has not shifted to the defendants, we are not concerned with the question whether their possession was actually adverse within the meaning of Art. 114 of the Limitation Act.

I agree, therefore, with my learned brother that the appeal should be dismissed with costs.

Appeal dismissed.

Z. K.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2525 OF 1922.

March 15, 1923.

Present:—Mr. Justice Abdul Raoof.

MUHAMMAD RAMZAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

THE MUNICIPAL COMMITTEE, ALIPUR—PLAINTIFFS—RESPONDENTS.

Adverse possession—Mortgagee—Money spent on property by person in possession—Charge—Overt act—Execution of decree—Symbolical possession, delivery of, effect of—Municipal Committee, whether can acquire adversely.

The mere fact that a person in possession of property over which he asserts title as owner has spent money on the property for which he would have a charge over the property does not convert his possession into that of a mortgagee. [p. 510, col. 2.]

It is open to a mortgagee to assert his ownership over mortgaged property by doing an overt act and giving notice of his intention to the mortgagor. [p. 510, col. 2.]

The mere fact that formal possession of property is given to a decree-holder in execution of his decree does not bring about any change in the possession or title of third persons. [p. 510, col. 2.]

There is nothing to prevent a Municipal Committee from acquiring property by adverse possession. [p. 510, col. 2.]

Second appeal against a decree of the District Judge, Multan, dated the 8th July 1922.

Mr. *Rama Nand*, for the Appellants.

Mr. *Har Gopal*, for the Respondent.

JUDGMENT.—This was a suit for possession of a vacant site on the allegation that the site in suit and the land around it were the property of the Municipal Committee, Alipur, and that the site was annually leased from year to year by public auction and that it was leased in 1917-18 to one Ishar Das and the defendants took it on a sub-lease from the latter. Muhammad Ramzan, one of the defendants, on the expiry of the term of his lease refused to vacate it and to deliver possession to the lessee to whom it was leased in 1918-19 and set up a proprietary title. The evidence disclosed that the Municipal Committee had been recorded in the revenue papers as the owner of the site. The onus was, therefore, placed upon the defendants to prove the title. The following issue was framed.

Whether the defendants are owners and in adverse possession of the site in suit for over twelve years? The history of the site as traced out in the judgments of the two Courts shows that the land belonged to one Sohaura and other co-sharers and that in 1894 the Municipal Committee for sanitary purposes levelled the land and after notice to the owners filled up the pits. One Palia Khan applied on the 4th of January 1895 that his ownership over the land be recognised by the Committee. An estimate of the cost of levelling the land was prepared and the Municipal Committee demanded from the owners the cost of levelling the

land and of filling up the pits. The site now in suit is only a part of the land which the owners claimed and which the Municipal Committee ordered to be returned on payment of expenses. Masu Khan and other owners were prepared to sell the land to the Municipal Committee, but it was reported to the Tahsildar that the defendants had one twelfth share in the land and that they were not prepared to sell it. The defendants also filed certain written objections on the 24th of May 1896, and expressed their desire to pay their share of the expenses. The defendant Muhammad Ramzan was shown the detail of the expenses, but the Municipal Committee urged that it had been spending money over the land for thirty years and expressed a wish to acquire an interest in the land, but Muhammad Ramzan refused.

The Municipal Committee thereupon held a meeting and passed a resolution to the effect that the Committee had been in possession of the land for more than 12 years and that they were not willing to allow the defendants or other owners to take possession of it. The defendants were accordingly informed of the decision of the Municipal Committee and were directed to have the matter settled by a suit in a Civil Court. This resolution was passed on the 26th of January 1897, and according to the findings of the Courts below the defendants were informed of it in the following March. Ever since then the Municipal Committee had been in possession of the land adversely. The evidence given by the defendants to prove their possession has been disbelieved and that given by the Municipal Committee to prove the acquisition of title by adverse possession has been believed. Both the Courts below have concurrently found against the defendants and have decreed the plaintiff's suit. Hence this second appeal.

On the findings of fact recorded by the Courts below, no question of law arises. Mr. Rama Nand, the learned Vakil for the appellants, however, has vehemently argued that the position of the Municipal Committee was akin to that of a mortgagee, as under the Municipal Act they had acquired a charge on the land by spending money on it and that, therefore, they could not have acquired adverse possession. I am unable to follow the argument of the learned Vakil, but even if it be granted for a moment that the position of the Municipal Committee was that of a mortgagee, then the resolution passed by it and the information given to the defendants clearly showed that by an overt act the Committee had asserted ownership in the land and ever since then had been in possession as owner. A great deal of the Court's time was taken up by Mr. Rama Nand in putting forward several irrelevant contentions that the evidence in the case had been misread by the Courts below; that the question of adverse possession had not been properly tried and that the question of the charge on the property in favour of the Municipal Committee had not been taken into consideration by the Courts below. It is, however, clear that no such contention was ever put forward before any of the Courts below and it is for the first time that an attempt is being made in this Court to resist the suit upon this untenable ground.

Another contention put forward was that in 1900 possession over the land was taken in execution of a decree and that on the 22nd of September 1900, the land was mutated in the names of the decree-holders. Both the Courts below have dealt with this question and have found that actual possession always remained with the Municipal Committee and the mere fact that formal possession was given to the decree-holders did not bring about any change in the possession or title of the Municipal Committee. The mutation also did not affect the position of the Municipal Committee if they had all along actually remained in possession and continued to let the site to tenants.

Mr. Rama Nand earnestly pressed upon me that I should examine the sections of the Municipal Act with a view to find out whether the Municipal Committee could have acquired adverse possession. The learned Counsel seriously contended that, according to the various provisions of the Municipal Act, a Municipal Committee is incapable of acquiring adverse possession,

I must confess that I am unable to follow the argument of the learned Vakil.

The appeal is concluded by findings of fact and I see no ground for interference. The appeal is accordingly dismissed with costs.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 418 OF 1921.

November 8, 1923.

Present:—Mr. Justice Waller.

THE SOUTH INDIAN RAILWAY COMPANY BY THEIR AGENT AT TRICHINOPOLY—DEFENDANT—PETITIONER

versus

S. P. R. S. NARAYANA AYYAR—PLAINTIFF—RESPONDENT.

Railways Act (IX of 1890), ss. 77, 140—Suit against Railway Company—Notice to subordinate Officer, whether notice to Agent—Consignment of goods—Suit to recover compensation for loss—Burden of proof—Limitation, commencement of—Limitation Act (IX of 1908), Sch. I, Art. 31.

In a suit to recover compensation for the loss of goods consigned to the defendant Railway Company for carriage under a Risk-Note which exempts the Railway Company from liability except in the event of wilful neglect of the Company or theft by or wilful neglect of its servants and provides that robbery from a running train does not constitute wilful neglect, the burden of proving neglect on the part of the Company lies on the plaintiff. If it is alleged by the Company that the goods were lost by theft while the train was running, the burden of proving this fact lies on the Company. [p. 512, col. 1.]

Albuquersque and Sons v. *South Indian Railway Company*, 68 Ind. Cas. 269; 16 L. W. 667; (1922) M. W. N. 328; 43 M. L. J. 90; (1922) A. I. R. (M.) 231; 31 M. L. T. 470, followed.

Where it is found that the notice required by section 77 of the Railways Act has not been given to the Agent of the Railway but was sent to some subordinate officer of the Railway, the plaintiff in order to succeed, must prove, either that the power of the Agent to receive notices under section 140 of the Act had been delegated to the Subordinate officer who had actually received the notice, or that the Company by its rules or course of business had held out to the public that notices might be given to such officer instead of to the Agent and thus stopped itself from raising a technical defence. [p. 515, col. 1.]

A suit to recover compensation for loss of goods consigned to a Railway Company for carriage is governed by Art. 31 of Schedule I to the Limitation Act, and limitation for the suit begins to run from the date on which the defendant Company finally says the goods cannot be delivered. [p. 512, col. 2.]

Mahadeva Aiyar v. *South Indian Railway Company*, 69 Ind. Cas. 59; 45 M. 1351 14 L. W. 684; 30 M. L. T. 112 42 M. L. J. 2021 (1922) A. I. R. (M.) 362; (1921) M. N. W. 278, followed.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the judgment and decree of the Court of the Subordinate Judge, Mayavaram, in Small Cause Suit No. 911 of 1920.

This petition coming on for hearing on the 18th of December 1922 the Court (Ayling, J.) delivered the following

JUDGMENT.—This revision petition arises out of a Small Cause Suit in which the respondent, the consignee of a bale of cotton thread, entrusted for transport to the South Indian Railway Company, sued the Company for Rs. 470 damages for the loss of the said bale in transit. The bale was entrusted to the Railway Company on 2nd April 1919. Nothing has been heard of it since and there can be no possible doubt that it must be treated as lost. The loss of the bale is the basis of the suit.

The liability of the Company has to be determined with reference to a special agreement, Exhibit I, entered into between them and the consignor at the time of the despatch of the bale. This provides that in consideration of the carriage of the bale being at a lower rate the consignee (under whom, of course, plaintiff claims) has no right to compension for loss of the goods except in the event of wilful neglect of the Railway Administration or theft by or wilful neglect of its servants during transit. It is further provided *inter alia* that a robbery from a running train does not constitute wilful neglect. This question of the liability of the Railway Company has been dealt with by the Subordinate Judge in paragraphs 4 and 5 of his judgment. The issue he framed is this:—

"Whether the bale in question was lost by theft while the train was running and whether the defendant Company took

the necessary steps to prevent such a risk?"

The issue seems to me to have been very badly drafted because there are really two distinct questions involved, the burden of which is not on the same side in each case. Under the terms of the agreement the burden of proving neglect on the part of the Company lies on the plaintiff as explained by Kumaraswami Sastri, J., in *Albuquersque and Sons* v. *South Indian Railway Company* (1). It is open to the Company to say that the bale was lost by theft while the train was running, in which case, they are, as a matter of course, exempted from liability, but the burden of proof on this point lies on the Railway Company. The issue framed by the Subordinate Judge does not cover the first point at all. He has set himself simply to consider whether the Railway Company has shown that the bale was lost by theft from a particular waggon number 1897 during transit between Perundurai and Erode. He has laid down the extraordinary proposition that even if the bale was so stolen, it will not be theft from a running train if the thief got into the waggen before the train started, a proposition which seems to me to have no foundation; and his arguments on the evidence relating to the loading of the bale in the particular waggon specified seem to me to be most inconclusive. I connot accept the finding such as it is and must call for a specific finding from the present Subordinate Judge on the following two issues:—

(*i*) Was the suit bale lost in consequence of the wilful neglect of the Railway Administration or theft by, or wilful neglect of, its servants, transport-agents or carriers?

(*ii*) Was it lost by robbery from a running train within the meaning of Exhibit I?

Another point taken by the learned Vakil for the petitioner relates to the question of notice. This is governed by sections 77 and 140 of the Railways Act, IX of 1890. The former provides that a person entitled to compensation for loss of goods can only recover it if his claim has been preferred in writing by him or on his behalf, to the Railway Administration within six months from the date of the delivery of the goods for carriage by rail. Section 140 of the same Act provides for the method of service of notices on the Railway Administration. The effect of these two sections has been considered by a Full Bench of this Court in *Mahadeva Aiyar* v. *South Indian Railway Company* (2). In the present case the plaintiff relies on a notice, Exhibit A, which was addressed to the District Traffic Superintendent on 5th September 1919, within six months of the consignment of the bale. The question is whether those specified conditions o sections 77 and 140 have been complied with. Here again, I cannot accept the findings of the Subordinate Judge. The judgment of the Full Bench above referred to lays down the conditions on which notice to a Subordinate Officer like the District Traffic Superintendent could be deemed sufficient compliance; and it is sufficient to say that the Subordinate Judge's judgment is entirely without reference to the conditions therein laid down. I must, therefore, call for a proper finding on issue No. II, "whether the suit is barred for want of proper notice," in view of what is contained in the Full Bench judgment above referred to.

The last point taken on behalf of the Company is that the suit is barred by limitation. The proper Article applicable appears to be Art. 31 of the Indian Limitation Act, IX of 1908. On this point, I think the Subordinate Judge's findings must be accepted. Paragraph 7 of his judgment deals with it and he relies on a judgment of this Court in *Madras and Southern Marhatta Railway Company, Limited* v. *Bhimappa* (3). I can see no ground for distinguishing that case

(1) 68 Ind. Cas. 269; 16 L. W. 667; (1922) M. W. N. 328; 43 M. L. J. 90; (1922) A. I. R. (M) 231; 31 M. L. T. 470.

(2) 69 Ind. Cas. 59; 45 M. 135; 14 L. W. 684; 30 M. L. T. 112; 42 M. L. J. 202; (1922) A. I. R. (M) 362; (1921) M. W. N 878.

(3) 17 Ind. Cas. 419; 23 M. L. J 511.

from the present one, and it appears to be an authority for the Subordinate Judge's calculation of the time prescribed, from the date when the defendant Company finally said that the bale could not be delivered. I do not think on the question of limitation there is any ground for interference.

Findings on the issues referred to the Subordinate Judge must be returned within two months from this date. Either side will be at liberty to adduce fresh evidence, if they wish, on the two issues which have been referred to, in substitution of issue (1) as originally framed by the Subordinate Judge. Seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment the Subordinate Judge of Mayavaram submitted the following

FINDINGS.—On the issues Nos. 1 and 2 referred to therein, *viz.*,

(1) Was the suit bale lost in consequence of the wilful neglect of the Railway Administration or theft by, or wilful neglect of its servants, transport-agents or carriers?

(2) Was it lost by robbery from a running train within the meaning of Exhibit I?

* * * * *

On the 1st issue.—It follows that the bale had been lost on account of the neglect of the Railway Transport Officer. The further question is whether the neglect could be called wilful. When a bale had been consigned to an officer of the Railway Company and by his neglect the bale is not consigned, the neglect cannot but be considered to be wilful, unless there are extenuating circumstances to prove the contrary. In such cases, where the transport has to be done by a Railway Officer, if no explanation is forthcoming as to why the bale had not been loaded, he cannot be exonerated on the ground that the plaintiff has not proved that he (the officer) had wilfully kept it back. All neglect is wilful unless there are circumstances to show that the neglect was due to accident or to circumstances over which the Railway Officer had no control. In the absence of any such extenuating circumstances I cannot but hold that the non-loading of the bale was due to the wilful neglect of the transport agent. This conclusion is fully supported by the decision reported as *The Central India Spinning and Weaving Company* v. *G. I. P. Railway* (4).

As to the 2nd issue.—I find it in the negative as the oral evidence is untrustworthy and as the loss could have been proved by very satisfactory documentary evidence in the possession of the Company. It must be noted that no intimation was given of any such loss to the plaintiff promptly and that the theft was suggested by the Company only on 30th August 1919 though the bale is alleged to have been lost on 2nd April.

Then as regards the question whether proper notice had been given to the Company of the claim under section 77 of the Railways Act, the section only requires that notice should be given to the Administration. As a matter of convenience, section 140 lays down that the notice may be given to the Agent. But it has been held by their Lordships of the Madras High Court, in the Full Bench decision in *Mahadeva Aiyar* v. *South Indian Railway Co.* (2) that where there have been officers deputed to whom complaints could be made and who could settle the claims, and if it is shown to have reached the responsible office for the Railway Administration, the notice would be sufficient. In the present case, it would be seen that in answer to the letter written by the plaintiff to the District Traffic Superintendent, reply is sent to the plaintiff by the General Traffic Manager, and it would also be seen that the notice sent to the Agent is forwarded to the General Traffic Manager for disposal. The consignment receipt, Exhibit I (*a*), also shows that the person to whom the plaintiff should complain is the General Traffic Manager. Even in his last reply, the General Traffic Manager refers to the reply he had already sent. It, therefore, follows that the notice given by the plaintiff had reached the proper officer to whom it should be sent, and I accordingly hold that the notice given

(4) 67 Ind. Cas. 162; 24 Bom. L. R. 272; (1922) A. I. R. (B.) 46; 47 B. 155.

by the plaintiff to the District Traffic Superintendent on 19th August 1919 is a a proper notice as contemplated by section 77 of the Railways Act.

Mr. *V. Viswanatha Sastri*, for the Petitioner:—The findings are against me. The learned Judge has held that the Railway Company has failed to prove that the bale in question had been loaded in the particular waggon No. 1897 and, therefore, the bale was lost through the wilful neglect of the Company so as to take the case out of the limited liability undertaken. My submission is that the Judge has misunderstood the law on the subject. The onus is heavy on the plaintiff in these cases to bring home to the defendant Company actual neglect which would amount to wilful neglect under the law. Failure to prove that it was loaded in a particular waggon does not show neglect. The plaintiff has to prove wilful neglect before the onus can be thrown on the defendant Company of proving theft in a running train.

There is the other question of notice. The notice to the Agent, as required by sections 77 and 140 of the Railways Act was admittedly after the six months. The plaintiff relies on a notice sent to the General Traffic Manager or the District Traffic Superintendent. Nothing has been shown from which it can be inferred that the Company had put forward any other person as the person to whom the Agent's functions had been delegated. No estoppel has been made out within the ruling of the Full Bench in *Mahadeva Aiyar* v. *South Indian Railway Co.* (2).

Mr. *D. Ramaswamy Aiyengar*, for Mr. *C. S. Venkatachariar*, for the Respondent.—On the first question, failure to prove proper loading of the suit bale, and suppression of the loading book are positive proof of the wilful neglect of the Company. In no such case is it possible for the plaintiff—a stranger to the working of the Company—to bring home to the Company servant this neglect with any greater degree of certainty.

On the question of notice the evidence recorded in the case, the findings of the lower Court on both occasions are clearly in my favour. The circumstances are such as to bring the case under the Full Bench ruling in *Mahadeva Aiyar* v. *South Indian Railway Co.* (2) I rely on the following facts:—

(1) The Railway Receipt given to plaintiff requires him to report to the Station Master first and then to the General Traffic Manager.

(2) The Station Master has been authorised by the General Traffic Manager to negotiate and settle my claim.

(3) Notices and letters addressed by me to the District Traffic Superintendent and the Agent himself have been forwarded for disposal to the General Traffic Manager.

(4) It is the General Traffic Manager that replies to me for notices addressed to the Agent and the District Traffic Superintendent.

(5) This objection as to want of notice was not raised by the Railway Company till the stage of the suit.

(6) The Railway Company is by such conduct estopped from denying the delegation of the Agent's powers to the General Traffic Manager within the meaning of the judgment of Ayling, O. C. J. in *Mahadeva Aiyar* v. *South Indian Railway Co.* (1).

This petition coming on for final hearing on the 1st of November 1923 after the return of the findings of the lower Court upon the issues referred by this Court for trial and having stood over for consideration till this day the Court delivered the following

JUDGMENT.—The findings called for have been recieved. I will deal first with that relating to the claim under section 77 of the Railways Act. The finding of the Subordinate Judge is that the notice given by plaintiff reached the proper officer to whom it should have been sent. The particular notice was, I take it, the letter addressed by plaintiff on 19th August 1919 to the District Traffic Superintendent, Trichinopoly (Exhibit D), and replied to by the Deputy Traffic Manager (Freight). It is not quite clear whom the Subordinate Judge considered to be the "proper officer," but I imagine that he meant by this

expression the General Traffic Manager of the Railway. His argument, I understand, is this. Plaintiff's letter to the District Traffic Suerintendent was replied to by the General Traffic Manager (as a matter of fact, the reply came from his Deputy; the notice sent by plaintiff to the Agent was referred by the latter to the General Traffic Manager; the consignment receipt indicates that consignors should complain to the General Traffic Manager; therefore, the General Traffic Manager must have been authorized to receive claims under section 77 and notice to him is a sufficient compliance with section 140 of the Act.

This finding is based on the Full Bench ruling in *Mahadeva Aiyar* v. *South Indian Railway Co.* (1) As I read that ruling, what two of the three Judges, decided was this, that there should be evidence (1) either that the power of the Agent to receive notices under section 140 had been delegated to some subordinate Officer, who had actually received the notice or (2) that the Company by its rules or course of business had held out to the public that notices might be given to such an officer instead of to the Agent and thus estopped itself from raising a technical defence.

In this case, I can find no such evidence. The rules of the Company have not been produced and there is nothing to show that the Agent has delegated to any of his subordinates his power under section 140. Nor is there any evidence from which it can be inferred that plaintiff's first claim came to his notice. The circumstances referred to by the Subordinate Judge do not justify the conclusion that the Company's course of business has led the public to believe that notice may be given to the District Traffic Superintendent, the Deputy Traffic Manager or the General Traffic Manager instead of to the Agent. Even plaintiff, when he came to issue his formal notice, addressed it to the Agent when, unfortunately for himself, it was out of time. He cannot, I think, fall back on informal correspondence between himself and Subordinate officers of the Railway at an earlier date.

I think that the Subordinate Judge's finding that plaintiff's letter to the District Traffic Superintendent of 19th August 1919 was a proper notice is supported by no evidence. Nothing has been proved that would bring the case within the Full Bench ruling referred to above. It is not necessary to consider the other findings. The suit is barred. The revision petition is allowed with costs throughout.

V. N. V.

Z. K. *Petition allowed.*

BOMBAY HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 127 OF 1921.

March 22, 1922.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Kanga.

MOTI CHAND RAOJI AND ANOTHER—DEFENDANTS NOS. 1, 2 & 3—APPELLANTS

versus

MANEKCHAND RAMCHAND GOJAR— AND OTHERS— PLAINTIFFS— RESPONDENTS.

Hindu Law—Joint family—Separation—Tenancy-in-common—Manager, position of.

When the members of a Hindu joint family express an intention to separate, they are no longer members of the joint family in the eye of the law, yet if there has been no partition of the joint family property, the members would continue as tenants-in-common and would be liable for the acts of the member in charge of the property.

Appeal.

Mr. *B. J. Desai* (with him Messrs. *R. G. Reale* and *Rutenla*), for Appellants.

Mr. *Goyajee* (with him Mr. *W. K. Manker*), for the Respondents.

JUDGMENT.—This is an appeal filed by the original second and third defendants against the decree of the First Class Subordinate Judge of Sholapur in favour of the plaintiffs. Admittedly, the plaintiffs had advanced the money, which is sought to be recovered, to the appellants' father on the 31st July 1918. Although at that time the family had expressed the intention to separate, and in the eyes of the law, they were no longer members of a joint Hindu family, yet if there had been

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no partition of the joint family property, the members of the family would continue as tenants in common and would be liable for the acts of that member of the family who was in charge of the joint property. The onus, therefore, would be upon the second and third defendants to show that the advance made to their father admittedly for the purpose of a Ginning Factoy and a shop at Latur in the Nizam's Dominions, was made after the actual division of that property so that they would no longer be liable for such advances. That was a fact, which if existed, would well be within the knowledge of the appellants. The second defendant instaed of giving evidence in favour of this contention supported the plaintiff's case. The third defendant never even went into the witness box to prove that the Latur Factory had been actually divided amongst the members of the family before the advances were made. The result is that unless the third defendant is given an opportunity now of proving, what he never attempted to prove in the Court below, the appeal must necessarily fail. But there is no precedent for allowing an appellant to lead evidence, which could have been led in the Court below, in appeal. Even if he had applied for review in the Court below he could not have brought himself within the provisions of the Code; because it could be said that the evidence which he wanted to lead was not within his knowledge, when the suit wes heard. The result must be that the appeal must be dismissed with costs.

N. H. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 551 OF 1920.

February 20, 1923.

Present:—Mr. Justice Broadway and Mr. Justice Moti Sagar.

ISHAR DAS—PLAINTIFF—APPELLANT

versus

FAZAL ILAHI AND OTHERS—DEFENDANTS—RESPONDENTS.

Co-owners—One co-owner dealing with property as sole owner—Registration of deed of alienation—Notice to other co-sharers—Execution of decree—Attachment and sale of judgment-debtor's property—Burden of proof.

It is not necessary for one joint owner of property to constantly examine the registers with a view to satisfying himself that his co-owner is not holding himself out as the sole proprietor of the joint property. [p. 517, col. 1.]

The mere fact of the registration of a document by which one co-owner purports to deal with joint property as sole proprietor cannot be held to give the other co-owner notice of the former's dealing with the property. [p. 517, col. 1.]

Tilakdhari Lal v. *Khedan Lal*, 57 Ind. Cas. 465; 48 C. 1; 39 M. L. J. 243; (1920) M. W. N. 561; 2 U. P. L. R. (P. C.) 139; 22 Bom. L. R. 1319; 18 A. L. J. 1074; 25 C. W. N. 49; 28 M. L. T. 224; 47 I. A. 239; 32 C. L. J. 479; 13 L. W. 101; 2 P. L. T. 101 (P. C.), followed.

A decree-holder who is seeking to bring certain property to sale in execution of his decree must establish that the property belongs to his judgment-debtor only and is liable to be sold in execution of his decree. [p. 517, col. 2.]

Second appeal from the judgment of the District Judge, Gujaranwala, dated the 12th December 1919.

Dr. *Gokul Chand Narang*, for the Appellant.

Mr. *M. Obedullah*, for Mr. *Niaz Ali*, for the Respondents.

JUDGMENT.—One Ishar Das obtained a decree against one Fazal Ilahi and in execution of that decree attached a certain house and attempted to bring it to sale. The brothers and nephews of Fazal Ilahi filed objections to the attachment and sale urging that they were joint owners with Fazal Ilahi of the house attached and entitled to three-fourths of it. Their objections were given effect to by the Executing Court and Ishar Das then instituted a suit for a declaration that the house in question was the sole property of Fazal Ilahi and liable to be brought to sale in execution of his (Ishar Das') decree. His suit was dismissed and an appeal preferred by him to the District Judge failed. He has now come up to this Court in second appeal through Dr. Gokul Chand Narang. It is contended that the findings of the learned District Judge are erroneous and based on inconclusive evidence. As to this it was urged that the mere fact of Fazal Ilahi's brothers having sent him, and other members of the family, money by money-orders while they were away from home did not warrant the conclusion that the house in question had been purchased by

Fazal Ilahi for all the brothers. A reference to the judgment of the learned District Judge, however, shows that he has not come to his decision on the mere sending of money orders by the brothers but has placed reliance on the oral testimony of certain witnesses who have been regarded as worthy of credence by him. There is thus in our opinion no force in this contention,

It was next urged that inasmuch as the said brothers had allowed Fazal Ilahi to hold himself out as the sole owner they are in equity precluded from now advancing any claim. Reference has been made to *Mahomed Moxuffer Hossein* v. *Kishori Mohun Roy* (1). *Khwaja Muhammad Khan* v. *Muhammad Ibrahim* (2). *Krishnajiban Sanyal* v. *Muhammad Masiuddin Mandal* (3). *Bakhshi Ram* v. *Liladhar* (4) and *Sham Lal* v. *Johri Mal* (5). We are in complete agreement with the principles enunciated in those authorities but are unable to see that they afford the appellant any assistance in this case. It is true that Fazal Ilahi executed three mortgages of the house in question describing himself as the sole mortgagor. These documents were registered but we are unable to see that the mere fact of registration can be held to have given Fazal Ilahi's brother notice of Fazal Ilahi's dealings with the property. We do not think it necessary for one joint owner of property to constantly examine the registers with a view to satisfying himself that his co-owner is not holding himself out as the sole proprietor of the property. In this view we are supported by the *dictum* of their Lordships of the Privy Council in *Tilakdhari Lal* v. *Khedan Lal* (6). Ishar Das is seeking to bring certain property to sale and it is for him to clearly establish that this property belongs to his judgment-debtor only and is liable to be sold in execution of the decree.

We accordingly dismiss this appeal with costs.

Appeal dismissed.

Z. K.

(1) 22 C. 909; 22 I. A. 129; 5 M. L. J. 10; 6 Sar. P.C. J. 583; 11 Ind. Dec. (N S.) 602 (P. C.).
(2) 26 A. 400; A. W. N. (1904) 99.
(3) 63 Ind. Cas. 244; 33 C. L. J. 369.
(4) 21 Ind. Cas. 619; 35 A. 353; 11 A. L. J. 371.
(5) 1 Ind. Cas. 732; 38 P. L. R. 1909; 37 P. R. 1909; 50 P. W. R. 1909.
(6) 57 Ind. Cas. 465; 48 C. 1; 39 M. L. J. 243; (1920) M. W. N. 591; 2 U. P. L. R. (P. C) 130; 22 Bom. L. R. 1319; 18 A. L. J. 1074; 25 C. W. N. 49; 28 M. L. T. 224; 47 I. A. 239; 32 C. L. J. 479; 13 L. W. 161; 2 P. L. T. 101 (P. C.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 913 OF 1921.

June 30, 1922.

Present:—Mr. Justice Kanhaiya Lal and Mr. Justice Sulaiman.

RAM SAHAI—PLAINTIFF—APPELLANT

versus

ANGNOO—DEFENDANT—RESPONDENT.

Patents and Designs Act (II of 1911), ss. 38, 43—Invention—Improvement—Registration.

No registration under section 43 of the Patents and Designs Act is effective, unless the design or configuration sought to be protected, is new and original and not of a pre-existing common type. [p. 518, col. 2.]

A combination of materials would not be entitled to protection under the Patents and Designs Act unless it was a combination of a character which involved the exercise of any special inventive power or had some originality about it. [p. 518, col. 2.]

The Elgin Mills Co. v. *The Muir Mills Co.*, 17 A. 490; A. W. N. (1895) 113; 8 Ind. Dec. (N.S.) 639, referred to.

An invention means any manner of new manufacture and includes an improvement; but every improvement need not be an invention. [p. 518, col. 1.]

Second appeal from the judgment of the District Judge, Farrukhabad, dated 11th March 1921.

Mr. *K. N. Katju*, for the Appellant.

Mr. *Gulzari Lal*, for the Respondent.

JUDGMENT.—The plaintiff carries on the manufacture of iron fences at Nagpur. On the 2nd October 1917 he got two designs of iron fences registered under section 43 of Act II of 1911. His complaint is that the defendant has imitated those designs and has been manufacturing and selling fences of a similar kind at Farrukhabad. He sued him accordingly for

damages and for an injunction to restrain the defendant from imitating his registered designs.

The defence was that the designs were in common use before they were registered by the plaintiff and that the plaintiff was not entitled to any protection.

The Courts below found in favour of the defendant and dismissed the claim. It is clear from the designs on the record and from the evidence which was adduced in the Trial Court, that there was nothing particularly new or original in the two designs which the plaintiff got registered. One of these designs had been in use at Farrukhabad from several years previously. Mulchand, a relation of the plaintiff, was manufacturing iron fences of that design from more than 15 or 16 years prior to the registration of the patent; and several persons depose that they had bought iron fences of that design from Mulchand ten or twelve years prior to the suit. The other design is much simpler in character and merely another enlargement of one portion of the former. There is no originality about it. Section 43 of Act II of 1911 says that the Controller may allow a person, claiming to be the proprietor of any new or original design, not previously published in British India, to register the same. But no such registration is effective, unless the design or configuration, sought to be protected, is new and original and not of a pre-existing common type. An "invention" has been defined to mean any manner of new manufacture and includes an improvement; but every improvement need not be a new invention. Section 38 lays down that an invention shall not be deemed to be a new invention if it was before the date of the application for a patent thereon publicly used in any part of British India or made publicly known in any part thereof, unless such public knowledge was derived by fraud and the public user was not acquiesced in for a period of more than six months. In the present case the evidence which was believed by both the Courts below clearly indicated that the designs in question were in use at Farrukhabad from long before the date when the registration of the patent was applied for by the plaintiff and it is not possible, therefore, to say that those designs were new or original and the plaintiff was entitled to the protection which he seeks. In *The Elgin Mills Co.* v. *The Muir Mills Co.* (1) it was held that a combination of materials would not be entitled to protection unless it was a combination of a character which involved the exercise of any special inventive power or had some originality about it. The two designs in the present instance were not of that character and the plaintiff was not entitled to the protection which he claimed under the Act. The Courts below were, therefore, justified in refusing to grant the injunction asked for. We dismiss the appeal accordingly with costs including fees in this Court on the higher scale.

N. H. *Appeal dismissed.*

(1) 17 A. 490; A. W. N. (1895) 113; 8 Ind. Dec. (N. S.) 639.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2328 OF 1922.

February 14, 1923.

Present:—Mr. Justice Moti Sagar.

KIRPA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Musammat CHINTI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Custom—Reversioner—Relationship, proof of—Members of same got—Civil Procedure Code (Act V of 1908), O. VI, r. 17—Appeal, second—Amendment of plaint, whether can be permitted.

The mere fact that two persons belong to the same *got* does not necessarily lead to the inference that they are descended from the same common ancestor. [p. 520, col. 1.]

Lehna v. *Kishan*, 78 P. R. 1888, dissented from; *Ghulam Hussain* v. *Sultan Muhammad*, 39 Ind. Cas. 717; 8 P. W. R. 1917, followed.

A plaintiff cannot, in second appeal, be allowed to amend his plaint by introducing an entirely new cause of action. [p. 520, col. 2.]

Second appeal from a decree of the District Judge, Hoshiarpur and Kangra Districts, dated the 14th June 1922.

Mr. *Faqir Chand*, for the Appellants.

Mr. *Devi Dyal*, for the Respondents.

JUDGMENT.—The following pedigree-tables will tend to elucidate the facts of this case and the nature of the dispute between the parties:

No. 1.
Mirza
|
Gurya.
|
Suja.

Soba | Bhaga. | Devia.

Soba → Arjan → Legha.

Bhaga. → Gajjan, (plaintiff No. 3) (since dead).

Devia. → Shibbu, (plaintiff No. 1) (since dead).

Devia. → Thakar Ditta, (plaintiff No. 2) (since dead).

No. 2.
Ratna
|
Sultani
|
Hira=*Musammat* Kauri.

Musammat Kauri, the alienor, is the widow of Hira, grandson of one Ratna, while the plaintiffs are the great-grandsons of Gurya, the son of one Mirza. The pedigree-tables on the record do not show what relationship Ratna bore to Mirza, nor have the plaintiffs produced any evidence to show that they were related to each other. There is no doubt that both of them belonged to the same *got*, but this alone is not sufficient to prove that they were related, and if related in what degree.

Hira, the husband of *Musammat* Kauri, was the owner of 101 *kanals* 6 *marlas* of land in the village Umbralu Tappa Thela in the Hamirpur Tahsil of the Kangra District. After his death this land was mutated in the name of his widow, *Musammat* Kauri. On the 13th of June 1911 *Musammat* Kauri made a gift of this land to Kirpa, defendant No. 1. Thereupon the plaintiffs brought a suit for possession on the allegations that the land in dispute had been gifted by Gurya, their ancestor, to Ratna on the condition that if Ratna's line became extinct, the land gifted would revert to the donor and his heirs, that Hira had now died childless and Ratna's line had become extinct, and that, therefore, the land in suit reverted to the plaintiffs. It was further alleged that the alienation was altogether void and did not affect the plaintiffs' rights in any way whatever. The defendant denied that Ratna was in any way related to Mirza. He also denied the *factum* of the alleged gift by Gurya to Ratna or that it reverted to the plaintiffs on the failure of Hira's heirs.

The Trial Court found the gift in favour of Ratna established and held that the land in suit reverted to the plaintiffs on the extinction of Hira's line. On appeal the learned District Judge differed from the finding of the Trial Court on this point and held that the gift was not fully established, and that in any case the plaintiffs had failed to prove that by custom the land reverted to the donor's line on failure of the direct descendants of the donee. In spite of this finding, however, the learned District Judge, dismissed the appeal on the ground that the plaintiffs were the collateral heirs of Hira, and that they were, therefore, entitled to challenge the alienation made by Hira's widow, *Musammat* Kauri.

Against this decision the defendant has filed a second appeal to this Court through Mr. Fakir Chand, and it has been contended on his behalf that the learned District Judge was not justified in setting up an entirely new case for the plaintiffs which was not contained in their pleadings, and that there was no evidence on the record to prove that the plaintiffs were the collateral heirs of the deceased Hira. This contention, in my opinion, is well founded and must prevail. A reference to the plaint makes it quite clear that the only ground on which the plaintiffs came into Court was that there was a gift in favour of Ratna on condition that the land would revert to the donor if Ratna's line died out; No

other ground of claim was put forward and the only issue upon which the parties went to trial was whether there was or was not a gift in favour of Ratna of the type set up by the plaintiffs in their plaint. This issue having been found against the plaintiffs, the suit ought to have been dismissed, and the defendant, in my opinion, is fully justified in complaining that the learned District Judge has decided the case upon a point which had never been put in issue, and upon which the parties had never been given an opportunity of producing their evidence.

On the merits also I am of opinion that the plaintiffs have no case. There is not a tittle of evidence on the record from which the fact of the plaintiffs' collateral relationship with Hira can be deduced. The only evidence upon which the learned District Judge has held that the plaintiffs are the collaterals of Hira is that afforded by the fact that they belong to the same *got*, but this fact alone is clearly insufficient to establish any such relationship. The learned District Judge in coming to this finding has relied upon a ruling reported as *Lehna* v. *Kishan* (1) in which the mere fact that the plaintiffs were of the same *got* as the deceased was held to be sufficient to warrant the presumption that they were descended from the same common ancestor. This ruling, however, has been distinctly dissented from in later rulings, and it is now well settled that it cannot be presumed that members of the same *got* are necessarily related to each other. The latest authority upon this point is that reported as *Ghulam Hussain* v. *Sultan Mohammad* (2), in which it has been laid down by Mr. Justice Scott-Smith that the mere fact that the plaintiff is of the same caste and *got* as the alienor does not necessarily lead to the inference, that he is descended from the same common ancestor and is his heir. It was urged by the learned Counsel for the plaintiffs that they should now be given an opportunity to amend their plaint and to produce evidence in support of their alleged relationship. I am unable to accede to this prayer. The plaintiffs had full opportunity to amend their plaint in the Courts below, but never did so. There was nothing to prevent the plaintiffs from suing in the alternative in the first instance and basing their suit upon two grounds namely—(1) that there was a gift by Gurya in favour of Ratna; and (2) that if this gift was not established the plaintiffs were entitled to challenge the alienation on the ground of their collateral relationship. No explanation has been put forward as to why the plaint was not framed in this manner. I refuse to grant them an opportunity to amend their plaint in second appeal by introducing an entirely new cause of action, and hold that they have entirely failed to establish their claim.

The result is that the appeal is accepted and the suit dismissed with costs throughout.

Z. K. *Appeal allowed.*

(1) 78 P. R. 1888.
(2) 39 Ind. Cas. 717; 8 P. W. R. 1917.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 613 OF 1921.
January 31, 1922.
Present:—Mr. Justice Greaves.

JATIRAM GAYAN DAS—PETITIONER
versus
DINO NATH SAMANTHA AND OTHERS—OPPOSITE PARTIES.

Bengal Tenancy Act (VIII of 1885), s. 153—Sale, setting aside of—Fraud and irregularity—Appeal.

An appeal lies from an order setting aside a sale under section 153 of the Bengal Tenancy Act on the ground of fraud and irregularity, notwithstanding that the amount claimed is less than Rs. 50 in value. Unless there is irregularity alone and irregularity untainted with fraud, the appeal lies. [p. 521, col. 1.]

Kali Mandal v. *Ramsarbaswa Chakravarti*, 32 C. 957; 9 C. W. N. 721; 1 C. L. J. 476 and *Nobin Chandra Chowdhury* v. *Bepin Chandra Roy*, 29 Ind. Cas. 308; 19 C. W. N. 953; 22 C. L. J. 244, followed.

Rule.

Mr. *S. C. Maitl* and *Harendra Kumar Sarbadikari*, for the Petitioner.

Babus *Mohendra Nath Roy* and *Santosh Kumar Paul*, for the Opposite Parties.

JUDGMENT.—This Rule must be discharged. The learned Subordinate Judge has remanded to the Munsif for hearing an application by the judgment-debtor to set aside a sale. The application to set aside the sale was heard *ex parte*. The learned Subordinate Judge says that the evidence is insufficient. Now, the point in respect of which the Rule was granted is that by virtue of the provisions of section 153 of the Bengal Tenancy Act no appeal lay as the amount claimed was under Rs 50 in value. The only question that arises is whether the matter falls within the Explanation given to section 153 or not. The Full Bench case of *Kali Mandal* v. *Ramsarbaswa Chakravarti* (1): decided that in a case of this nature an appeal lay. After that decision, by the Amending Act of 1907 the present Explanation to section 153 was introduced. Now, since the introduction of that Explanation Mr. Justice Chatterjee and Mr. Justice Mullick have held in the case of *Nobin Chandra Chowdhury* v. *Bepin Chandra Roy* (2) that where the application is based on fraud an appeal lies notwithstanding the Explanation to section 153. It is true, that Mr. Justice Mullick in that case expressed some doubt whether an appeal would lie in the case of an irregularity tainted by fraud but where actual fraud had not been established. I find it rather difficult to follow the distinction which Mr. Justice Mullick made. But what I have got to see in this case is whether the Munsif's order was made on the ground of irregularity in the sale or on the ground of fraud and irregularity. If his finding amounts to a decision that there were both fraud and irregularity then I think the matter is covered by the decision in *Nobin Chandra Chowdhury* v. *Bepin Chandra Roy* (2). Now the matter was heard before the Munsif originally *ex parte* and as the learned Subordinate Judge says the evidence is meagre and unsatisfactory. But the application was based on the ground of fraud and material irregularity. I feel no doubt myself after reading the judgment-debtor's evidence and the order of the Munsif that fraud was an element which entered into the Munsif's decision in setting aside the sale. This being so I think the case is covered by the decision already referred to [reported as *Nobin Chandra Chowdhury* v. *Bepin Chandra Roy* (2)]. I think if you have both fraud and irregularity established, the fact they are coupled together does not exclude an appeal. I think that unless you have irregularity alone and irregularity untainted by fraud an appeal lies.

I think the order of the Subordinate Judge is correct and the Rule accordingly must be discharged with costs. Hearing fee one gold *mohur*.

N. H. *Rule discharged.*

(1) 32 C. 957; 9 C. W. N. 721; 1 C. L. J. 476.
(2) 29 Ind. Cas. 308; 19 C. W. N. 953; 22 C. L. J. 244.

BOMBAY HIGH COURT.

LETTERS PATENT APPEAL NO. 15 OF 1921.

March 13, 1922.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

KESHAV NARAYAN SHASTRI PRABHANE—DEFENDANT—APPELLANT

versus

RAMCHANDRA GANESH PRABHANE AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Adverse possession—Co-owners—Denial of title—Ouster.

The mere assertion by one co-owner in possession of property that the other co-owner has no right to the property is not sufficient to constitute ouster. It might be inferred by evidence of exclusion of the other persons interested in the property uninterrupted for a very long time.

Letters Patent Appeal.

Mr. *S. S. Patkar*, for the Appellant.

Mr. *M. P. Pathardhan*, for the Respondents.

JUDGMENT.—Two questions have been argued in this Letters Patent Appeal; first whether the notice of the 9th August

1901 was received by the plaintiff. It appears that the plaintiff and his brother, Gopal, were residing away from the defendant who was in possession of the family property. That property was mortgaged, and the mortgage was redeemed by the defendant. He sent notice to the plaintiff and his brother Gopal as follows: "Our ancestral land was in mortgage with Ghanashama Birdichand. We have paid him off for your share including the principal and its interest Rs. 1,600, you should pay this amount within two months; otherwise you will not have any right whatever over this property." There is no evidence whatever that the plaintiff received this notice.

With regard to the notice sent to Gopal, the postal acknowledgment is returned purporting to be signed by Gopal but the signature on the acknowledgment, in the first place is not proved to be that of Gopal; and secondly does not even on the face of it purport to be the signature of Gopal.

With regard to the notice served on the plaintiff he has denied having received it, and that being so, the presumption which might arise from the notice having been despatched to his address by post would be annulled.

With regard to the notice served on Gopal, who is now dead, all that we know is that the acknowledgment has been received, but it does not bear the signature of Gopal. At this distance of time, therefore, it would be extremely inadvisable for a Court to presume that Gopal had received the notice.

But apart from that even supposing that the notices had been received by the plaintiff and Gopal, we agree with the decision of the Court below that that notice does not amount to an ouster. The mere assertion by one co-owner in possession of property that the other co-owner has no right to the property by itself would not be sufficient to constitute ouster. It might be inferred by evidence of exclusion of the other persons interested in the property uninterrupted for a very long time. But it cannot be said that since the date of the notice the defendant has been in possession of the family property for so long that it could be presumed that such long possession amounts by itself to an ouster, even if it be annexed to the notice of August 1901. We think, therefore, that the appeal must be dismissed with costs.

N. H. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CIVIL RULE No. 427 OF 1921.

January 26, 1922.

Present:—Justice Sir Thomas Richardson, KT., and Mr. Justice Ghose.

AMAR PRASAD DEB—AUCTION-PURCHASER—PETITIONER

versus

GAGAN CHANDRA HALDAR AND OTHERS —OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Bengal Tenancy Act (VIII of 1885), s. 173—Sale of holding—Benami purchase by judgment-debtor—Material irregularity—Sale set aside—Appeal, competency of.

Where a person interested in the sale of a holding applies to have it set aside under section 173 (3) of the Bengal Tenancy Act on the ground of a *benami* purchase of the holding by the judgment-debtor and also under O. XXI, r. 90 of the Civil Procedure Code on the ground of material irregularity in conducting the sale, and the sale is set aside on both the grounds, the fact that the order setting aside the sale under the Civil Procedure Code is appealable does not entitle the appellant to contest the decision of the Trial Court as regards the ground under the Tenancy Act as well. [p. 523, cols. 1 & 2.]

Harabandhu Adhikari v. *Harish Chandra Dey*, 3 C. W. N. 184, relied on.

Sreenath Haldar v. *Bepin Behari Mal*, 33 Ind. Cas. 574, distinguished.

Rule.

Messrs. *Ram Chander Majumdar*, *Apurba Charan Mukherjee* and *Jogesh Chandra Bose*, for the Petitioner.

Messrs. *Jogesh Chandra Roy*, *Suraj K. Chatterjee* and *Promotha Nath Mukherjee*, for the Onposite Party.

JUDGMENT.—The facts appearing in this Rule are follows:—Opposite parties Nos. 3 to 5 as landlords obtained a decree for arrears of rent against opposite par-

ties Nos. 6 to 8 as *raiyats* of an occupancy holding. In execution of the decree the holding was sold and purchased by the petitioner on the 7th December 1920. Thereafter, opposite parties Nos. 1 and 2 as under *raiyats* under opposite parties Nos. 6 to 8 applied to have the sale set aside on two separate and several grounds, firstly under clause (3) of section 173 of the Bengal Tenancy Act, on the ground that the holding had been in fact purchased by the judgment-debtors, opposite parties Nos. 6 to 8, *benami* in the name of the petitioner and secondly under r. 90 of O. XXI of the Civil Procedure Code on the ground of material irregularity in the conduct of the sale. The learned Munsif who tried the case in the first instance found in favour of the opposite parties Nos. 1 and 2 on both these grounds. He, accordingly, set aside the sale. When the petitioner's appeal came before the learned Subordinate Judge, he held that though the Trial Court's order was appealable as an order under the Civil Procedure Code, it was not appealable as an order under the Tenancy Act. He considered it unnecessary, therefore, to enter into the merits of the case made under the Code, inasmuch as the appeal must in any view of those merits prove infructuous. He accordingly dismissed the appeal.

The petitioner then obtained this Rule calling upon the opposite party to show cause why the order dismissing the appeal should not be set aside.

The learned Vakil for the petitioner has argued that the petitioner having a right of appeal under the Code, it was also open to him in the appeal to contest the decision of the Trial Court under the Tenancy Act. In our opinion, this contention cannot be supported. As we have said, the sale was set aside on two distinct grounds, and the fact that an appeal lay so far as one ground was concerned, would not confer a right of appeal in respect of the other. There is a direct decision against the petitioner in *Harabindhu Adhikari* v. *Harish Chandra Dey* (1). The learned Vakil cited *Sreenath Haldar Bepin Behari Mal* (2). We have considered the judgment in that case. On the facts stated by the learned Judges it appears that the sale there was sought to be set aside substantially under O. XXI, r. 90. No reference was made to section 173 of the Bengal Tenancy Act in the judgment of the Court of first instance. Further the observations made in the judgment of the learned Judges in reference to that section were obiter inasmuch as in the result the Rule was discharged on the ground that a second appeal preferred against the same order of the lower Appellate Court having been summarily dismissed by another Bench, it was not open to the petitioner to move the Court in its revisional jurisdiction. The decision in *Harabandhu's case* (1) is, therefore, binding on us and we must follow it.

The Rule is discharged with costs hearing fee three gold *mohurs*.

N.H. *Rule discharged*

(1) 3 C. W. N. 184.

(2) 33 Ind. Cas. 574.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 3138 OF 1918.

March 9, 1923.

Present:—Mr. Justice Broadway and Mr. Justice Harrison.

FITZ-HOLMES—DEFENDANT—APPELLANT

versus

THE BANK OF UPPER INDIA, LIMITED—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 74—Penalty—Mortgage—Interest—Rate to be reduced on punctual payment—Evidence Act (I of 1872), s. 92—Contract in writing—Oral agreement—Evidence of subsequent conduct, whether admissible.

In order to avoid the consequences laid down in section 74 of the Contract Act all that a mortgagee need do is to reserve the higher rate as payable under the mortgage and to provid for its reduction in case of punctual payments: [p. 526, col. 1.]

Kutub-ud-din Ahmad v. *Bashir-ud-din*, 5 Ind. Cas. 665; 32 A. 448; 7 A. L. J. 394, followed.

FITZ HOLMES *v.* BANK OF UPPER INDIA.

Where a contract has been reduced to writing, oral evidence of subsequent conduct can under no circumstances be admitted to prove a contemporaneous oral agreement. [p. 527, col. 1.]

Maung Kyin v. *Ma Shwe La*, 42 Ind. Cas. 642; 45 C. 320; 15 A. L. J. 825; 33 M. L. J. 648; 3 P. L. W. 185; 6 L. W. 777; 22 C. W. N. 257; 23 M. L. J. 36; 27 C. L. J. 175; 20 Bom. L. R. 278; (1918) M. W. N. 300; 9 L. B. R. 114; 11 Bur. L. T. 21; 44 I. A. 236 (P. C.), followed.

Appeal from a decree of the Senior Sub-Judge, Simla, dated the 27th September 1918.

Mr. *Barkat Ali*, Diwan *Mehr Chand* and Lala *Niamat Rai*, for the Appellant.

Mr. *M. Obedulla*, for the Respondent.

JUDGMENT.—The Liquidator of the Bank of Upper India brought this suit against Mr. Fitz-Holmes for recovery of Rs. 2,68,053-13-0 with costs and interest secured on two mortgage-deeds, dated the 30th April 1912, and in default of payment of this sum for sale of the mortgaged property and also a personal decree for the balance, if any. The suit has been decreed in full by the Senior Subordinate Judge of Simla, a preliminary decree being given on the 27th September 1918, declaring the sum claimed to be due, that is to say, Rs. 2,86,642-14-4 including interest and costs up to the 27th March 1919, and further ordering that Rs. 2,82,997-12-9 out of the sum shall carry interest at the rate of Rs. 6 per cent. until realization, and that unless the amount decreed be paid before the 27th March, the mortgaged property or a sufficient portion thereof shall be sold. After the period had elapsed a final decree was passed and appeals have been presented both from the preliminary and the final decrees. The deeds on which the suit is based are a cash credit mortgage-bond with a potential maximum of Rs. 50,000 and an ordinary mortgage for Rs. 2,00,000. The rate of interest 9 per cent. is the same in both documents, there being a clause to the effect that if all the conditions in the covenant are observed and interest and insurance premia are paid on due dates, this rate of interest will be reduced to 7 per cent. The defendant pleaded that instead of the terms agreed upon being those recited in the deeds, the agreement made at the time was that interest was to be charged at 7 per cent. and in case of default an enhanced rate of 9 per cent. was to be charged and that any how on the terms as recited in the deeds the rate of 9 per cent. was penal. He further claimed certain items by way of set-off. The following issues were framed:—

1 What was the rate of interest agreed upon? In particular was the 9 per cent. rate a rate by way of penalty? If so, what interest should the Court allow?

2. Can the eight items mentioned at the end of paragraph (2) of the pleas be equitably set-off? If so, are they correct and should they be so set-off? Are any of them time-barred?

3. What is the actual amount due to the plaintiff?

Before calling evidence the Senior Subordinate Judge decided to hear arguments on the preliminary legal point arising out of the pleas taken as to interest and also as to whether the items claimed could be equitably set-off. These were duly argued before him and a decision has been given that the first question of whether evidence can be led to show that the agreement was not as stated in the deeds is finally disposed of by a recent Privy Council ruling reported as *Maung Kyin* v. *Ma Shwe La* (1), that *Kutub-ud-din Ahmad* v. *Bashir-ud-din* (2) is conclusive on the subject of the penal nature of the deeds as drawn and that out of the items claimed as set-off, five refer to another suit and the remaining three cannot be equitably set-off in this suit, more especially as no stamp has been paid upon them.

On appeal the first point taken is that the learned Senior Subordinate Judge refused to adjourn the case to enable the defendant to move the District Judge to hear the case himself and that at the hearing on the following day, 5th September, the Counsel, who appeared, were not duly instructed and that sufficient opportunity was not allowed to them by giving an adjournment to enable them to obtain further instructions and to study their case more fully. It may here be pointed

(1) 42 Ind. Cas. 642; 45 C. 320; 15 A. L. J. 825; 33 M. L. J. 648; 3 P. L. W. 185; 6 L. W. 777; 22 C. W. N. 257; 23 M. L. J. 36; 27 C. L. J. 175; 20 Bom. L. R. 278; (1918) M. W. N. 300; 9 L. B. R. 114; 11 Bur. L. T. 21; 44 I. A. 236 (P. C.).

(2) 5 Ind. Cas. 665; 32 A. 448; 7 A. L. J. 394.

out that although an adjournment was applied for on the 4th September for the one definite purpose of moving the District Court to transfer the case, no further adjournment was applied for on the following day and it was not urged before the Senior Subordinate Judge that the Counsel who appeared had not been duly instructed. What had actually happened was that on the same day, 14th August 1918, this suit was instituted in Simla, and two similar suits, one between the same parties with the addition of Mrs. Fitz-Holmes as co-defendant and one against Mrs. Fitz-Holmes alone, were instituted in the Court of the District Judge, Ambala, the property involved in those suits being situated within his jurisdiction and not within that of the Senior Subordinate Judge of Simla. These cases were taken by the District Judge himself and it is urged that an opportunity should have been given to the defendant to make an application to him to try this Simla case also. The Court of the District Judge of Ambala closed for the vacation on the 31st August, while that of the Senior Subordinate Judge remained open during September. The application was not put in until the 4th September when the Court of the District Judge was closed. There was no reason whatever why the Senior Subordinate Judge should have adjourned the case pending before him to enable the defendant to make an application in the following month of October. Had due zeal and diligence been shown there would have been no difficulty about his presenting and obtaining orders on an application of this nature before the District Court of Ambala closed.

The second point taken in ground No. 1 (*b*) is to the effect that the two Counsel who appeared were not duly instructed, and in support of this an affidavit has been put in by one of them but not by the other. The facts as explained are that the defendant sent a friend of his, named Waryan Singh, to instruct these Counsel in Lahore and to take them to Simla and when they did appear on the 5th, after asking for an adjournment on the 4th September, they put in a written reply to the plaint which was signed by both, and on the same day Diwan Mehr Chand, the Senior Counsel, stated that he was in a position to make this statement and that he would have the pleas properly signed at a later date. On the following day he filed a lengthy list of documents and a further list of witnesses whom he wished to summon. In arguing his point Counsel has alternated between impugning the competence of these practitioners at one moment, and at the next urging that they did all that was humanly possible for the most capable lawyers to do, but that they had not received their full instructions as the time was too short and that, therefore, while describing certain documents in their list, they failed to ask to have the necessary issues framed for which those documents were required, or to take the additional pleas which would possibly have brought about the framing of such issues. He contends that the Court should itself have examined this list of documents, should have taken further pleas for the defendant and should have framed issues in accordance with those pleas. Inasmuch as the Counsel acted as fully instructed throughout and the Senior Counsel stated that he was in a position to plead, and it was never contended before the Senior Subordinate Judge, as is now urged, that they were only instructed to apply for an adjournment, we are of opinion that there is no force whatever in the contentions now put forward. It is clear that Counsel were fully instructed, that they never asked for an adjournment to enable them to obtain further and fuller instructions, and that the legal points were fully argued before the Senior Subordinate Judge.

It is further urged that Counsel intended to present further pleas, and that they were instructed to do so by the defendant. The issues were argued on the 18th and judgment was not pronounced till the 27th, an adjournment being given for the purpose. It was open to Counsel, had they wished to do so, to apply at any time during this interval for permission to amend their pleadings. Nothing of the sort was done, and we find, therefore, that there is no force whatever in these contentions, and no reason has been established why the case should be remanded and re-tried.

The second ground urged in appeal is that no issue was framed as to the validity

of the notice served upon the defendant, it being contended that paragraph 5 of the written statement did not admit the validity of the notice. This paragraph runs as follows :—'Is correct (*i.e.*, paragraph 5 of the plaint is correct) so far that a correspondence has been going on between the parties for some time back, but defendant has always been ready to make reasonable proposals which have been without any sufficient ground rejected by the Liquidator for plaintiff Bank." This is not a denial of the receipt or of the validity of the notice received as mentioned in paragraph 5 of the plaint to which it replies. It is merely a contention that the defendant has not been fairly treated by the plaintiff, and has not been given sufficient opportunity to negotiate with a view to a settlement. We find that on the pleadings the correct issues were framed.

The main points urged are the question of the rate of interest and whether the items claimed as set-off can be allowed. In appeal these have been reduced to two, and it is admitted that items Nos. 2 to 4 and 6 and 7 relate to another case. Nothing is said of item No. 8, and items Nos. 1 and 5 alone are claimed and referred to in the grounds of appeal.

The first contention is that the words used in the mortgage-deed actually mean that 7 per cent. is to be charged in the first instance, and that a penalty of 2 per cent. is to be added in case of default. The meaning to be attached to the condition as recited is explained very clearly in *Kutub-ud-din Ahmad* v. *Bashir-ud-din* (2) In order to avoid the consequences of section 74 of the Contract Act all that a mortgagee need do is to reserve the higher rate as payable under the mortgage, and to provide for its reduction in case of punctual payments.

After endeavouring to show, without success, that this ruling does not apply, Counsel adopts an alternative line of attack, which again falls under two heads. He contends, in the first place, that at the time the agreement was made the parties intended and understood that 7 per cent. would be charged and a further 2 per cent. would be added as a penalty in case of a default being made. In the event of his failing to establish this point he wishes to show that there was a subsequent oral agreement which he describes as a waiver, and which he contends comes within the definition in section 92 of the Evidence Act. This is an impossible position inasmuch as the two pleas are wholly contradictory, for if the terms of the original agreement were that in the first instance 7 per cent. was to be charged, there could be no reason for the making of a subsequent oral agreement varying the terms so as to make them comply with this original agreement. He finally decided to adhere to his first line of argument and to give up the alternative contention of a subsequent oral agreement. On the question of whether he can be allowed to produce evidence of a contemporaneous oral agreement varying the terms of the written document, the learned Senior Subordinate Judge has summarised the authorities very clearly and we find ourselves in complete agreement with the conclusion to which he comes that this question which was formerly debatable, and one on which the High Courts differed, has been finally decided by *Maung Kyin* v. *Ma Shwe La* (1).

It is contended before us, as it was contended before the Senior Subordinate Judge, that the Privy Council has not definitely set aside *Abdul Ghafur Khan* v. *Abdul Kadir* (3). As explained by the learned Senior Subordinate Judge that ruling followed *Preonath Shaha* v. *Madhu Sudan Bhuiya* (4), and *Khankar Abdur Rahman* v. *Ali Hafez* (5), and the distinction made by the Calcutta High Court between evidence of previous and contemporaneous conduct as opposed to evidence of subsequent conduct was drawn in exactly the same way in *Abdul Ghafur Khan* v. *Abdul Kadir* (3). In *Maung Kyin* v. *Ma Shwe La* (1), their Lordships of the Privy Council say :—"This series of cases including [*Preonath Shaha* v. *Madhu Sudan Bhuiya* (4), *Khankar Abdur Rahman* v. *Ali Hafez* (5),] definitely ceased to be of binding authority after the judgment of this Board pronounced by Lord Davey

(3) 72 P. R. 1901; 114 P. L. R. 1901.
(4) 25 C. 603; 2 C. W. N. 562; 13 Ind. Dec (N. S.) 397 (F. B.).
(5) 28 C. 256; 5 C. W. N. 351.

in the case of *Balkishen Das* v. *W. F. Legge* (6)" and it follows that *Abdul Ghafur Khan* v. *Abdul Kadir* (3), has also ceased to have any force, and in order to prove evidence of a contemporaneous oral agreement, oral evidence of subsequent conduct can, under no circumstances, be admitted. It appears to us that there is all the difference in the world between the present type of case, and that reported as *Ram Singh* v *Ganga Singh* (7). There and in other cases which have been quoted, the question to be decided was the inference to be drawn from the unquestioned terms of the document as to the intention of the parties and the nature of the agreement, *e.g.*, whether it was a gift or a sale, or a sale or a mortgage. Here an attempt is made to show by evidence of subsequent conduct that the terms were different from those entered in the deed. We therefore, hold agreeing with the learned Senior Subordinate Judge that the plea could not be taken that evidence could not be led in support of it, and that the terms, as recited, must be enforced.

As to the items claimed as set-off, Mr. Obedulla, Counsel for the respondent Bank, has agreed that the appellant should be allowed a reduction of the total amount claimed as items Nos. 1 and 5 in case the remainder of the decree is upheld. We, therefore, dismiss the appeal with costs except in so far as to reduce the total amount by Rs. 1,587-10-8.

In this case a final decree had been given on the expiry of the period of grace allowed and a further interval of over three years and ten months has elapsed. The question, therefore, does not arise of any further action being taken before execution is sought.

Z. K. *Appeals dismissed.*

(6) 22 A. 149; 27 I. A. 58; 4 C. W. N. 153; 2 Bom. L. R. 523; 7 Sar. P. C. J. 601; 9 Ind. Dec. (N. S.) 1130 (P. C.).

(7) 70 Ind. Cas. 202; 3 L. 389; (1922) A. I. R. (L.) 356.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1431 OF 1920.

June 2, 1922.

Present:—Mr. Justice Kanhaiya Lal.

SARJU PRASAD AND OTHERS—PLAINTIFFS —APPELLANTS

versus

GAJADHAR LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 13—Defendant's Counsel expressing inability to proceed with case—Decree for plaintiff—Ex parte decree.

The Pleader for the defendant in a suit stated on the date of hearing that his client and witnesses had not turned up and that he was unable to proceed with the case. The Court thereupon proceeded to decide the suit on the merits and passed a decree. The defendant sought to set aside the decree under O. IX, r. 13, of the Civil Procedure Code:

Held, that by saying that he could not proceed with the case it could not be said that the Pleader had withdrawn himself and the decree passed, therefore, could not be regarded, and set aside, as an *ex parte* decree. [p. 528, col. 2.]

Mr. *S. N. Mukerji*, for the Appellants.

JUDGMENT—This appeal arises out of a suit brought by the plaintiffs for a declaration that they were not bound by a decree obtained collusively by the defendants, Gajadhar Lal and others, against *Musammat* Puna, the widow of Mangli, and that a sale held in execution of that decree did not effect anything more than the life-interest of the said lady.

The 4th of August 1919 was fixed for the hearing of the suit. On that date the defendant, Gajadhar Lal, applied for an adjournment on the ground that he had summoned his witnesses, but they had not been served. The Court in which the suit was pending granted the adjournment and fixed the 21st August 1919 for its hearing. On that date the plaintiffs were present and the evidence adduced by them was recorded. The contesting defendant, Gajadhar Lal, was not present. His Pleader stated that his client had not turned up till then, that the witnesses summoned by him were also not present, and that he did not know what had happened to prevent them from attending. He expressed his inability in consequence to proceed with the hearing. On that date a telegram had been received by the Court from Gajadhar Lal,

purporting to have been sent from the Railway Station Manhar, on the 21st August 1919 at 11-40 A.M., stating that he had missed the train and was lying at Bindki Road with the witnesses and asking that the hearing of the case might be postponed. He had, as a matter of fact, summoned eight witnesses on the 13th August 1919 for the date fixed for the hearing; and if his allegation was correct that the witnesses were coming with him by train and had been detained on account of his missing connection at Bindki Road, his absence on the date fixed could have been explicable. The Court, however, proceeded under O. XVII, r. 3 to try the suit on the merits and decreed it with costs.

An application was subsequently filed by the said defendant, accompanied by an affidavit, for the setting aside of what he described as an *ex parte* decree, but it was rejected by the Court on the ground that no such application was maintainable. He then filed an appeal from the order rejecting that application and another appeal from the original decree decreeing the suit. The former appeal was dismissed by the learned Subordinate Judge on the 10th April 1921. The latter, though filed beyond time, was admitted by him under section 5 of the Limitation Act (IX of 1908) and ultimately allowed. The order passed by him in the latter appeal merely declared that the Court of first instance had no power to decide the suit on the merits in the absence of the contesting defendant and that the decree passed by it was only an *ex parte* decree.

The legality of that order is challenged here. The order is both in substance and form open to question. The suit was not originally decided *ex parte*. The Pleader of the contesting defendant was present. He had not stated that he had no instructions to proceed with the hearing. All that he had said, according to the order-sheet, was that his client had not turned up for some reason not known to him, that the witnesses summoned by him had also not attended, and that he was unable to proceed with the case. The Court of first instance thereupon proceeded to decide the suit on the merits and an appeal was maintainable from that decree. By saying that he was unable to proceed with the hearing it cannot be said that the Pleader had withdrawn himself; and the decree passed in that suit cannot, therefore, be regarded as an *ex parte* decree which could be set aside in the manner laid down in O. IX, r. 13 of the Code of Civil Procedure. In form the order passed by the lower Appellate Court was similarly open to objection. It was not open to the learned Subordinate Judge to take the view that the decree was an *ex parte* decree after he had dismissed the appeal, which had been filed from an order refusing to set it aside, on the ground that the decree was one dealing with the suit on the merits. All that the learned Subordinate Judge could have done was to have enquired into the reasons which led to the absence of the contesting defendant on the date fixed for hearing, and if he was satisfied that there was sufficient excuse for his absence, he could have passed an order setting aside the decree passed by the Court of first instance and remanded the suit for re-trial after taking such evidence as the contesting defendant wanted to adduce in support of his defence. If he was not satisfied that there was sufficient reason for his absence, it was still necessary for him to have examined the suit on the merits and determined whether the decree passed by the Court of first instance was proper or not.

The appeal is, therefore, allowed and the case sent back to the lower Appellate Court with directions to re-admit the appeal to its original number and to dispose of it, with due regard to the observations made above, in the manner required by law. As the contesting defendant is absent today and the procedure adopted by him has put the plaintiff-appellant to considerable expense and trouble, there is no reason why he should be deprived of the costs incurred by him in filing this appeal. He is, therefore, allowed his costs as against Gajadhar Lal including fees in this Court on the higher scale.

N. H.

Appeal allowed.

CORPORATION OF CALCUTTA *v.* BIJOY KUMAR ADDY.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 108 OF 1922.

April 10, 1923.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Rankin.

THE CORPORATION OF CALCUTTA —DEFENDANT—APPELLANT

versus

BIJOY KUMAR ADDY IN HIS OWN RIGHT AND AS EXECUTOR TO THE ESTATE OF LATE ASHUTOSH ADDY AND OTHERS —PLAINTIFFS—RESPONDENTS.

Calcutta Municipal Act (III of 1899 B. C.), ss. 408, 409, 622—Requisition, failure to comply with—Construction by occupier—Discharge of owner from liability, extent of—Procedure under s. 409, effect of—Specific Relief Act (I of 1877), s. 56 (e)—Injunction to restrain criminal proceedings—Jurisdiction, exercise of.

Sub-section (3) of section 622 of the Calcutta Municipal Act, does not discharge from liability an owner who has not complied with a requisition, merely because the occupier of a portion of the land has rendered compliance with the requisition impracticable in part. The owner is discharged from liability under the section only to the extent that compliance is rendered impossible by the conduct of the occupier. [p. 530, col. 2.]

Non-compliance with a requisition under section 408 of the Calcutta Municipal Act imposes a liability on the owner. If the requisite improvements are carried out by the General Committee under section 409 of the Act, the default on the part of the owner vanishes, but till the work is completed, the default remains, entire or partial, and the liability of the owner to be prosecuted still continues in operation. [p. 531, col. 1.]

It is not the practice of a Court of Equity to interfere with the acts of Corporate bodies, unless they are manifestly abusing their powers. [p. 532, col. 1.]

Duke of Bedford v *Dawson*, (1875) 20 Eq. 353; 44 L. J. Ch. 519; 33 L. T. 156, *Ahmedabad Municipality* v. *Manilal*, 20 B. 146; 10 Ind. Dec. (N. S.) 655; 19 B. 212; 10 Ind. Dec. (N. S.) 144, relied on.

Though the extreme position cannot be maintained that there is absolutely no jurisdiction in a Court of Equity to restrain criminal proceedings for the recovery of a penalty imposed by a Statute, for breach of its enactments, the Court will not interfere, unless in very special circumstances, by way of injunction or declaration of right, where the Legislature has pointed out a mode of procedure before a Magistrate. [p. 531, col. 2.]

Case-law discussed.

Appeal from the decree of the Subordinate Judge, 24-Parganahs, dated 20th December 1921.

Sir *Asutosh Chaudhury*, Babus *Manmatha Nath Mookerji* and *Satindra Nath Mookerjee*, for the Appellant.

Babu *Gour Mohan Dutta*, for the Respondents.

JUDGMENT.—The plaintiffs-respondents are the owners of premises No. 12-1, Pudopookur Lane, and Nos. 34-1 and 37-3, Watgunge Street, which are *bustee* lands in occupation of their tenants. The lands are situated within the jurisdiction of the Municipal Corporation of Calcutta and are subject to the operation of Chapter XXVI of the Calcutta Municipal Act, 1899, (Act III of 1899 B. C.). The defendant Corporation called upon the plaintiffs to carry out improvements in the *bustees* and upon their failure to comply with the requisition instituted successive criminal prosecutions to compel execution of the works. The result has been that the plaintiffs have been convicted on no less than eight occasions and sentenced to pay fines of various amounts under section 575 read with section 408 of the Calcutta Municipal Act. The plaintiffs have thereupon instituted the present suit for an injunction against the Corporation. The plaintiffs pray that the Corporation be restrained by an injunction, (*a*) from taking any action or proceeding for non-compliance with the requisition for carrying out improvements in their premises, and (*b*) from instituting or continuing any proceeding or putting the law in motion for enforcing the requisition. The claim for an injunction was based on the assertion that the Corporation had not only initiated proceedings without strict compliance with the provisions of the law in that behalf and without proper service of notice upon the parties interested, but had instituted prosecutions against them in perverse exercise of alleged powers not authorised by law. The Corporation repudiated these allegations and maintained that they had acted in strict compliance with statutory provisions. The Subordinate Judge came to the conclusion that the Corporation had not acted without jurisdiction, but granted an injunction, first, because the plaintiffs were not in a position to carry out all the improvements by reason of the obstructive attitude of some of their tenants on the

premises, and, secondly, because the Corporation had taken action under section 409 with a view to carry out the improvements themselves. The present appeal has been brought by the Corporation to test the propriety of this order.

Section 406 of the Calcutta Municipal Act authorises the General Committee to arrange for inspection, report and preparation of standard plan by a medical officer and an engineer, in cases where the improvement of a *bustee* is a matter of emergency. Section 407 requires the General Committee to approve such standard plan after hearing objections of the owner and after making such modification as they may deem proper. Section 408 next provides that the General Committee may cause a written notice to be served upon the owners of the land, requiring them to carry out all or any of the improvements or any portion thereof. Section 409 empowers the General Committee to carry out such improvements in default of the owners, and to realise the expenses from them. Section 574 makes non-compliance with requisitions under section 408 punishable with a fine, and section 575 makes the continuing offence punishable with a daily fine after a first conviction.

In the present case, it was contended that the notices contemplated by sections 407 and 408 had not been duly served and that the proceedings were consequently without jurisdiction, as indicated in *Kanai Lal* v. *Corporation of Calcutta* (1). The Subordinate Judge has held on the evidence that the requirements of sections 406, 407 and 408 were fulfilled and the requisite notices were served in the manner prescribed by section 593. He has further pointed out that receipt of the notices under sections 407 and 408 is admitted by one of the plaintiffs. The conclusions of the Subordinate Judge are amply supported by the evidence on the record. In these circumstances, the view cannot be maintained that the General Committee acted illegally and without jurisdiction, when they called upon the plaintiffs to make the improvements under section 408.

The plaintiffs have contended, however, that they should not be held responsible for failure to comply with the requisition made by the Corporation, inasmuch as the improvements could not be carried out while the land was still occupied by tenants who could not be removed. Section 622 authorises the owner of any land, who is prevented by the occupier thereof from complying with any requisition made in respect of the land, to apply to the Chief Judge of the Court of Small Causes of Calcutta. The Chief Judge, on receipt of such application, may make a written order requiring the occupier to afford all reasonable facilities to the owner for complying with the requisition. The occupier shall, after eight days, afford all such reasonable facilities as may be prescribed in the order: and, in the event of his continued refusal so to do, the owner shall be discharged during the continuance of such refusal from any liability which he would otherwise incur by reason of his failure to comply with the requisition. In the case before us, the plaintiffs invoked the aid of section 622 and yet three tenants, Salemah Bibi, Jabanulla Serang and Solaman Molla refused to comply with the order. The Subordinate Judge has, however, found that although these three tenants refused to afford facilities to the plaintiffs and thus rendered it impracticable for them to carry out completely all the improvements required by the General Committee, the plaintiffs could have carried out some at least of the improvements. But the plaintiffs have not done anything at all to comply with the requisition. In such circumstances, section 622, sub section (3) is of no assistance to the plaintiffs. It would be unreasonable to construe that provision in the sense that an owner, who has not complied with a requisition at all, is discharged from liability, merely because the occupier of a portion of the land has rendered compliance impracticable only in part. Upon a fair interpretation of section 622, we must hold that the owner is discharged from liability only to the extent that compliance is rendered impossible by the conduct of the occupier.

(1) 11 C. W. N. 508; 5 Cr. L. J. 293.

The plaintiffs have next urged that the notice under section 408 was waived by the Corporation, when it was decided to take action under section 409 and to have the improvements carried out by the General Committee at the cost of the owner. We are of opinion that there is no solid foundation for this contention. Non-compliance with a requisition under section 408 imposes a liability on the owner. If the requisite improvements are carried out by the General Committee under section 409, the default on the part of the owner vanishes; but till the work has been completed, the default remains, entire or partial, and the liability of the owner to be prosecuted still continues in operation. This view is not opposed to the decision in *Emperor* v. *Nader Shah* (2) There it was ruled that if after service of notice, negotiations ensue, which are tantamount to a request by the defaulter and a consent by the Commissioner to re consider the matter, such negotiations operate as a waiver of the notice. This does not justify the inference that if the General Committee decides to take recourse to section 409, the owner is forthwith absolved from the liability he has already incurred by reason of his failure to comply with the requisition under section 408. In the case before us, a drain was constructed departmentally, as a temporary measure, during the period of continued default on the part of the plaintiffs. No doubt, half of the costs of construction was realised from them, but this did not extinguish their liability on account of failure to carry out such of the improvements as could have been effected, notwithstanding the obstructive attitude of three of their tenants. We are of opinion that section 409 is of as little avail to the plaintiffs as section 622.

There has been much discussion at the Bar as to whether a Court of Equity has jurisdiction to restrain criminal proceedings for the recovery of a penalty imposed by a Statute for breach of its enactments. An authority for an affirmative answer has been traced to the decision of Lord Hardwick in *Mayor and Corporation of York* v. *Pilkington* (3) though a contrary view had been indicated by Holt, C. J., in *Holderstaffe* v *Saunders* (4); see also the decision of Lord Hardwicke in *Montague* v. *Dudman* (5). But the tendency of modern decisions is that even if the Court has such jurisdiction it will not interfere as a general rule; *Saull* v. *Browne* (6), *Kerr* v. *Preston Corporation* (7), *Hedley* v. *Bates* (8), *Stannard* v. *Vestry of Saint Giles* (9), *In re Briton Medical and General Life Assurance Association* (10), *Grand Junction Waterworks* v. *Hampton Urban District Council* (11), *Devonport Corporation* v. *Tozer* (12), *Merrick* v. *Liverpool Corporation* (13). The principle deducible from these decisions is that though the extreme position cannot be maintained that there is absolutely no jurisdiction in the Court to restrain proceedings before a Magistrate, the Court will not interfere, unless in very special circumstances, by way of injunction or declaration of right, where the Legislature has pointed out a mode of procedure before a Magistrate; see also *Emperor of Austria* v. *Day* (14). A similar view has been adopted in the Courts of the United States, and relief has been frequently denied on the ground that the proceedings were for the enforcement of a criminal or *quasi* criminal nature and that equity declines to interfere with the administration of the Criminal Laws. It has been maintained, however, that a Court of Equity may in a proper case interfere by injunction to restrain an act

(2) 29 B. 351; 6 Bom. L. R. 664; 1 Cr. L. J. 8.

(3) (1742) 2 Atk. 302; 9 Mod. 273; 26 E. R. 584.
(4) (1694) 6 Mod. 16; 87 E. R. 780.
(5) (1751) 2 Ves. Sen. 396; 28 E. R. 253.
(6) (1874) 40 Ch. 64; 44 L. J. Ch. 1; 31 L. T. 493; 23 W. R. 50; 13 Cox C. C. 30.
(7) (1876) 6 Ch. D. 463; 46 L. J. Ch. 409; 25 W. R. 264.
(8) (1885) 13 Ch. D. 498; 49 L. J. Ch. 170; 42 L. T. 41; 28 W. R 365.
(9) (1892) 20 Ch. D. 190; 51 L. J. Ch. 629; 46 L. T. 243; 30 W. R. 695.
(10) (1886) 32 Ch. D. 503; 55 L. J. Ch. 416; 54 L. T. 152; 34 W. R. 390.
(11) (1898) 2 Ch. 330; 67 L. J. Ch. 603; 62 J. P. 566; 78 L. T. 673; 14 T. L. R. 467; 46 W. R. 644.
(12) (1902) 2 Ch. 182 at p. 198; 71 L. J. Ch. 751; 86 L. T. 612; 18 T. L. R. 489.
(13) (1910) 2 Ch. 449; 79 L. J. Ch. 751; 104 L. T 399; 74 J. P. 445; 8 L. G. R. 966.
(14) (1861) 3 De G. F & J. 217 at p. 253; 30 L. J. Ch. 690; 4 L. T. 494; 7 Jur. (N. S.) 639; 9 W. R. 712; 45 E. R. 861.

or proceeding, criminal, or *quasi*-criminal in form, which tends to the impairment of property rights, and proceedings for the enforcement of Municipal Ordinances, such as the one before us, have been treated as *quasi*-criminal (Pomeroy on Equity Jurisprudence, section 1777). We need not pursue this point further, but it should not be overlooked that the judicial decisions on the subject in other jurisdictions were largely rendered necessary by the system of classification of Courts prevalent there. Apart from this we have the well-settled rule that it is not the practice of the Court to interfere with Corporate bodies, unless they are manifestly abusing their powers, *Duke of Bedford* v. *Dawson* (15), *Ahmedabad Municipality* v. *Manilal* (16). It is consequently unnecessary to consider the terms of section 56 (*e*) of the Specific Relief Act, which provides that an injunction cannot be granted to stay proceedings in any criminal matter, and which, it has been suggested, should be construed to imply that there is no bar to enjoining contemplated prosecutions where proceedings are only threatened and are not yet pending. Nor need we adopt the extreme view that an injunction should not be granted to prevent the institution of criminal proceedings for non compliance with requisitions of Municipal authorities, merely because the person concerned, when prosecuted for an alleged default, may be acquitted on proof that the action of the Corporation was *ultra vires*. On the facts established in the case before us, we are clearly of opinion that an injunction should not be granted.

The result is that this appeal must be allowed and the suit dismissed with costs in both Courts. The hearing fee in this Court is assessed at five gold *mohurs*.

Z. K. *Appeal allowed.*

(15) (1875) 20 Eq. 353: 44 L. J. Ch. 519: 33 L. T. 16

(16) 19 B. 212; 10 Ind. Dec. (N. S.) 141; 20 B. 146; 10 Ind Dec (N S) 655.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1169 OF 1919.

January 17, 1923.

Present:—Mr. Justice Broadway and Mr. Justice Zafar Ali.

RAM KISHAN—PLAINTIFF—APPELLANT

versus

RAUSHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 16, 20—Suit for accounts and partition of joint family property—Jurisdiction of Court to deal with property outside British India—Appeal, second—Jurisdiction, question of, whether can be raised for first time—Hindu law—Joint family—Partition—Property kept joint—Partnership, whether created—Member managing business—Accounts, liability to render.

In a suit for accounts of dealings with and a partition of joint family property filed in a British Court, the Court has jurisdiction to deal with immoveable property situate in a Native State. [p. 534, col 1.]

Jagnandan Singh v. *Kishore Chand*, 100 P. W. R. 1908, *Fateh Ali* v. *Charles Edward Gray* 36 Ind. Cas. 210; *A. G. Madari* v. *R. Miser*, 36 Ind. Cas. 431; 9 Bur. L. T. 119, *Viralhadra Goudu* v. *Gurusenkata Charlu*, 22 M. 312 at p. 313; 8 Ind. Dec. (N. S.) 222, *Kashinath Govind* v. *Anant Sitaram*, 24 B. 407; 2 Bom. L. R. 47; 12 Ind. Dec. (N. S.) 804, *Durga Das* v. *Jai Narain*, 50 Ind. Cas. 156; 17 A. L. J. 567, relied on.

A question relating to jurisdiction which is a pure question of law and can be dealt with on the record as it stand without any further evidence being recorded can be taken in second appeal although it was not urged before the lower Appellate Court. [p. 534, col 1.]

Where on a partition of joint family property it is agreed that certain items should continue to remain joint, it cannot be held that the members of the family constitute a partnership with respect to such items. [p. 534 col 1.]

Where one member of a joint Hindu family manages a family business he is in the position of an agent *qua* the other members, and it is incumbent on him to render an account of the business, and he cannot escape from the liability of rendering accounts simply because he says that he possesses no account-books. [p. 534, col. 2.]

Second appeal from a decree of District Judge, Hissar, dated the 8th January 1919.

Bakhshi *Tek Chand* and Lala *Gobind Ram Khanna*, for the Appellant.

Mr. *Nanak Chand Pandit*, for the Respondents.

JUDGMENT.—One Paras Ram had five sons all of whom had no male issue. Of these four adopted various persons as their sons—*vide* the following pedigree table:—

PARAS RAM

Gaja Nand died issueless	Balmokand	Dhan Raj	Dilsukh Rai	Lakhmi Chand
	Partab Chand Adopted son (defendant No. 2)	Raushan Adopted son (Defendant No. 1)		Ram Kishen Adopted son (Plaintiff)

Musammat Bhajji widow (defendant No. 3)	Bhagwan Das Adopted son (defendant No. 4)

In 1911 a suit for partition was filed between the sons of Paras Ram which was decided in 1912 on a compromise under which the family was disrupted but it was definitely agreed that certain outstandings and moveable and immoveable properties situated at Anupgarh in the Bikaner State were to remain joint as before.

On the 1st December 1915 Ram Kishen instituted a suit against Dhan Raj, Balmokand, *Musammat* Bhajji and Bhagwan Das. The suit was for accounts and partition of a one-fourth share of all dealings, connected with the parties' firm at Anupgarh and a division of all landed and residential property connected therewith which might after enquiry be discovered. In paragraph 5 of the plaint Ram Kishen definitely asserted that he had ascertained that all moveable and immoveable property at Anupgarh had been sold. On the 19th of June 1916 the learned Subordinate Judge (Mr. Anderson) held that Ram Kishan was entitled to a one fourth share of the moveables in suit but that the British Courts had no jurisdiction in relation to any immoveable property situate in the Bikaner State. On the 5th of July 1916 the same learned Subordinate Judge held that certain other properties at Minchinabad could not form the subject-matter of this suit. The case was finally disposed of on the 13th of July 1917 by another learned Subordinate Judge (E. T. Bhan) who held that Ram Kishen had failed to prove that moneys had been realised by the defendants in connection with the Anupgarh properties and dismissed the suit. Ram Kishen appealed to the learned District Judge who, on the 18th of January 1919, upheld the decision of the learned Subordinate Judge so far as the dismissal of Ram Kishen's suit was concerned, but, accepting a cross-appeal by Raushan Lal, Partab Chand, representatives of Dhan Raj and Balmokand, granted a decree in their favour for Rs. 200 with costs against Ram Kishen. In the course of his judgment the learned District Judge found that Balmokand and Dhan Raj and consequently their adopted sons had never had any concern with the Anupgarh property or business and that, therefore, they were not liable to render any accounts. He held that Bhagwan Das had been the manager of the business and the property at Anupgarh but considered that he was also not liable to render any accounts inasmuch as it had not been proved that he was in actual possession of any account-books. Against this decision Ram Kishen has come up to this Court in second appeal through Mr. Tek Chand, and Mr. Nanak Chand Pandit has been heard on behalf of the respondents Raushan and Partab Chand. Bhagwan Das, though served, has not considered it necessary to put in an appearance.

It has been urged by Mr. Tek Chand that the decision of Mr. Anderson, dated 19th June 1916, to the effect that the British Courts had no jurisdiction to deal with the immoveable property in the Native States was erroneous, and in support he referred to *Jagnandan Singh* v. *Kisho e Chand* (1), *Durga Das* v. *Jai Narain* (2) *A. G. Madan* v. *R. Misser* (3) *Krishnaji Govind* v. *Anant Sitaram* (4), *Virabhadra Gowdu* v *Guruvenkata Charlu* (5) and *Fateh Ali* v. *Charles Edward Gray* (6). He further contended that after the decision of the partition suit in 1912, the parties, *qua* the property left undivided, became partners, a partnership coming into existence within the definition of that

(1) 100 P. W. R. 1908.
(2) 50 Ind. Cas. 156; 17 A. L. J. 567.
(3) 36 Ind. Cas. 431; 9 Bur. L. T. 119.
(4) 24 B. 407; 2 Bom. L. R. 47; 12 Ind. Dec. (N. S) 864.
(5) 22 M. 312 at p. 313; 8 Ind. Dec. (N. S.) 222.
(6) 36 Ind. Cas. 210.

erm as given in the Indian Contract Act. So far as the contention that the partnership came into existence is concerned, we are of opinion that it cannot succeed. The property was the joint property of a Hindu joint family. The jointness of this family came to an end in 1912 but it was specifically agreed that certain property (now in suit) should continue to remain joint as before. The plaint as framed also clearly indicates that no partnership, as contemplated by the Indian Contract Act, was alleged by Ram Kishen. His suit was for accounts and partition of property held jointly. At the same time we are of opinion on the authorities cited by Mr. Tek Chand that the British Courts had jurisdiction to deal with the suit as instituted including the immoveable property situated in the Native States. *Jagnandan Chand Singh* v. *Kishore Chand* (1) is specially in point. Mr. Nanak Chand Pandit urged that this question of jurisdiction although a pure question of law could not be urged in second appeal, inasmuch as it had not been made a ground of attack in the appeal to the District Court. In this view, however, we are unable to agree. The question is one of law pure and simple which can be dealt with on the record as it stands without any further evidence being recorded.

So far as the liability of Mr. Nanak Chand Pandit's clients Raushan and Partab Chand to render accounts is concerned, however, we are of opinion that the finding of the learned District Judge concludes the matter, being a finding on a question of fact. It has been definitely found that neither of these two respondents or their respective fathers ever had any concern with the business or the properties situated at Anupgarh, and further it has also been found that Bhagwan Das was the manager of the firm there. So far as Raushan and Partab Chand are concerned, therefore, we consider that the decision of the Court below must stand.

Bhagwan Das, however, who has been found to have been the manager of the firm, and as such in possession of the Anupgarh properties at one time, cannot be freed from the liability of rendering accounts simply because he has said that he possesses no account-books and the plaintiff has been unable to prove the existence of such. As the manager of the firm, Bhagwan Das was in the position of an agent *qua* the other joint owners and it was incumbent on him to render an account of all assets and expenditure. In this view we are supported by a decision of the Allahabad High Court reported as *Rajhunath* v. *Ganpatji* (7) cited with approval in *Jagnandan Singh* v. *Kishore Chand* (1).

The next point for consideration is the decree passed against Ram Kishen. In our opinion this decree cannot stand, inasmuch as we consider that Bhagwan Das must be called upon to render an account of his stewardship of the property in suit. The rights of Raushan and Partab Chand in the proceeds of the property sold by Ram Kishen will have to be settled when Bhagwan Das has rendered accounts and the actual sums to which each party is entitled have been arrived at.

We accordingly accept this appeal, set aside the decree passed against Ram Kishen for Rs. 200 and direct that a preliminary decree be passed against Bhagwan Das holding him responsible for the rendition of accounts of the property in suit. Costs in this Court will follow the event. This order is *ex parte* against Bhagwan Das.

Appeal accepted.

Z. K.

(7) 27 A. 374; A. W. N. (1905) 3.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 432 OF 1921.

March 17, 1922.

Present :—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Pearson.

MOHADEB KUDU—PETITIONER

versus

BENODE LAL PATRA—OPPOSITE PARTY.

Probate and Administration Act (V of 1881), s. 69—Adverse claimant to testator—Interest in estate—Probate, opposition of.

AZAD KHAN *v.* NASIB GUL.

A person denying the title of the testator to deal with certain property as his own and claiming adversely to him, cannot be said to have such an interest in the estate of the deceased as would entitle him to come in and oppose the grant of Probate.

Messrs. *Brojolal Chakravarty* and *Rishendranath Sircar*, for the Petitioner.

Mr. *D. N. Chakravarty*, *Ch. Ray Choudhury* and *Kali Kinkar Chakravarty*, for the Opposite Party.

ORDER.—We do not think that the petitioner has any *locus standi* to appear and oppose the grant of Probate of the Will of Nandarani Dasi.

A person denying the title of the testator to deal with certain property as his own and claiming adversely to him, cannot be said to have such an interest in the estate of the deceased as would entitle him to come in and oppose the grant of Probate. This is not disputed on behalf of the petitioner. But it is contended that it was the estate of her husband, Khiroda Prosad Pal which was being dealt with by the lady in the exercise of the power given to her by her husband's Will, and that, therefore, the petitioner may be said to have an interest in the estate of the lady. But although she was dealing with the estate of her husband and professed to do so in the exercise of the powers conferred upon her she was dealing with it as her own. Any dealing however with the estate of Khiroda Prosad Pal by the lady not authorized by his Will or in excess of the powers conferred upon her by the Will cannot affect the rights of the School which the petitioner represents.

Upon the facts of the case there may be good ground of contention between the parties, but we do not think that the procedure by way of *eavet* can be invoked for the purpose of determination of the questions arising.

We are unable therefore, to interfere with the order of the Court below. The Rule is discharged. We make no order for costs.

N. H. *Rule discharged.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1796 OF 1919.

December 21, 1922.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Moti Sagar.

AZAD KHAN—DEFENDANT—APPELLANT

versus

NASIB GUL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Alienation—Self-acquired property—Agreement to sell by husband—Receipt of part consideration—Death of husband—Mortgage by widow in lieu of advance, whether binding on reversioners.

Where a male proprietor agrees to sell his self-acquired property and receives a portion of the sale consideration in advance, but dies before the sale is effected, and his widow mortgages the property to the vendee in lieu of the advance made by him to the deceased, the mortgage cannot be treated as an alienation by the widow of her husband's property in lieu of a debt voluntarily incurred by the husband; it is an alienation in discharge of an obligation which is binding on the estate of the husband, and cannot, therefore, be questioned by the reversioners of the husband, the deceased having full powers to deal with his self-acquired property in any manner he pleased. [p. 537, col. 1]

Second appeal from a decree of the District Judge, Attock, at Campbellpur, dated the 17th May 1919.

Messrs. *Ghulam Rasul* and *B. D. Qureshi*, for the Appellant.

Mr. *M. S. Bhagat*, for the Respondents.

ORDER.—The facts of the case which has given rise to this second appeal may be summarised as below:—

One Taju had two sons, Zarif and Khan Bahadur. The plaintiffs are the sons of Zarif. Khan Bahadur had two wives, *Musammat* Mai Bibi, defendant No. 3, and *Musammat* Khanma, defendant No. 2. Khan Bahadur's son was Nadir Khan. He was married to one *Musmma*, She ina, who is defendant No. 1 in this case. Nadir Khan contracted to sell the land in dispute in the present case to one Azad Khan for Rs. 3,100. The sale was to be effected by means of mutation. The mutation could not be effected on the date fixed as the Tahsildar was unable to arrive on the spot. The vendor Nadir Khan, however, insisted on a part payment of the consideration money. Rupees 1,100 were paid by Azad Khan, the intended vendee, but before the sale could be completed, the vendor died. On

the death of the vendor the property was mutated in the names of his mother, *Musammat* Khanma, his step-mother *Musammat* Mai Bibi and *Musammat* Sherina, his widow. An understanding was arrived at between *Musammat* Khanma and *Musammat* Sherina on the one hand and Azad Khan on the other to the effect that the latter should give up his rights as vendee and should accept a mortgage of the land in dispute for the amount which he had advanced as a part payment of the consideration. Thereupon two mutations were effected in his favour, namely, Nos. 2060 and 2061. The present suit was instituted by the plaintiffs as collaterals for a declaration that the oral mortgage effected by defendants Nos. 1 and 2 in favour of defendant No. 4 shall have no effect on plaintiffs' reversionary rights after the death or re-marriage of defendants Nos. 1 and 3. On the pleadings of the parties two issues were framed by the Trial Court, namely,

(1) Is the alienation in dispute for consideration and valid necessity?

(2) Have the plaintiffs acquiesced in the transaction in dispute and cannot contest it now?

During the pendency of the suit before the Trial Court an application was made on behalf of Azad Khan, the alienee, asking the Court to frame two more issues in the case, namely, (1) that the property in dispute was not ancestral *qua* the plaintiffs, and (2) that even if the property was ancestral, the plaintiffs were not competent to sue in the presence of daughters of Nadir Khan. As these questions had not been raised in the original pleadings, the Trial Court refused to frame the suggested issues. An additional reason for refusing to allow the amendment of the issues given by the Court was that it being an alienation by a woman the question whether the property was ancestral or non-ancestral did not arise. The alienation was questioned on the ground that it was without consideration and without necessity. The Trial Court found upon the evidence given by some respectable witnesses that the payment of Rs. 1,100 had been established. On the question of necessity the Court came to the conclusion that it being a debt due from Nadir Khan; the mortgagors were justified in making the alienation in order to satisfy the claim of Azad Khan. The learned Senior Subordinate Judge was of opinion that all that was necessary for the mortgagee to prove was whether there existed a debt or not. Having found that the debt existed the Court held that there was full justification for the execution of the mortgage. The learned Senior Subordinate Judge further held that it was an act of good management that the ladies persuaded Azad Khan to accept a mortgage instead of a sale. No decision was given by the Trial Court on the second issue, namely, whether the plaintiffs had acquiesced in the transaction in dispute and could not contest it. In view of the findings recorded by it the Trial Court dismissed the suit of the plaintiffs.

The plaintiffs preferred an appeal against the decree of the Trial Court to the lower Appellate Court. The latter Court agreed with the Trial Court in finding that Rs. 1,100 had, as a matter of fact, been paid by Azad Khan to Nadir Khan. The learned Judge of the Court below, however, took the view that it was incumbent on the vendee to prove that there was necessity for the debt which had been incurred by Nadir Khan and that it was not enough to prove that a debt existed in order to sustain an alienation. After laying down this proposition the learned Judge took into consideration whatever evidence there was on the record on this point and came to the conclusion that the mortgagee had failed to establish that there was necessity for the debt and for the alienation. Taking this view the lower Appellate Court accepted the appeal and decreed the suit of the plaintiffs.

Azad Khan, the defendant, has come up to this Court in second appeal and it has been contended by Mr. Ghulam Rasul on his behalf that, having regard to the rule described in paragraphs 62 and 63 of the Rattigan's Digest of Customary Law, all that was necessary for the alienee to prove was that it was a just debt. He contended that, according to Explanation I attached to paragraph 63 of the Rattigan's Digest, a just debt is a debt (1) which is really due, (2) has been contracted for a

purpose other than one that is immoral or forbidden by law, or opposed to public policy, and (3) can be recovered from his person or property generally. In support of his contention he further relied upon the ruling in *Devi Ditta* v. *Saudagar Singh* (1) and a few other rulings, explaining what was laid down in that ruling. Mr. M. S. Bhagat, Counsel for the respondents, argued that it was not enough to prove simply that the debt existed, but that it was further incumbent upon the mortgagee to prove that there was necessity for the incurring of the debt, in consideration of which the present mortgage has been made. A large number of rulings have been cited on both sides to maintain the respective positions taken up in this case. The majority of those rulings are devoted simply to the task of discovering the meaning of what was laid down in *Devi Ditta* v. *Saudagar Singh* (1) and perhaps if we were called upon to decide the precise question argued before us, we would have to wade through those rulings, and come to some decision as to what was actually laid down in *Devi Ditta* v. *Saudagar Singh* (1), but we are relieved of the necessity of doing this, for what had really happened was that a part-payment of the consideration money had been made in respect of the intended sale and as the sale was not completed a failure of consideration took place and the vendor become liable to return the Rs. 1,100 which had been received by him. This can hardly be said to be a debt voluntarily incurred. In law, therefore, his representatives were bound to return this amount of consideration to him or to satisfy his demand in any other manner. It is not possible to say under these circumstances that Nadir Khan voluntarily had incurred any debt. It is, therefore, not necessary to investigate the question whether he incurred this debt for any of those objectionable purposes which are laid down in several rulings. If the property was non-ancestral, Nadir Khan both under the law and custom had every right to alienate it. His act cannot be said to be against law. It is merely a coincidence that the contract entered into could not be performed and Nadir Khan by the operation of law became a debtor. In order, therefore, to dispose of this appeal finally it is necessary to determine the question whether the property was ancestral or self-acquired. We, therefore, remit this issue to the lower Appellate Court for decision. The Court will allow the parties to produce such additional evidence as they may wish to bring before the Court. We also think it necessary to call upon the lower Appellate Court to allow the parties to produce evidence on the second issue framed by the Trial Court and record a finding on this issue also. On return of the findings ten days will be allowed to the parties to file objections.

We may note that a preliminary objection to the hearing of the appeal was raised by Mr. M. S. Bhagat, the learned Counsel for the respondents, on the ground that, as in order to decide the question of necessity, the Court had necessarily taken into consideration the question whether there was necessity according to custom, the appellant is not entitled to proceed with the second appeal without producing a certificate. In our opinion as regards the facts, the case is fully covered by the ruling in *Santa Singh* v. *Waryam Singh* (2). The appeal does not raise any question relating to the validity or the existence of custom, and, therefore, no certificate is necessary. We, therefore, disallow the preliminary objection and proceeded to hear the appeal.

Z. K. *Case remanded.*

(1). 65 P. R. 1900; P. L. R. 1900, p. 322.

(2) 24 Ind. Cas. 361; 19 P. R. 1915; 207 P. L. R. 1914; 147 P. W. R. 1914.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL, NO. 1252 OF 1920.

March 12, 1923.

Present:—Mr. Justice Martineau and Mr. Justice Zafar Ali.

Musammat SHERA KHATUN—DEFENDANT—APPELLANT

versus

MUHAMMAD ALI SHAH—PLAINTIFF

Musammat BIBI JI—DEFENDANT—RESPONDENTS.

Will, construction of—Circumstance taking place long after execution, whether affects construction—Custom—Gift—Reversion—Self-acquired property.

Each Will must be interpreted according to its own language and the circumstances attending its conception. A circumstance which takes place long after the execution of a Will and the death of the testator, can afford no assistance in the interpretation of the Will. [p. 539, col. 1.]

Under the Punjab Customary Law there is a wide distinction between succession to ancestral property and succession to self-acquired property and the principle of reversion to the heirs of the donor is limited to property over which he had not unrestricted power of disposition. [p. 539, col. 1.]

Jot Ram v. *Hardawari*, 23 Ind. Cas. 527; 27 P. R. 1914; 22 P. L. R. 1914; 240 P. W. R. 1913, followed.

Second appeal from a decree of the District Judge, Rawalpindi, dated the 26th April 1920.

Mr. *Aziz Ahmad*, for the Appellant.

Mr. *Zafar Ullah Khan*, for the Repondents.

JUDGMENT.—According to his last Will executed on the 30th October 1889, one Sher Ali, Sayad of Tahsil Gujar Khan, District Rawalpindi, who had no male offspring left all his property, which was mostly self-acquired, to his (1) brother Muhammad Ali, plaintiff, (2) unmarried daughter Shera Khatun and (3) two wives. On his death, which occurred shortly after, mutation of his estate in favour of all the legatees was sanctioned in 1890 in accordance with the Will and with the consent of all of them. No dispute arose till 1910, but in that year *Musammat* Shera Khatun married and Muhammad Ali sued for possession of her share, stating that the testator did not make her absolute owner but contemplated to make a provision for her till her marriage. The suit was dismissed on the finding that the gift was absolute. The widow Bhagsudi had died before that in 1905, and her share was mutated in 1907 to the surviving widow, *Musammat* Bibi Ji, mother of *Musammat* Shera Khatun. In 1916 *Musammat* Bibi Ji gifted all her property to her daughter and thereupon Muhammad Ali brought the suit out of which this second appeal has arisen to obtain a declaration that the gift would not affect his reversionary rights after the death or re-marriage of *Musammat* Bibi Ji. The suit was at first decreed by the Court of first instance, but on appeal the learned District Judge remanded the case for fresh decision on the issues framed by him. The learned Subordinate Judge who then tried the case gave judgment against the plaintiff and dismissed his suit, finding *inter alia* (1) that the widows were given by the Will an absolute estate, (2) that as regards the self-acquired property the daughter excluded the brother in accordance with the general custom obtaining in the Province, and (3) that the plaintiff by his ratification of the Will and acting upon it was precluded from laying claim to the property which was ancestral. On appeal the learned District Judge reversed these findings and decreed the plaintiff's suit.

We are of opinion that the learned District Judge misread the Will and went wrong in considering that the *rawaj-i-am* relating to daughters' right of succession applied to sell-acquired property also. The language used by the testator in describing the bequest in favour of his wives is not dissimilar to that relating to his brother and, daughter, and therefore, it cannot be said that he intended to create a life estate in the case of the wives. Further, the way in which he devised the property indicates that he gave to his brother much more than he was ordinarily entitled to, in order to propritiate him, so that he might not give trouble to his daughter and wives after his death by impugning the Will. All that the plaintiff could claim was the right to succeed to the ancestral land, which was 37 *kanals* only, on the death of the widows. In lieu of those 37 *kanals* the testator gave him nearly 80 *kanals* together with a house, both of which he had himself acquired from one Megh Raj. It was in consideration for this generous treatment that the plaintiff accepted the Will and acted upon it, fully realising that

his brother had made his daughter and wives full owners of what was decreed to them. As the gift to the brother as well as to the daughter was absolute there is nothing to indicate that it was not so in the case of the wives. On the other hand the testator had so much regard for one of the latter that he gave to her the power of dividing the property between the female legatees. The learned District Judge interpreted the Will by a reference to (1) the Will of another person which had given rise to a litigation and (2), the fact that on the death of *Musammat* Bhagsudi, the other widow, succeeded to her share. But each Will must be interpreted according to its own language and the circumstances attending its conception, and a circumstances of the nature of (2) which took place long after its execution, can afford no assistance in the exposition of it. As we find that the widows were absolute owners of the property bequeathed to them, and that the plaintiff gave up his contingent future interest in the ancestral land on receiving immediately more than twice its equivalent, no part of that property could revert to him. In *Jot Ram* v. *Hardawari* (1) it was pointed out by a reference to several previous rulings that "there is a wide distinction between succession to ancestral property and succession to self acquired property,..... and that the principle of reversion to the heirs of the donor....is limited to property over which he had not unrestricted power of disposition." *Harilal* v. *Bai Rewa* (2) and *Carlapatti Chinna* v. *Cota Wammalivariah* (3) cited by Counsel for the respondent in support of his contention that female donees should be presumed to have been given a life estate only, are not in point because both those cases are under the Hindu Law according to which a female does not acquire the rights of absolute owner in property received from the father or husband.

The learned Counsel for the plaintiff-respondent raised the further contention that the finding of the lower Appellate Court that the defendants had failed to prove that among Sayads of Gujar Khan Tahsil a married daughter succeeds to self-acquired property in the presence of her uncle, was a finding on the question of custom and could not be contested in the absence of a certificate under section 41 of the Punjab Courts Act. But in the present case the daughter's right to succeed to the father's property does not arise at all as the widows were the absolute owners of the property that has been gifted to her.

Therefore, we accept the appeal and reversing the judgment and decree of the learned District Judge restore that of the First Court. The plaintiff to pay the defendant's costs throughout.

Appeal accepted.

Z. K.

(1) 23 Ind. Cas. 527; 27 P. R. 1914; 22 P. L. R. 1914; 249 P. W. R. 1913.
(2) 21 B. 376; 11 Ind. Dec. (N. S.) 253.
(3) 3 Ind. Cas. 475; 33 M. 91.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1215 OF 1920.
April 12, 1922.
Present:—Mr. Justice Ryves.
FATEH MUHAMMAD CHAUDHURI—PLAINTIFF—APPELLANT
versus
Musammat SITA CHAUDHRAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Decree in pre-emption suit—Period for depositing pre-emption money ending on Sunday—Deposit next day, validity of—Civil Procedure Code (Act V of 1908), O. XXI, r. 14(b).

Where the last day of the period allowed by a pre-emption decree for depositing the pre-emption money is a Sunday, a deposit made on the day following is not a compliance with the decree and, under O. XXI, r. 14 (*b*) of the Civil Procedure Code, the suit for pre-emption stands automatically dismissed. [p. 540, col. 2.]

Hirdey Narain v. *Alam Singh*, 48 Ind. Cas. 353; 41 A. 47; 16 A. L. J. 892, followed.

Mr. *Iqbal Ahmad*, for the Appellant.

Mr. *Harnandan Prasad*, for the Respondent.

JUDGMENT.—Fath Muhammad Chaudhuri plaintiff appellant purchased some *zemindari* property under a sale-deed dated the 20th of August 1914. Thereupon two suits for pre-emption were brought: (1) by *Musammat* Sita the defendant-respondent, and (2) by *Musammat* Mohree. Both the suits were decreed, that is to say each plaintiff was given a decree entitling her to get possession of half of the property on payment of a certain sum within a given time. *Musammat* Sita paid in the money within the time prescribed and obtained possession of half of the property. The last day on which, according to the decree, *Musammat* Mohree ought to have deposited the money was the 16th of April 1916. That day happened to be a Sunday and she deposited the money on Monday, the 17th. On the 15th of April the day before the final date for depositing the money, *Musammat* Mohree sold her decree, or, in other words, the half of the property which she was entitled to pre-empt under the decree, to Mansabdar, a son of the plaintiff. Fateh Muhammad applied to the Court to withdraw the money deposited by *Musammat* Mohree, but on the report of the office that the money had been deposited too late, his application was dismissed. In December 1916 *Musammat* Mohree applied to withdraw her deposit and it was given back to her. Then *Musammat* Sita sued to pre empt Mansabdar. Fateh Muhammad was not made a party and she got a decree and, having paid in the decretal amount within the time prescribed, got formal possession against Mansabdar, and, on application before the Revenue Authority, got mutation in her favour, that is to say, Fateh Muhammad's name which had been entered against this half of the property was expunged and *Musammat* Sita's name was substituted, although Fateh Muhammad was no party to those proceedings. In this suit Fateh Muhammad asked for possession of that half of the property. The Trial Court decreed the suit but the lower Appellate Court dismissed it, holding that payment by *Musammat* Mohree of the decretal amount on Monday, the 17th April 1916, was a good payment and that in consequence her sale to Mansabdar passed the property. The plaintiff comes here in appeal and the one essential point which emerges for decision is whether *Musammat* Mohree, having failed to deposit the decretal amount by the 16th April 1916, complied with the decree or not, because, if she did not, then automatically under O. XXI, r. 14 (*b*) her suit for pre-emption stood dismissed and she conveyed nothing by her sale on the 15th of April 1916 to Mansabdar. According to the older rulings of this Court, for instance, *Dabi Din Rai* v. *Muhammad Ali* (1). *Musammat* Mohree's payment on the 17th would have been held to be within time. It has, however, recently been held by the Pre-emption Bench in *Hirdey Narain* v. *Alam Singh* (2) that the payment on Monday was beyond time. A Special Bench of this Court was appointed some years ago to deal with pre-emption cases in order to obtain uniformity in decisions. That being so, I think I am bound to follow this later decision. I may point out that on principle it seems to me difficult to distinguish this case from the case of *Reoti Ram* v. *Sita Ram* (3) but, however, as I have said before, I think I am bound by the decision of the Special Bench dealing with pre-emption cases. In this view the decree of the Court below must be set aside and the decree of the First Court restored with costs, including in this Court-fees on the higher scale.

Decree restored.

N. H.

(1) 3 A. 850; A. W. N. (1881;) 100; 2 Ind. Dec. (N. S.) 573.
(2) 48 Ind. Cas. 353; 41 A. 47; 16 A. L. J. 892.
(3) 60 Ind. Cas. 894; 19 A. L. J. 49.

MUHAMMAD DIN *v.* ZEB-UN-NISA.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 986 OF 1919.

January 3, 1922.

Present:—Mr. Justice Scot-Smith and Mr. Justice Harrison.

MUHAMMAD DIN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat ZEB-UN-NISA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 1—Appeal—Decrees, separate—Appeal, second—Decree in one appeal, copy of, not filed, effect of—Res judicata.

Plaintiff sued to recover a certain share in two houses from defendant No. 1; and her alienee defendant No. 2. The suits were decreed by the Trial Court and separate appeals were preferred by defendant No. 1 and defendant No. 2, which were accepted by one judgment written in the appeal preferred by defendant No. 1 Separate decrees were, however, drawn up. Plaintiff preferred a second appeal and only filed copies of the judgment and decree in the appeal of defendant No. 1 along with his Memorandum of Appeal:

Held, (1) that the copy of the decree of the lower Appellate Court in the appeal preferred by defendant No. 2 not having been filed along with the Memorandum of Appeal, there was no appeal against that decree and the decree had consequently become final;

(2) that the matter in dispute having become *res judicata* between plaintiff and defendant No. 2 who claimed under defendant No. 1, plaintiff's appeal against defendant No. 1 could not proceed.

Second appeal from a decree of the District Judge, Lahore, dated the 14th March 1919, reversing that of the Subordinate Judge, First Class, Lahore, dated the 19th December 1918.

Mr. *Azim Ullah*, for the Appellants.

Messrs. *Obeidullah*, *Hazura Singh* and *Mahesh Das*, for the Respondents.

JUDGMENT.—The plaintiffs-appellants sued *Musammat* Zeb-un-Nisa, widow of Allah Din, and Ghulam Nabi and Rahim Bakhsh, alienees from her of two houses, for possession of their 5-16th share therein by partition. The First Court held that according to the Muhammadan Law the plaintiffs were entitled to possession of the share claimed and gave them a decree therefor subject to the payment of Rs. 316 to *Musammat* Zeb-un Nisa. From this order two appeals were filed in the Court of the District Judge. (1) Civil Appeal No. 19 by Ghulam Nabi and Rahim Bakhsh, the vendees. They made the plaintiffs respondents and also *Musammat* Zeb un-Nisa and *Musammat* Imam Bibi; (2) Appeal No. 20 by *Musammat* Zeb-un-Nisa in which she made the plaintiffs only respondents and did not implead the vendees. The District Judge disposed of the appeals by judgment in Civil Appeal No. 20 (*Musammat* Zeb-un-Nisa's appeal) and wrote a short judgment in the other appeal in which he referred to his judgment in Civil Appeal No. 20. Two separate decrees were drawn up, one in each appeal. The District Judge accepted the appeals and dismissed the plaintiffs' suit. The plaintiffs have filed a second appeal to this Court, but they have only filed copies of the judgment and the decree in Civil Appeal No. 20, namely, that of *Musammat* Zeb-un Nisa. They have filed no copy of the decree in Civil Appeal No. 19 to which Ghulam Nabi and Rahim Bakhsh were parties.

Mr. Obedullah on behalf of the respondents raises a preliminary objection that it was necessary for the plaintiffs to file two appeals, or at all events to file copies of both judgments and both decrees. In our opinion, this objection has force. Under O. XLI, r. 1, Civil Procedure Code, it is laid down that the Memorandum of Appeal should be accompanied by a copy of the decree appealed from and of the judgment on which it is founded. Now, there is no copy of the decree in favour of Ghulam Nabi and Rahim Bakhsh along with the Memorandum of Appeal in this case. Therefore, it is clear that the appeal has not been properly filed. If, for the sake of argument, we were to hear the present appeal and set aside the decree, there would still be subsisting the decree in favour of Ghulam Nabi and Rahim Bakhsh which would operate as *res judicata* and the plaintiffs' suit would still stand dismissed as against them. Mr. Azim Ullah, appellants' Vakil, in the end said that he was prepared to file the copies of the judgment and the decree in Civil Appeal No. 19 of the District Judge's Court, if time were allowed to him. In our opinion, however, no sufficient cause has been shown within the meaning of section 5 of the Indian Limitation Act for extending time. The appeal by the

time the additional copies are filed will be obviously long time-barred. Counsel who filed the present appeal must have seen from the copy of the decree that Ghulam Nabi and Rahim Bakhsh were no party to it. This fact should have been sufficient to put him on his guard and he should have applied then for a copy of the decree to which they were parties. A valuable right has now accrued to Ghulam Nabi and Rahim Bakhsh and we do not consider it would be fair to them to extend the time under section 5 of the Limitation Act.

We accordingly dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 755 OF 1921.

April 19, 1923.

Present:—Mr. Justice Krishnan and Mr. Justice Venkatasubba Rao.

SUNDARA RAMANUJAM NAIDU—LEGAL REPRESENTATIVE OF THE PLAINTIFF—PETITIONER

versus

SIVALINGAM PILLAI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Court-Fees Act (VII of 1870), s. 7 (v) (e), (x) (a)—Suit for specific performance of contract of sale and for possession, nature of—Valuation—Court-fees payable.

A suit to enforce specific performance of a contract to sell immoveable property by directing execution of a proper sale-deed in favour of the plaintiff on his paying the price into Court and for recovery of possession is a suit for specific performance falling under section 7 clause *x* (*a*) of the Court-Fees Act and not one for possession falling under clause *v* (*e*) of the said section, and Court-fee in such a suit is, therefore, payable on the amount of the consideration.

A suit for specific performance is, in its essence, different from a suit for possession and the mere fact that possession is also claimed in such a suit does not render it any the less a suit for specific performence. [p. 545, col. 2.]

Nihal Singh v. *Sewa Ram*, 35 Ind. Cas. 275; 38 A. 292; 4 A. L. J. 434, *Gopal Das* v. *Parmanand*, 60 Ind. Cas. 512, followed.

Madan Mohan Singh v. *Gaja Prosad Singh*, 11 Ind Cas. 228; 14 C. L. J. 159, not followed.

Muhi-ud-din Ahmad Khan v. *Majlis Rai*, 6 A. 231; A. W. N. (1884) 42; 3 Ind. Dec. (N. S.) 837; *Bhashyakarlu Naidu* v. *Nungambakkam Andalammal*, 49 Ind. Cas. 385; (1918) M. W. N. 896 at p. 897; 9 L. W. 19; 35 M. L. J. 89, referred to.

Krishnammal v. *Sunadararaja Aiyar*, 22 Ind. Cas. 912; 38 M. 698; 15 M. L. T. 103; (1914) M. W. N. 200; 1 L. W. 147, *Krishnaswami* v. *Sundarappayyar*, 18 M. 415; 5 M. L. J. 164; 6 Ind. Dec. (N. S.) 638; *Nathu* v. *Budhu*, 18 B. 537; 9 Ind. Dec. (N S) 867, distinguished.

Petition, under section 115 of Act V of 1908, praying the High Court to revise a decree of the Court of the Subordinate Judge, Kumbakonam, in Civil Miscellaneous Appeal No. 25 of 1920, preferred against a decree of the Court of the District Munsif, Kumbakonam, in Original Suit No 241 of 1917.

This petition coming on for hearing on the 20th July 1922, the Court delivered the following

JUDGMENT.—The question raised here is how suits for specific performance and for possession of the property agreed to be sold are to be valued for the purposes of jurisdiction. Before disposing of this question, we think it proper that we should have a finding from the lower Appellate Court as to what exactly is the amount of consideration for the agreement, Exhibit A. It is not stated in exact figures in the deed but has to be arrived at on an ascertainment and calculation of the items mentioned in it.

The finding will be submitted within two months from this date and seven days will be allowed for filing objections. Fresh evidence will be allowed on both sides.

In compliance with the above order, the Subordinate Judge of Kumbakonam submitted the following

FINDING.—I have been directed to submit a finding on the following issue, namely, "What exactly is the amount of consideration for the agreement, Exhibit A, on an ascertainment and calculation of the items mentioned in it?"

* * * * *

My finding on the issue remitted by the High Court is that the consideration for Exhibit A is Rs. 2,265 made up of (*i*) principal Rs. 2,030, (*ii*) interest Rs. 159 and (*iii*) costs incurred in Court and miscellaneous expenses connected therewith Rs. 76.

Messrs. *T. Narasimha Aiyengar* and *K. S. Doikan*, for the Petitioner.

Messrs. *A. Krishnaswamy Aiyar*, *T. S. Ramaswamy Aiyar* and *V. Sundaram Aiyar*, for the Respondents.

This petition coming on for final hearing on the 4th April 1923 after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

Krishnan, J.—This civil revision petition arises from a suit brought by plaintiff to enforce specific performance of a contract to sell a shop by directing the defendant to deliver a proper sale-deed to him on his paying the price into Court and for recovery of possession of the property. The question that arises for decision is what is the proper value of this suit for purposes of jurisdiction. Section 8 of the Suits Valuation Act makes the value for Court fees and for jurisdiction the same in such suits. We have, therefore, to see under what provision or provisions of the Court Fees Act the suit has to be valued. The District Munsif held that it was one for recovery of possession and should be valued under section 7, clause V (*c*) of the Act and as that value was over Rs. 3,000, the pecuniary limit of his jurisdiction, he returned the plaint to be presented to the proper Court. On appeal the Subordinate Judge upheld that view and hence the revision to us by the plaintiff.

Plaintiff contends that the suit falls under clause x (*a*) of section 7 and not under clause v at all. The defendant on the other hand argues that the suit falls under clause v (*c*) and its value is either the aggregate of the values computed under clauses v (*c*) and x (*a*) or at any rate is the value under clause v (*c*). Clause x (*a*) provides that in a suit for specific performance of a contract of sale the Court-fee payable is "according to the amount of the consideration." Now the consideration stated in the document is "the sum total of the principal, interest, costs incurred and other miscellaneous expenses connected therewith." We called for a finding to ascertain how much these items totalled up to in cash and the finding is that it works out to Rs. 2,265. We accept that finding as one of fact; and it follows that if the suit is valued under clause x (*a*) alone it is within the Munsif's jurisdiction.

It seems to me that the suit clearly falls within the description of a suit for specific performance under clause x (*a*) and the addition of the prayer for possession makes no difference. The relief by way of giving possession arises from the relief granting the execution and delivery of the sale deed, as without a registered sale deed, title cannot be transferred under the Transfer of Property Act where the value is over Rs. 100; without the latter relief being granted, the former cannot: see *Muhi-ud-Din Ahmad Khan* v. *Majlis Rai* (1). Nevertheless both the rights, *viz.*, the right to the sale-deed and the right to possession spring out of the same contract though one necessarily precedes the other. The delivery of possession is a part of the specific performance of a contract of sale unless the terms thereof show that the vendee was not under an obligation to deliver possession. The claim for delivery of possession is as much a part of specific performance as the claim for the payment of the price is, when the seller brings the suit for specific performance. In fact this Court has held in *Bhashyakarlu Naidu* v. *Nungambakkam Andilammal* (2) that a suit for the purchase price by itself is a suit for specific performance. It is clear from Form No. 47, first Schedule, Appendix A of the Civil Procedure Code, that a prayer for possession is a proper prayer in a suit for specific performance without altering the

(1) 6 A. 231; A. W. N. (1884) 42; 3 Ind. Dec. (N. S.) 837.
(2) 49 Ind. Cas. 385; (1918) M. W. N. 896 at p. 897; 9 L. W. 19; 36 M. L. J. 89.

character of the suit. It seems to me that this suit cannot be properly described as a suit for possession of property and brought under clause v of the Court Fees Act simply because a prayer for possession is added, any more than, for example, a suit for redemption of a usufructuary mortgage, wherein also there will be a prayer for possession, can be so described and brought under that clause.

Now, as regards the authorities cited before us, the case in *Nihal Singh* v. *Sewa Ram* (3) is a direct ruling on the point and is in favour of the view I am taking. On the other hand a ruling of the Calcutta Court in *Malin Mohan Singh* v. *Gaja Prosad Singh* (4) has an observation in it that the suit such as the one before us is in substance a suit for possession and must be valued as such. That view has been followed by the Lahore High Court in *Gopal Das* v. *Parmanand* (5). But the question has not been fully discussed in these cases and with great respect to the learned Judges, I regret I am unable to follow their view for the reasons I have given above.

It was strenuously contended by the learned Vakil for the respondent that the view I am taking is opposed to the view taken in *Krishnammal* v. *Sundararaja Aiyar* (6) as to the nature of a suit for specific performance. That was a ruling under O. II, r. 2 of the Code of Civil Procedure and it was held there that the failure to ask for possession in the suit for specific performance did not bar a second suit for possession. This ruling is directly against the ruling in *Krishnaswami* v. *Sundarappayyar* (7), but the point was not referred to a Full Bench. I do not think we need, however, settle this conflict of opinion as the ruling relied on has no direct bearing on the present case which is one under the Court Fees Act. The point there was whether a plaintiff suing for obtaining a proper sale deed was entitled to make a claim for possession as a matter of right and the learned Judges held he was not, and that clause (2) of rule 2, therefore, did not apply to him. Though it was conceded that such a plaintiff may be permitted to add such a prayer it was held that it was not a claim that arose directly from the cause of action sued on and, therefore, the failure to make it did not entail the consequence stated in clause (2) of the rule. Whether this view be correct or not, the point in the suit before us is totally different. It is this that when the prayer for possession is allowed to be added does the suit cease to be one for specific performance and become a suit for possession or combination of both suits under the Court Fees Act, I do not think so.

I have already given my reasons for holding that it cannot be treated as a suit for possession under the Court Fees Act. It follows of course that it could not be a combination of two suits either or of "two or more distinct subjects" to attract the application of section 17 of the Court Fees Act. The word "subject" is of a somewhat uncertain connotation and it was held to be "not capable of any precise definition" in *Neelakandhan Nambudripad* v. *Ananthakrishna Ayyar* (8). The case cited in *Krishnaswami* v. *Sundarappayyar* (7) is no authority for saying that in a suit for specific performance and for possession Court-fee should be paid on the aggregate value of the two prayers. Though perhaps that case seems to have assumed such a proposition, there is no discussion about it and the observation itself is an *obiter dictum* as the deficient Court-fee had been paid. We cannot thus treat it as an authority on the point. No other case has been cited to support the same view.

I have come to the conclusion that the present suit is rightly valued under section 7 clause x (*a*) of the Court Fees Act and that it is within the jurisdiction of the Munsif. I, therefore, set aside the orders of both the lower

(3) 35 Ind. Cas. 275; 38 A 292; 14 A. L. J. 434.
(4) 11 Ind. Cas. 228; 14 C. L. J. 159.
(5) 60 Ind. Cas. 512.
(6) 22 Ind. Cas. 912; 38 M. 698; 15 M. L. T. 103; (1914) M. W. N. 200; 1 L. W 147.
(7) 18 M. 415; 5 M. L. J. 164; 6 Ind. Dec. (N. S.) 638.
(8) 30 M. 61; 16 M. L. J. 402; 1 M. & T. 426.

Courts and direct the District Munsif to take the plaint on his file and dispose of the suit according to law. Defendant will pay plaintiff's costs in this and in the lower Appellate Court. The costs in the First Court will abide and follow the result.

Venkatasubba Rao, J.—The point to be decided is whether the District Munsif's Court has jurisdiction to entertain the suit. The plaintiff prayed for a decree directing the defendant to execute a sale-deed in respect of the suit property and to deliver possession thereof. The defendant had agreed to execute a conveyance in favour of the plaintiff, and the suit was to enforce specific performance of this agreement. It has been found that the house is worth more than Rs. 3,000, but the consideration for the contract of sale amounts to Rs. 2,265. Is this a suit for specific performance falling under section 7, clause (x) of the Court-Fees Act, or is it a suit for possession to which section 7, clause (v) of the same Act applies? In the former case, the Court-fee payable has to be computed *ad valorem* on the amount of the consideration (in this instance Rs. 2,265), and under section 8 of the Suits Valuation Act (VII of 1887), the same amount will determine also the Court which has jurisdiction to try the suit. On the other hand, if the suit is one for possession, the Court fee has to be computed under section 7 v (*e*) with reference to the market value of the house (more than Rs. 3,000), and under section 14 of the Madras Civil Courts Act III of 1873, the *forum* will have to be determined with reference to that value. In short, if the suit is held to be a suit for specific performance of a contract of sale, the District Munsif's Court will have jurisdiction; if the suit is held to be a suit for possession, that Court will have no jurisdiction.

I am quite clear that the suit falls within section 7 (x) (*a*) of the Court Fees Act. The words used are "specific performance of a contract of sale." Specific performance does not exist merely of the execution of a sale-deed. A suit to obtain a sale-deed is not what is referred to in the said section, but it is a suit for specific performance of a contract of sale. The execution of a conveyance is only a part of the specific performance. If the vendor agrees to execute a conveyance as well as to deliver possession, it cannot be said that specific performance of the contract does not comprise both the execution of the sale-deed and delivery of possession. In every contract of sale, unless the contrary appears, the vendor must be deemed to impliedly agree to give possession of the property to the purchaser. In a suit for specific performance the purchaser seeks to enforce the terms of his contract. The seller as much agrees to put the purchaser in possession as he agrees to execute a conveyance in his favour.

Then it is argued that, as the plaintiff also claims possession in the suit, the suit must be regarded as one for possession. But the specific provision relating to suits for specific performance excludes the applicability of the general provision relating to suits for possession. If the claim to possession is involved in the claim to specific performance, the suit will still remain one for specific performance and it must be dealt with only on that footing. A suit for redemption is, in effect, a suit for possession of the property but can it be contended that the provision applicable to such a suit is not the one dealing with suits for redemption, section 7, clause (IX), but the one dealing with suits for possession section 7, clause (v), I shall not use the words principal and ancillary. It is not strictly correct to say that, in a suit for specific performance of a contract, the execution of a conveyance is the principal relief and possession is secondary and ancillary. It is, indeed, difficult to say in the abstract that a certain relief is the primary relief claimed I would prefer to rest my judgment on the ground that a suit for specific performance is, in its essence, different from a suit for possession, and the mere fact that possession is also claimed does not render the suit any the less a suit for specific performance.

I may observe that the agreement on which the suit is based, far from indicating an intention not to give possession, contains evidence of the fact that the parties intended that possession should be given.

The view taken in *Nihal Singh* v. *Sewa Ram*(3), a decision of a Single Judge, supports my conclusion. In *Madan Mohan Singh* v. *Gija Prosad Singh* (4) the Calcutta High Court took a different view; but there is no discussion of the principle, and we find merely a statement to the effect that a suit for specific performance is, in substance, a suit for possession. *Gopal Das* v. *Parmanand* (5) is a decision of a Single Judge of the High Court of Lahore and it affords very little assistance, because in the judgment it is assumed that a sale had already taken place and, therefore, the suit could not possibly be regarded as one for specific performance of a contract to sell, though I must say, with all respect, that it is far from clear how there could be a completed oral sale, the consideration being stated to be Rs. 4,250. *Nathe Khan* v. *Muhammad Khan* (9) is a case from the Punjab, and the learned Judge who decided it followed *Madan Mohan Singh* v. *Gija Prosad Singh* (4) on the ground that he could not find any authority to the contrary although his own inclination was the other way.

I hold that the suit is a suit for specific performance of a contract to sell.

Mr. Alladi Krishnaswami Ayyar, the learned Vakil for the defendant, very strongly relied upon *Krishnammal* v. *Sundararaja Ayyar* (6). It was held in it that a plaintiff, who had obtained in a previous suit a decree directing the defendant to execute a sale-deed was not barred after obtaining the conveyance from instituting a fresh suit for the recovery of possession of the property covered by the conveyance. Order II, r. 2 of the Civil Procedure Code, omitting portions not relevant, runs thus: "Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the same cause of action; and when a plaintiff omits to sue in respect of any portion of his claim, he shall not afterwards sue in respect of the portion so omitted." The argument advanced is this: if a second suit for possession is not barred, it follow that the right to possession does not arise out of the same cause of action; and if the right to possession does not arise out of the same cause of action, it is wrong to say that out of the same contract spring both the rights—the right to a sale-deed as well as the right to possession. But this argument ignores the fundamental difference to which reference is made in the judgment of Tyabji, J., in *Krishnammal* v. *Sundararaja Aiyar* (6), between a right to possession arising out of the contract to sell and the right to possession based upon the conveyance, a distinction also pointed out in the judgment of Sargent, C. J., in *Nathu* v. *Budhu* (10). If a plaintiff claims in the first suit only a conveyance and omits to ask for possession, a second suit for possession based upon the agreement may fail; but if the claim to possession in the second suit is based upon the conveyance obtained in pursuance of the decree in the first suit, the cause of action in the second suit is entirely different, and the first suit cannot operate as a bar. This is the effect of *Krishnammal* v. *Sundararaja Aiyar* (6) *Nathu* v. *Budhu* (10). It has been held that in the same suit there may be prayers both for execution of a conveyance and for possession. It has also been held that a second suit for possession is not barred by the previous suit in which a mere conveyance was claimed. I do not think that there is any inconsistency in the two sets of decisions. The right to possession claimed in the second suit must be deemed to be the right based upon the conveyance and not arising out of the contract to sell. This is, in my view, the true principle and, judged in the light of it, the decisions are easily re-conciliable, and the view I am taking is not opposed to the principle underlying these various decisions.

In the result I agree with the order proposed by my learned brother.

V. N. V. *Order set aside;*
Z. K. *Case remanded.*

(9) 46 Ind. Cas. 534; 128 P. W. R. 1918.

(10) 18 B. 537; 9 Ind. Dec. (N. S.) 867.

ARUNACHELA GOUNDAN *v.* SWAMINATHA AIYAR.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 1 OF 1923.

August 22, 1923.

Present:—Mr. Justice Spencer and Mr. Justice Devadoss.

ARUNACHELA GOUNDAN—PETITIONER—DEFENDANT—APPELLANT

versus

SWAMINATHA AIYAR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47—Execution by legal representative of decree-holder—Plea of estoppel personal against legal representative.

Section 47 of the Civil Procedure Code is wide enough to permit any valid objection to be taken by the judgment-debtor to the execution of a decree by the decree-holder or his legal representative.

On an application by the legal representative of a deceased decree-holder, to execute a decree obtained by the deceased, it is open to the judgment-debtor to raise any defence such as that of estoppel which is personal to the legal representative, since the latter combines in his person as such not only those rights to which he has succeeded on account of the death but also those objections to which he has rendered himself liable in consequence of his separate agreement if any with the judgment-debtor.

Chidambaram Chettiar v *Krishna Vathiyar*, 37 Ind. Cas. 836; 40 M. 233; 21 M. L. T. 24; 5 L. W. 132; (1917) M. W. N. 74; 32 M. L. J. 13, applied.

Appeal against an order of the District Court, Coimbatore, in A. S. No. 232 of 1922, preferred against an order of the Court of District Munsif, Dharmapuram, in C. M. P. No. 99 of 1922, (E. P. R. No. 688 of 1921 in O. S. No. 697 of 1917) on the file of the Court of the District Munsif, Udamalpet.

FACTS.—In a suit on a mortgage, the judgment-debtor pleaded payments to the plaintiff's son alleged to have been made on the latter's representation that the mortgage amount was really his though the mortgage was in the name of his mother. The Court overruled the contention holding that such payments even if true would not be a proper discharge of the mortgage and accordingly gave a decree to the plaintiff. Subsequently the mother died and the son applied to execute the decree. The judgment-debtor thereupon pleaded that the son who was executing the decree was estopped by his prior representations and by receipt of payments from executing the decree.

Messrs. *T. S. Ramaswami Aiyar* and *V. Sundaram Aiyar*, for the Appellant.

Mr. *K. P. Mahadeva Aiyar*, for the Respondent.

JUDGMENT.—The finding of the lower Appellate Court that Swaminatha Aiyar is the legal representative of his mother Seethalakshmi, the deceased decree-holder, is not and cannot now be challenged.

The District Judge's refusal to allow the appellant to set up in these execution proceedings, any agreement prior to decree, and his direction to the appellant to seek his remedy in a separate suit cannot however be supported. Section 47 of the Civil Procedure Code is wide enough to permit any valid ebjection to be taken by a judgment-debtor to the execution of a decree by the decree-holder or the decree-holder's legal representative. It was held in *Chidambaram Chettiar* v. *Krishna Vathiyar* (1), by a Full Bench of this Court, that even an agreement made prior to the decree as to the manner in which the decree should be executed after it was passed could be pleaded as a bar to the enforcement of the decree as it stood. Here the judgment-debtor can raise, in bar of Swaminatha Aiyar's application to execute the decree obtained by his mother, any defence such as that of estoppel which is personal to Swaminatha Aiyar, because the latter now combines in his person not only those rights to which he has succeeeded in consequence of his mother's death, but also those obligations to which he has rendered himself liable in consequence of his separate agreement with the judgment-debtor. The appeal is allowed on this point and the District Munsif is directed to hear and determine the execution petition after allowing the judgment dedtor to put forward any valid defence that he may see fit to raise in the execution proceedings. The civil miscellaneous second appeal is allowed with costs in this Court.

V. N. V. *Appeal allowed.*

(1) 37 Ind. Cas. 836; 40 M. 233; 21 M. L. T. 24; 5 L. W. 132; (1917) M. W. N. 44; 32 M. L. J. 13.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT
NO. 1379 OF 1923.
September 5, 1923.
Present:—Mr. Justice Mulla.

SAREMAL PUNAMCHAND—PLAINTIFF
versus
KAPURCHAND PUNAMCHAND AND OTHERS—DEFENDANTS.

Contract Act (IX of 1872), s. 151—Partnership—Partner, money borrowed by—Firm, whether liable—Trading firm, what is—Buying and selling of goods.

Any partner in a trading firm has an implied authority to borrow money for the purposes of the business on the credit of the firm, and no duty is cast on the person advancing the money to make any enquiries, and the other partners are liable though the borrowing partner may misappropriate the money. [p. 550, col. 2.]

A firm would be a trading firm within the meaning of the above rule if its business consists in buying and selling. A partnership for the purpose of buying and selling copper and brass utensils is of a commercial nature, and every partner in such a firm has implied authority to borrow money on behalf of the firm for the business of the firm. [p. 550, col. 2.]

In the case of a partnership, however, where the business of the firm does not include the buying and selling of goods, no partner can borrow money or pledge the partnership property so as to bind his co-partners. [p. 550, cols. 1 & 2.]

Case-law discussed.

Mr. *Munshi*, for the Plaintiff.
Mr. *Dapthary*, for Defendant No. 2.

JUDGMENT.—This is a suit to recover Rs. 6,000 lent and advanced by the plaintiff to the defendants.

The plaint states that on May 23, 1920 the plaintiff advanced to the defendants, who then carried on business in partnership, Rs. 6,000 at interest at the rate of six per cent. per annum, but that the loan has not been re-paid. The first defendant appeared in person and denied the loan. The second defendant filed his written statement. He admits the partnership, but denies all knowledge of the loan, and contends that if it be proved that the loan was made, he is not liable for it as no loan was necessary or usual in the business of the kind carried on by the firm.

At the trial of the suit the following issues were raised :—

(1) Whether the plaintiff advanced Rs. 6,000 to the firm of Kapurchand Sheshmal on May 23, 1920, as alleged in paragraph 3 of the plaint?

(2) Whether the second defendant is liable for the loan or any part thereof?

The plaintiff carries on business at Belgaum as shroff and commission agent. Vajingji Onkarmal are his Bombay agents and he has an account with them. Whenever the plaintiff comes down to Bombay he lives in rooms attached to the firm of Vanjingji Onkarmal. One Ganeshmal was the *munim* of that firm in 1920.

The defendants at all times material to this suit carried on business in partnership in Bombay in the name of Kapurchand Sheshmal. The partnership was formed on March 11, 1920, and it was dissolved on May 28, 1920. The business of the partnership consisted in buying brass and copper utensils and selling them. The capital brought in by the second defendant was Rs. 671. Some capital was also brought in subsequently by the first defendant. It transpired at the hearing that there were two other partners. The share of each of the two defendants was six annas in the rupee, the share of the other two being two annas each.

The first and second defendants are first cousins. The said Ganeshmal is the paternal uncle of the second defendant's wife. The second defendant used to go to the firm of Vajingji Onkarmal to see Ganeshmal. The plaintiff knew both the defendants before the date of the loan. On April 27, 1920, the defendants borrowed Rs. 3,000 from Ganeshmal at interest at the rate of six per cent. per annum. This sum was borrowed by the firm admittedly for the partnership business. The loan was re-paid on May 26, 1920.

The plaintiff's case, as disclosed in his evidence, is that in May 1920, he had come down to Bombay and that he had taken quarters with Vajingji Onkarmal. On May 22 the first defendant saw the plaintiff at the *pedhi* of Vajingji Onkarmal, and told him that he had borrowed Rs. 3,000 from Ganeshmal, and asked for a loan of Rs. 6,000, saying that he would re-pay the loan within two or three months. The plaintiff asked the first defendant why he wanted the loan. The first defendant said that the loan was required for the business of his firm. The plaintiff admitted that he did not know what the business of the defendants was. The plaintiff asked the

first defendant to see him the next day when, he said, he would give the loan. The next day the first defendant went to the *pedhi* of Vajingji Onkarmal. The plaintiff asked Kundunmal, Onkarmal's son, for Rs. 6,000. Kundunmal directed his *munim*, Dipchand, to give Rs. 6,000 to the plaintiff. Dipchand paid Rs. 6,000 to the plaintiff and the plaintiff was debited with Rs. 6,009-6-0 in Vajingji's cash-book, Rs. 9-6-0 being the commission charged by Vajingji on the loan. Three *chithis* (Exhibit A) were then written out by Ganeshmal each for Rs. 2,000, and they were signed by the first defendant in the name of Kapurchand Sheshmal. The plaintiff then paid the Rs. 6,000 to the first defendant.

The plaintiff's evidence was corroborated by Kundunmal. Entries were produced both by the plaintiff and by Kundunmal from their respective books of account. Ganeshmal was at Marwar when the suit was heard and he was not called as a witness.

The first defendant said in his evidence that he never asked for a loan from the plaintiff and that the first time he saw the plaintiff was in the Court house after the summons was served on him. He said that he knew the firm of Vajingji Onkarmal for three years, that he knew Ganeshmal who, he said, was a partner in that firm, and that he had, on April 27 1920, borrowed Rs. 3,000 from Ganeshmal for the business of the firm. He further said that on or about May 23, 1920, he went to Ganeshmal and asked for a further loan of Rs. 6,000. Ganeshmal said that he would pay Rs. 5,000 only and that the defendant would have to pass *chithis* for Rs. 6,000. The first defendant agreed and Ganeshmal wrote out three *chithis* each for Rs. 2,000, being the *chithis* sued upon, and he signed them. Ganeshmal then said that he would not pay any money unless the second defendant also signed the *chithis*. The first defendant then saw the second defendant and told him what had happened. The second defendant told the first defendant that the first defendant was a *devalio* (spendthrift), for he had agreed to pass *chithis* for Rs. 6,000 for a loan of Rs. 5,000, and said that he did not want to continue in partnership with him. The first defendant also said in his evidence that the second defendant having refused to sign, saw Ganeshmal. Ganeshmal then took out from a box some pieces of paper saying that they were the *chithis* and tore them up. I think that the first defendant's denial of the loan is false and he told a deliberate untruth to save the second defendant from liability. I accept the evidence of the plaintiff and of Kundunmal and hold that the plaintiff lent to the firm of Kapurchand Sheshmal on May 23, 1920, Rs. 6,000 at interest at the rate of six per cent. per annum,

The firm, as stated above, was dissolved on May 28, 1920. Different versions are given by the first and second defendants as to the circumstances in which the firm was dissolved. The first defendant's version has been set out above. The second defendant denied in his evidence that the first defendant ever told him that he had arranged for a loan of Rs. 5,000 by passing *chithis* for Rs. 6,000 or that he ever called the first defendant a *devalio*. The second defendant says that the reason why he did not want to continue as a partner was that the first defendant lived at Dabisar and that he did not attend regularly to the business of the firm. I accept the second defendant's version.

The next question is, whether the second defendant is liable for the loan. The plaintiff admitted in his cross-examination that the second defendant had no conversation with him about the loan, but he added that two or three days after the loan was made, the second defendant saw him near the Pydhowni temple and told him that he had paid Rs. 3,000 to Ganeshmal out of the money borrowed by the firm from the plaintiff. The second defendant denied that he ever had any such conversation with him. I do not accept the plaintiff's evidence on this point. I think that the plaintiff's object in saying what he did was to fix the second defendant with knowledge of the loan.

Such being the facts of the case the question arises whether the second defendant is liable for the loan. It was contended on his behalf that no loan wa,

necessary or usual in the kind of business done by the partnership and that no liability, therefore, attached to him in respect of the loan, and reliance was placed on section 251 of the Indian Contract Act, 1872. The section is as follows:—

"Each partner who does any act necessary for, or usually done in, carrying on the business of such a partnership as that of which he is a member binds his co-partners to the same extent as if he were their agent duly appointed for that purpose"

The question, therefore, is whether the act of the first defendant in borrowing the money from the palaintiff for the partnership business was an act necessary for, or usually done in, carrying on business of such partnership as that of which the first defendant was a member. The leading English case on the subject is *Bank of Australasia* v. *Breillat* (1). In that case the Judicial Committee of the Privy Council observed as follows:—

"Every partner is, in comtemplation of law, the general and accredited agent of the partnership; or as it is sometimes expressed, each partner is *praepositus negotus societatis*; and may, consequently, bind all the other partners by his acts, in all matters which are within the scope and objects of the partnership. Hence, if the partnership be of a general commercial nature, he may pledge or sell the partnership property; he may buy goods on account of the partnership; he may borrow money, contract debts, and pay debts on account of the partnership, he may draw, make, sign, indorse, accept; transfer, negotiate, and procure to be discounted, promissory notes, bills of exchange, checks, and other negotiable paper, in the name and on account of the partnership."

The above case is an authority for the proposition that any partner in a trading firm has an implied authority to borrow money for the purposes of the business on the credit of the firm. But the firm must be a trading firm, a firm would be a trading firm if its business consists in buying and selling: *Higgins* v. *Beauchamp* (2). Where, however, the business is not of a commercial nature, *e.g.*, where it is a professional business *Hedley* v. *Bainbridge* (3), or even the business of a farmer [*Greenslade* v. *Dower* (4), or a quarry worker *Thicknesse* v. *Bromilow* (5)], where there is no buying and selling of goods, or an auctioneer [*Wheatley* v. *Smithers* (6), no partner can borrow or pledge the partnership property so as to bind his co-partners. In the auctioneer's case referred to above, the question was whether an auctioneer was a trader, and the Court held that he was not Ridley, J., saying that buying and selling were essential features of trading and that an auctioneer does not buy and only sells the goods of others. Upon appeal that decision was reversed upon the ground that the partnership had a shop, that the business was something further than that of an auctioneer and that it "contemplated the sale and the purchase of goods and porperty as part of the business of the partnership."

Where a firm is a trading firm, so that one partner can borrow money for the purpose of the business on the credit of the firm, no duty is cast on the person advancing the money to make any further inquiries: per Blackburn, J., in *Okell* v. *Eaton* (7). and the other partners are liable though the borrowing partner may misappropriate the money, see ill. (*b*) to section 251.

The partnership business in the present case consisted in buying copper and brass utensils and selling them. It was a partnership of a commercial nature, and the first defendant had, therefore, an implied authority to borrow money for the firm. I, therefor, hold that the second defendant is liable for the loan.

The conclusion to which I have come is confirmed by further facts proved in

(1) (1847) 6 Moo. P. C. 152 at p. 193; 12 Jur. 1891 13 E. R, 642; 79 R. R. 24.

(2) (1914) 3 K. B. 1192 at p. 1194; 30 T. L. R. 687.

(3) (1842) 3 Q. B. 316; 2 G. & D. 483; 11 L. J. Q. B. 293; 6 Jur. 853; 114 E. R. 527; 61 R. R. 239.

(4) (1828) 1 Man. & Ry. 640; 7 B. & C. 635; 6 L. J. (O. S.) K. B. 155; 31 R. R. 272.

(5) (1832) 2 Cr. & J. 425; 1 L. J. Ex. 1 8; 1 Dowl. P. C. 570; 2 Tyr. 495; 149 E. R. 180; 37 R. R. 752.

(6) (1907) 2 K. B. 684; 76 L. J. K. B. 900; 97 L. T. 418; 23 T. L. R. 585.

(7) (1878) 31 L. T. 330 at p. 331.

the case. The loan from the plaintiff was not the first loan obtained by the firm. Before that loan was obtained the firm had, on April 27 1920, borrowed Rs. 3,000 from Ganeshmal admittedly for the partnership business. Moreover, the second defendant admitted that if it became necessary, any one partner could borrow money for the firm. In this connection it may be observed that about the time the loan was obtained from the plaintiff, the firm had utensils of a value of between Rs. 700 and Rs. 1,000 only, the cash in hand was about Rs. 115, and the outstandings due to the firm were between Rs. 200 and Rs. 400. If the business had to be continued—and it was a business in which there were four partners—it was necessary, I think, to buy further stock in trade. I have no doubt in my mind that the object of the loan taken from the plaintiff was for the purposes of the partnership business as stated by the first defendant.

There is one more point to which I may here refer. It relates to the application of the money borrowed from the plaintiff. It is admitted that the loan made by Ganeshmal was re-paid on May 26 1920. The second defendant said that the first defendant paid it, but he did not know from what source. The first defendant admitted that he re-paid the loan. The question is, whence came the money to re-pay the loan. The first defendant's evidence on this point was full of contradictions. He first said he got the money from a Marwari named Foja. He then said that he got it from a box in his shop at Dahsar. When he was asked how the monies came in his box, he said that he had sold gold ornaments about two or two and a half months prior to May 26, 1920, and that the sale proceeds were kept by him in the box. He was unable to give the name of the person to whom he sold the ornaments nor could he, he said, point out the shop where he sold the ornaments. I decline to believe the first defendant when he says that he re-paid Ganeshmal out of money realised from the sale of ornaments. The story about the sale of ornaments seems to me to be a pure invention. I am inclined to think that Ganeshmal was paid out of the Rs, 6,000 borrowed form the plaintiff.

I, therefore, pass judgment for the plaintiff against both defendants for Rs. 6,000 with interest thereon at the rate of six per cent, per annum from May 23, 1920, costs and interest on judgment at six per cent.

The findings on the issues will be: No. (1)—In the affirmative, No. (2)—In the affirmative.

Z. K.

Suit decreed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1737 OF 1920.

June 15, 1923.

Present:—Mr. Justice Newbould and Mr. Justice Rankin.

MONMATHA KUMAR RAY—PLAINTIFF—APPELLANT

versus

JOSADA LAL PODDER AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Non-transferable occupancy holding transferred by raiyat—Kabuliyat *executed in favour of transferee*—Raiyat *in occupation—Landlords' right to re-enter—Abandonment or repudiation of landlords' title—Omissin to pay rent, whether denial of title*—Ex parte *decree, when to be passed.*

A mere transfer of a holding by a *raiyat* of a non-transferable occupancy holding, apart from any other consideration does not give the landlord a right to re-enter if the tenant, transferor, actually remains in occupation of the land. Therefore, if the *raiyat* executes a *kabuliyat* in favour of the transferee and does not repudiate the relationship of landlord and tenant between himself and the original landlord, and nor does he express his unwillingness to pay rent to the original landlord, the latter is not entitled to recover *khas* possession of the land. [p. 552, cols. 1 & 2.]

Rajani Kanta Biswas v. *Ekkowri Das*, 34 C. 689; 11 C.W.N. 811; 7 C. L. J. 78 and *Sepayan* v. *Ramdeb Rai*, 55 Ind. Cas. 360; 24 C. W. N. 117, referred to.

A mere omission to pay rent is not a denial of landlord's title. [p. 552, col. 2.]

MONMATHA KUMAR RAY v. JOSADA LAL PODDER.

Even if a case is heard *ex parte*, it is the duty of the Court to consider the interest of the absent party and not to pass a decree except on proof by the plaintiff that he is entitled to that decree. [p. 552, col. 2.]

Appeal against a decree of the Additional Subordinate Judge, Dacca, dated the 19th March 1920, modifying that of the Munsif, Second Court of that District, dated the 5th July 1919.

Babus *Surendra Nath Guha* and *Surja Kumar Guha*, for the Appellant.

Babus *Jogesh Chandra Roy*, *Satis Chandra Chowdhury* and *Gopal Chandra Das*, for the Respondents.

Babu *Biraj Mohon Mazumdar*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit in ejectment. The defendants Nos. 2 and 3 were the owners of a non-transferable occupancy holding under the plaintiff. They mortgaged their interest to defendant No. 1 who subsequently purchased that interest in execution of his mortgage decree. After that the defendants Nos. 2 and 3 executed a *kabuliyat* in favour of defendant No. 1 and remained in possession of the land. The Munsif gave the plaintiff a decree on contest against the defendant No. 1 and *ex parte* against the defendants Nos. 2 and 3 who did not appear in the suit. The plaintiff's title was declared and it was directed that he should recover *khas* possession of the same as against the defendants. On appeal the findings of fact of the First Court were upheld but the decree was varied to the extent that the prayer for *khas* possession as against defendants Nos. 2 and 3 was rejected; but it was declared that the defendant No. 1 had no title to the disputed land as against the plaintiff. Against this decree the plaintiff has preferred this second appeal.

There is a considerable amount of law dealing with the question of the right of the landlord to re-enter the land of a non-transferable occupancy holding after its transfer by the tenants, but in no case has it been held that the mere transfer apart from any other consideration gives the landlord a right to re-enter when the tenant, transferor, actually remains in occupation of the land. The latest case cited on behalf of the appellants and that which is most favourable to his contentions is that of *Rajani Kanta Biswas* v. *Ekkowri Das* (1). But in that case it was found that the tenant had not only transferred his holding but had also repudiated the existence of the relationship of landlord and tenant between himself and the original landlord. Here there is no such finding and what is more there is no such allegation in the plaint. In the plaint, as against the original tenants, the plaintiff's case rests solely on the allegation of transfer and the execution of *kabuliyat* in favour of the transferee. It is now suggested that we ought on a consideration of the facts to hold that there has been an abandonment because it has been found by the Munsif that the defendants Nos. 2 and 3 have not expressed their willingness to pay rent to the superior landlord. But a mere omission to pay rent is not a denial of the landlord's title, and there is neither the allegation nor a finding that these tenants ever refused to pay rent to the plaintiff. The latest authority on the point is the case of *Soparjan* v. *Ramdeb Rai* (2) and that supports the view we take that on the facts alleged in the present case the landlord is not entitled to recover possession. It is argued that as defendants Nos. 2 and 3 did not appear before the lower Appellate Court the decree should not have been modified in their favour. Even if a case is heard *ex parte* it is the duty of the Court to consider the interest of the absent party and not to pass a decree except on proof by the plaintiff that he is entitled to that decree. Here the plaintiff possibly by oversight omitted not only to prove that but even to allege the facts necessary to support the decree which he obtained in the Court of the Munsif. We, therefore, affirm the decree of the lower Appellate Court and dismiss this appeal with costs, one-half to defendant No. 1 and one-half to defendants Nos. 2 and 3.

Appeal dismissed.

S. D.

(1) 34 C. 680; 11 C. W. N. 811; 7 C. L. J. 78.
(2) 55 Ind. Cas. 360; 24 C. W. N. 117.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 101 OF 1923.
September 6, 1923.
Present:—Mr. Wazir Hasan, A. J. C.

BADRI PRASAD—DEFENDANT—APPLICANT
versus
MURLI DHAR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115, O. VI, r. 17—Provincial Small Cause Courts Act (IX of 1887), s. 25—Amendment of pleadings, refusal to allow—Revision.

An application for leave to amend a pleading is not a case, and no revision would, therefore, lie either under section 115 of the Civil Procedure Code or under section 25 of the Provincial Small Cause Courts Act, against an order refusing leave to amend.

Civil revision against an order of the Additional Judge, Small Cause Court, Lucknow, dated the 17th May 1923.

Mr. *Mohammad Ayub*, for the Applicant.

Mr. *Ram Bharosay Lal*, for the Opposite Party.

JUDGMENT.—This is an application under section 25 of the Provincial Small Cause Courts Act. The applicant is the defendant in a suit for the recovery of rent of a certain shop. That suit is still pending in the Court of the Additional Judge of the Court of Small Causes, Lucknow. The defendant applied for leave to amend his pleadings. The lower Court by its order dated the 17th May 1923 refused to grant the leave asked for. The application before me is for the purpose of getting the order of refusal revised.

The application for leave to amend is not, in my opinion, a case, and, therefore, no revision would lie against an order refusing to grant leave to amend either under section 25 of the Provincial Small Cause Courts Act or under section 115 of the Code of Civil Procedure. The application is dismissed with costs.

Application dismissed.

Z. K.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 2743 OF 1915.
October 25, 1920.
Present:—Mr. Justice Chevis and Mr. Justice Scott-Smith.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—APPELLANT
versus
GHULAM RASUL KHAN—PLAINTIFF—RESPONDENT.

Custom — Rajputs — Proof — Intermarriage—Tailoring profession.

Where a person claims to be a *Mohal Rajput*, the mere fact that the various members of his family have worked at tailoring cannot itself be regarded as any proof that he is not a *Rajput*, for men of all castes follow the trade. But where the origin of the family is unknown and they are described in the revenue records as *khayyat* (tailors) *Mohal* and there is no proof that whoever first caused the entry to be made had any real title to the use of the term *Mohal*, nor is it proved that the family have been intermarrying with *Rajput* families, it is insufficient to establish that the family are *Mohal Rajputs*. [p. 555, col. 2.]

Where a family has been intermarrying with *Rajput* families, it is very strong evidence of its *Rajput* origin. What would satisfy the *Rajputs* of the countryside would be enough to satisfy the Courts. [p. 556, col. 1.]

First appeal from a decree of the Senior Subordinate Judge, First Class, Ludhiana, dated the 24th June 1915.

Mr. *Herbert*, Government Advocate, for the Appellant.

The Hon'ble Pandit *Sheo Narain*, R. B., and Bakhshi *Tek Chand*, for the Respondent.

JUDGMENT.—The plaintiff in this case, Ghulam Rasul, has been given a decree declaring that he is a Rajput by caste, and that he ought to be recorded in the revenue papers as a Muhammadan *Rajput*, The Secretary of State who is the defendant in this case appeals to this Court. The question for decision is whether the plaintiff has succeeded in proving that he is a Rajput. In the Revenue Records the plaintiff's family has been shown since 1852 as holding land, their caste being described as *Khayyat Mohal*. The case for the plaintiff is that *Khayyat* does not denote a tribe, but merely a profession, *viz.*, tailoring, that his *got* is *Mohal* and that his real tribe is *Rajput* and on his behalf it is urged that there is no other tribe except that of *Rajputs*

which contains a *got* of the name of *Mohal*. The plaintiff resides in the Ludhiana District, and owns land in three villages. The Revenue Records of *Mouza* Shahna give his pedigree back as far as his great-great-grandfather Nathu. The further pedigree propounded by the plaintiff is to be found in Exhibit A, which shows Nathu as one of the four sons of Khana. Beyond Khana the pedigree is traced backwards by the *Mirasi* who has been produced as a witness for the plaintiff in this case for another 13 generations when we come to a man named *Mohal*. Witnesses in support of the pedigree propounded have been called from two villages in the Fazilka Tahsil, *viz.*, Mohlanwala Khera and Ina Khera. The Revenue Records of these two villages give pedigrees of the witnesses back as far as Khana. Now it may be admitted for the sake of argument that these witnesses are *Mohal Rajputs*, and that they are descended from Khana who was himself descended in the 13th generation from *Mohal*, and it is also clear that the plaintiff is shown by the Revenue Records of Shahna village to be a descendant from Nathu, but the real question is whether there is any sufficient proof that Nathu is descended from Khana. Nathu is alleged to be one of the four sons of Khana, and if this is correct, the plaintiff has evidently as much claim as the witnesses who appeared on his behalf to be a member of the *Rajput* tribe. The evidence shows that up till a short time before the suit was brought the plaintiff was not sure whether he was a Jat or a Rajput, though he claimed to be one or the other and in 1902 when he applied for admission to an intermediate examination of law he described himself as a Muhammadan Rajput, though in a letter to the Deputy Commissioner dated the 16th May 1912 the plaintiff, while asserting that he is a *Mohal* does not seem to be sure whether he is a Rajput or a Jat (see page 229 of the paper-book) and merely urged that if he was not a Rajput, at least he was a Jat. From the evidence given by the plaintiff in this case it is clear that shortly before the institution of this case the plaintiff came across certain villages in the Ferozepore District where *Mohal Rajputs* reside and then a pedigree Exhibit P. A. was drawn up by Yakub (P. W. No. 3) with the help of Nura Mirasi (P. W. No. 4) and others. As already explained the only doubtful point in connection with the pedigree table is whether Nathu, plaintiff's great-great-grand-father, is one of the sons of Khana. If this link be accepted as correct, plaintiff's case is proved, otherwise there appears to be nothing to be said in support of the plaintiff's claim except that his family has always been shown in the Ludhiana Revenue Records as Mohal. Nura Mirasi is a witness on whom the learned Subordinate Judge has placed great reliance saying that he is astonished at his wonderful memory. Now, Nura as Mirasi of the witnesses—who have supported the plaintiff in this case, presumably knows their pedigree table very well. The pedigree table from Nathu downwards the plaintiff himself could, of course, easily supply. When questioned by the Subordinate Judge as to the plaintiff's pedigree the Mirasi could go down no further than the two sons of Nathu. So that all that the Mirasi had to learn by heart in order to give the evidence which he has actually given in Court was three fresh names, *viz.*, the name of Nathu whom he alleges to be one of the sons of Khana, and Nathu's two sons, Shadi and Pir Bakhsh. If the *Mirasi* really knew these names before, his evidence may be true, but if he had no knowledge at all of Nathu or any of the descendants of Nathu, then as already stated he had only to learn three fresh names in order to give the evidence which he has given in Court. We fail, therefore, to see where the proof of marvellous memory comes in.

The learned Sub-Judge seems also to have been greatly impressed by that portion of the evidence of this witness which deals with the verse recited by his grandfather showing the migration of Mohals from Bhatner to the Southern Punjab. But granting that there was a migration of *Rajput Mohals* from Bhatner to the Southern Punjab, it by no means necessarily follows that plaintiff is a descendant of these migrants. As to the witnesses, P. W. Nos. 5 to 17 who come from Mohlanwala Khera and Ina Khera and claim plaintiff as a newly found cousin

and assert unanimously that Khana had four sons, one of whom was Nathu, we have no hesitation in refusing to rely on such evidence. Take for instance the evidence of Qutba (P. W. No. 12) although this man like all others clearly asserts that Khana, his great-great-grandfather, had four sons, of whom was Nathu, and that Nathu's descendants are living at Shahna, in cross-examination he was forced to admit that he does not re-collect the names of his grandfather's three brothers. Now if he cannot remember the names of his grandfather's brothers, it stands to reason that he cannot recollect the name of his great-great-grandfather's brother. We are told that the distance between Shahna and the two villages from which these witnesses come is somewhat over 30 miles. It seems rather improbable that if this family which settled in Shahna four generations back had cousins residing only a distance of about 30 miles away, there should have been no connection kept up between branches, no exchange of visits at times of marriages, deaths, etc., and that plaintiff should have had no knowledge of these relations until a short time before suit. All the witnesses say that their acquaintance with the plaintiff is quite recent. We are, therefore, utterly unable to rely on the oral evidence which has been produced in support of the pedigree table propounded by the plaintiff.

Setting aside this pedigree tree the plaintiff's case seems to rest solely on the fact that his family has been described as *Khayyat* Mohal in the Revenue Records. On behalf of the plaintiff it is argued that *Khayyat* is a profession and not a caste and that other people have similarly been described in the Revenue Records by the name of their profession and not of their tribe. It is also urged that no tribes except *Rajputs* have any *got* by the name of *Mohal*. There seems little doubt that *Mohal* is the name of a sub-division of the tribes of Rajputs, and so far as the evidence in this case shows there is no other tribe in the Punjab which has a *got* of the name of *Mohal*. But the fact remains that the origin of the plaintiff's family is quite untraced, and there is no proof that Nathu, or whoever it was, who first got the name of the family entered in the Revenue Records as *Mohal*, had any real claim to be so described. On page 148 of Rattigan's Digest of Customary Law, 8th Edition; will be found certain remarks as to different tribes having the same *got* or name but Rai Sahib Sheo Narain argues that *got* and *gotra* are not the same thing.

It is also argued on behalf of the plaintiff-respondent that a single family cannot possibly constitute a *got* of any tribe. The simple fact, however, is that we have this one family descended from Nathu residing in the Ludhiana District, but the origin of the family is unknown and that the only description of them in the Revenue Records is that of *Khayyat Mohal*, and, as already stated there is no proof that whoever first caused this entry to be made had any real title to the use of the term *Mohal*. The mere fact that various members of the family have worked at tailoring cannot itself be regarded as any proof that the plaintiff is not a *Rajput*, for as is stated in Ibbetson's Census Report, page 333, which has been quoted by the learned Subordinate Judge, men of all castes follow the trade. The history of the Shahna village drawn up at the Revised Settlement of 1852 (see page 24 of the paper-book) certainly shows that one Sardar Bakhta got the village re-founded by sending for people from Nabha and Patiala and elsewhere. It throws no further light on the case as no mention of any *Mohal* is there made. The Mirasi Nura deposes that Nathu migrated from Rania to Shahna, and the learned Subordinate Judge says that this is supported by the evidence of Sardar Dal Singh and his report which is contained in Exhibit D-25 which is printed at page 228 of the paper-book. We have, however, in vain searched the evidence of Dal Singh and his report for any mention of such migration. The conclusion at which we arrive is that so far as is known there are no persons in the Punjab who have any real right to be described as *Mohals* except *Rajputs* and some Jats who rightly or wrongly claim that they are really of *Rajput* origin. So far at least as the record of this case goes, it is not apparent that any one else has a right to describe himself as *Mohal*. But still in the absence

of any satisfactory proof that the plaintiff's family have any real right to describe themselves as *Mohals* we consider that the plaintiff has failed to prove that he is a *Rajput*.

If the plaintiff really is a Rajput it is a great pity that he has not gone into the witness-box and given information as to the families into which he and his brothers and sisters, his father, his uncles and aunts have married. Had he proved that his family has all along been intermarrying with *Rajput* families this would have been, in our opinion, very strong evidence in his favour. What would satisfy the Rajputs of the country-side would probably be enough to satisfy the Courts for it is not easy to deceive the country-side. But apparently the only piece of evidence as to where plaintiff's family have been seeking marriages is the statement of Rai Bahadur Sardar Dal Singh, that Nathu's family intermarry with *Chhimbas* alone; no details are given, so we are not prepared to regard this statement as conclusive. But, even leaving it out altogether, the fact remains that plaintiff has altogether omitted to enlighten the Court as to where the family has been contracting marriage alliances.

It is also urged on behalf of the defendant that the suit is time-barred, and that a declaration which practically amounts to an order for correction of Revenue Records cannot be made by a Civil Court. It is however, unnecessary to discuss these matters, as on the merits we consider that the plaintiff has quite failed to prove that he is a *Rajput*.

We accept the appeal and dismiss the suit with costs in both Courts.

N. H.

Appeal accepted.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 889 OF 1921.

March 23, 1922.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Thomas Richardson, KT.

AFSAR KHAN—DEFENDANT—PETITIONER

versus

SHABU MONDAL—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908); O. XLI, r. 27—Oaths Act (X of 1873), s. 5—Appellant willing to take oath—Additional evidence—Failure to record reasons—Irregularity—Proceedings, whether vitiated.

A suit to recover a debt was dismissed in the Trial Court. On appeal the first Appellate Court after earing arguments, called upon the Counsel for both parties to produce their clients on a certain day if possible so as "to enable it to confront one with the other and to put questions to them upon the facts material to the case." The plaintiff came to the Court but not the other party and the Court asked him if he could state by the Quran if his case was true. The appellant said that he could do so. After this, the appellant eventually got a decree. The defendant appealed to the High Court:

Held, (1) that if the answer to the question put by the first Appellate Court was to be taken as additional evidence then the proceedings were irregular under O. XLI, r. 27, Civil Procedure Code, as the Court had failed to record reasons for the admission of the evidence; [p. 557, col. 1.]

(2) that if the answer was not to be regarded as additional evidence in view of the fact that the appellant was not actually called upon to take his oath upon the Quran, then the position was even worse for it was impossible to say that the answer given could have had no effect on the mind of the Judge; [p. 557, col. 2.]

(3) that, therefore, it could not be said that the irregularity was not such as to vitiate the proceedings. [p. 557, col. 2.]

Mr. *Dines Chandra Ray*, for the Petitioner.

Mr. *Lalit Mohan Banerjee*, for the Opposite Party.

JUDGMENT.

Sanderson, C. J.—This Rule was granted to show cause why the decree complained of should not be set aside and such order passed as to this Court might seem fit. The decree complained of was a decree made in consequence of the judgment by the learned Subordinate Judge on the 3rd of August 1921.

The suit was brought by the plaintiff to recover money alleged to have been lent by the plaintiff to the defendant.

The Court of first instance dismissed the suit. The plaintiff then appealed to the learned Subordinate Judge and arguments were presented to the learned Subordinate Judge on the 11th and 12th of August 1921. The judgment, as I have already said, was delivered on the 31st of August. By that judgment the learned Subordinate Judge overruled the decision of the Court of first instance, allowed the appeal, and decreed the suit for Rs. 120 plus Rs. 20 as damages. In the judgment the learned Judge discussed the evidence which was given on the one side and the other, and came to the conclusion that the plaintiff had made out his case.

The petition upon which this Rule was granted alleged that on the 20th of August the learned Judge called on the Pleaders for the opposite party, (that is the plaintiff), to produce the plaintiff before him in order to see whether he was in a position to assert his claim on a Qoran. It was further alleged that the plaintiff appeared before him with a Qoran in hand and stated before the learned Judge that the money was really due from the defendant to the plaintiff. The learned Judge has given a statement of what in fact took place. The learned Judge said that the statement in paragraph 9 was not correct. He said what happened was as follows:—"I asked the Pleaders on both sides to produce their clients on a certain day, if possible, so as to enable me to confront one with the other and to put questions to them upon the facts material to the case; on the day appointed or some other date the appellant (*i. e.*, the plaintiff) came to Court, but not the other party and I asked the appellant (*i. e.*, the plaintiff) if he could state by the Qoran if his case was true. He said he could do so. He had no Qoran with him at the time as far as I could make out."

It seems to me that this was an irregularity on the part of the learned Judge. There could only be one object in asking such a question, and that was for the purpose of the learned Judge satisfying himself as to the truth of the plaintiff's story; and the learned Vakil who appeared for the plaintiff in this Court has agreed that that must have been the object of the learned Judge in asking the question.

The matter may be looked at from two points of view. If the answer to the question which was put by the learned Subordinate Judge is to be taken as additional evidence, then it seems to me that the learned Judge has not complied with the provisions of O. XLI, r. 27, clause (2) Civil Procedure Code, which provides that "wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission." In this case on the record there is no note or reference to the fact that the plaintiff was called before the learned Judge and that this question was put to him. There is no reference to it in his judgment; and, therefore, the learned Judge has in no way recorded the reason for admission of this additional evidence if it be regarded as additional evidence; and, consequently from that point of view there would be an irregularity in the proceedings.

If it is looked at from another point of view, namely, that it is not to be regarded as additional evidence, having regard to the fact that the plaintiff was not actually called upon to take his oath upon the Qoran or to take any kind of oath before the learned Subordinate Judge, but merely said that he was prepared to state upon the Qoran that his case was true, then the position seems to be worse from the plaintiff's point of view, because it is impossible for us to say that that answer, which was given by the plaintiff, could have had no effect upon the mind of the learned Judge. To my mind probably it had considerable effect upon the learned Judge's mind, he himself having asked the plaintiff to be produced before him and he himself having asked this question: and consequently it seems to me that whether if it is looked at from the one point of view or the other point of view, there was an irregularity in the conduct of these proceedings, which was of such a nature that it would not be right to allow the decision of the lower Appellate Court to stand.

DURGA CHARAN MITRA *v.* RAJENDRA NARAIN.

Consequently in my judgment this Rule ought to be made absolute, the decree of the lower Appellate Court ought to be set aside and the matter ought to be remanded to the learned District Judge in order that the appeal may be heard by him or by such other learned Subordinate Judge as he may select.

We assess the hearing fee of this Rule at one gold *mohur* and direct that the costs of this Rule do depend upon the issue of the appeal upon the order of remand.

Richardson, J.—I agree.

Rule made absolute.

N. H.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 149 OF 1920.

August 2, 1922.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Cuming.

DURGA CHARAN MITRA—PLAINTIFF—APPELLANT

versus

RAJENDRA NARAIN SINHA—DEFENDANT—RESPONDENT.

Principal and agent—Authority to negotiate for sale, scope of—Agent whether can enter into contract.

An estate or house agent, authorised to procure a purchaser, has no implied authority to enter into an open contract of sale. [p. 559, col. 1.]

Unless express authority is given to the agent to sell, and for that purpose to enter into a binding contract, the principal reserves his final right to accept or refuse. [p. 559, col. 2; p. 560, col. 1.]

When an owner of property employs an estate-agent to procure a purchaser or tenant at a specified price, the agent has no implied authority to conclude a contract for sale. His duty is simply to find a purchaser or tenant and to communicate his offer to the owner. [p. 560, col. 1.]

There is a substantial difference between an authority to sell and an authority to find a purchaser. Authorising a man to sell means an authority to conclude a sale; authorising him to find a purchaser means less than that; it means, to find a man willing to become a purchaser, not to find him and also make him a purchaser. [p. 560, col. 2.]

Hamer v. *Sharp*, (1875) 19 Eq. 108; 44 L. J. Ch. 53; 31 L. T. 643; 23 W. R. 158; *Prior* v. *Moore*, (1887) 3 T. L. R. 624, *Chadburn* v. *Moore*, (1892) 61 L. J. Ch. 674; 67 L. T. 257; 41 W. R. 39, *Thuman* v. *Best*, (1907) W. N. 170; 97 L. T. 239, *Wilde* v. *Walton*, (1878) 1 L. R. Ir. 402 at p. 405, *Purna Chandra Dutt* v. *Indra Chandra Roy*, 69 Ind. Cas. 978; 49 C. 389; (1922) A. I. R. (C) 397, *Koylash Chunder Doss* v. *Tarincy Churn*, 10 C. 588: 5 Ind. Dec. (N. S.) 394, *Hyam* v. *Gubbay*, 32 Ind. Cas. 53; 20 C. W. N. 66, *Rosenbaum* v. *Beason*, (1900) 2 Ch. 267: 69 L. J. Ch. 569; 82 L. T. 658; 48 W. R. 522, *Godwin* v. *Brind*, (1869) 17 W. R. 29; 5 C. P. 299*n*; 39 L. J. C. P. 122*n*., relied on.

Saunders v. *Dence*, (1885) 52 L. T. 644 at p. 646 and *Wright* v. *Bigg*, (1852) 15 Beav. 592; 92 R. R. 568; 51 E. R. 668, distinguished.

Appeal against a decree of the Subordinate Judge, Alipore, dated the 22nd April 1920.

Babus *Mahendra Nath Ray*, *Bimala Charan Deb*, *Pramatha Nath Banerjee* and *Tarikeswar Nath Mitra*, for the Appellant.

Dr. *Dwarka Nath Mitter* and Babu *Bhupendra Nath Ghose*, for the Respondent.

JUDGMENT.—This is an appeal by the plaintiff in a suit for specific performance of a contract for sale of land. The Subordinate Judge has dismissed the suit on the ground that there was no valid and complete contract between the plaintiff and the defendant for the sale of the property.

On the 9th June 1919 the defendant Singh gave the following letter of authorisation to a man named Bose:

"I hereby authorise you to negotiate the sale of the lands at Tolligunge I have recently purchased from Messrs. Martin and Co. If you can secure a purchaser to purchase the same at the gross value of Rs. 16,000, I shall pay you Rs. 200 as your remuneration. If you be able to raise the price to any amount above Rs. 16,000, you will be entitled to the excess amount fully and I shall be bound to mention the whole amount in the conveyance.

Please note that this letter of authority will remain in force for a fortnight only to complete the transaction; after that this letter will stand cancelled."

On the 20th June 1919 the Solicitors of the plaintiff Mitra wrote the following letter to Singh: "Re. brickfield (belonging lately to Messrs. Martin and Co., and recently purchased by you) in Mutiapara Road, Tolligunge.

Our client Babu Durga Charan Mitra, of No. 3 Peary Charan Lane, Calcutta, has been approached by the broker appointed by you whom you authorised to sell the above land. Our client is a purchaser for the property and he accepts the terms contained in the letter addressed by you to the broker."

On the same date, Bose wrote as follows to Singh:

"I have this day sold by your order and for your account the lands in Tolligunge recently purchased by you from Messrs. Martin and Co., on the authority and in terms of your letter of authority dated the 9th June 1919. Brokerage of Rs. 200 as arranged has become payable to me."

On receipt of these letters, Singh appears to have informed Bose that he would not sell the land. Bose communicated this to Mitra. Theresupon, on the 21st June 1919, the Solicitors of the plaintiff wrote to the defendant and informed him that their client was not prepared to withdraw his acceptance of the contract. Bose also informed defendant at the same time that Mitra had accepted the offer to sell the land and insisted upon completion. Singh took no notice of these letters. Two days later, the Solicitors of the plaintiff wrote to the defendant that as the latter refused to complete the agreement, the plaintiff would take legal steps to enforce his rights. This suit was thereafter instituted on the 2nd July 1919.

It is well-settled that an estate or house-agent, authorised to procure a purchaser, has no implied authority to enter into an open contract of sale. In *Hamer* v. *Sharp* (1) Hall, V. C., decided that if you go to an estate-agent and tell him that you have a property to sell and that you want a purchaser, and you tell him what you have made up your mind shall be the price, and to a certain extent what shall be the conditions, and you instruct him to try and find a purchaser, that is not sufficient to authorise the agent to make a contract without any conditions whatever with regard to the title. This decision was applied by Kekewich, J., in *Prior* v. *Moore* (2) and *Chadburn* v. *Moore* (3). In the case last mentioned, Moore authorised Newman to find a purchase for some houses and to negotiate a sale, but Moore did not in express terms authorise Newman to enter into a contract. Kekewich, J., held that instructions to a house and estate agent to procure a purchaser and to negotiate a sale do not amount to authority to the agent to bind his principal by a contract for sale of real or leasehold property, and observed as follows: "Newman was to find a purchaser, and to negotiate a sale. Is that sufficient? No evidence was given as to custom; no evidence was brought to shew that the position of a house or estate-agent resembles that of a broker on the Stock Exchange or any other exchange. A house or estate-agent is in a different position owing to the peculiarity of the property with which he has to deal, which does not pass by a short instrument as stocks and shares do, but has to be transferred after investigation of title and in accordance with strict laws. An agent for sale of real estate must be more formally constituted than a seller of stocks and shares and securities of a similar nature. There is no definite authority. In *Hamer* v. *Sharp* (1) Vice Chancellor Hall does not....decide the question of authority, but only states his opipion. I must perforce refer to *Prior* v. *Moore* (2), where I indicated my own opinion distinctly, that instructions to a house agent to procure a purchaser and to negotiate a sale do not amount to authority to the agent to bind his principal by contract. Here the circumstances must not be forgotten, that Moore, on the second occasion, told Newman what he was prepared to take for the twenty-nine houses. Newman then jumped at the conclusion that he had power at that price to enter into a contract. That is, in my opinion, not sufficient, and unless express authority is given to the agent to sell, and for that purpose to enter into a binding contract,

(1) (1875) 19 Eq. 108; 44 L. J. Ch. 53; 31 L. T. 643; 23 W. R. 158.

(2) (1887) 3 T. L. R. 624;
(3) (1892) 61 L. J. Ch. 674; 67 L. T. 257; 41 W. R. 39.

the principal reserves his final right to accept or refuse."

The rule was applied by Parker, J. in *Thumin* v. *Best* (4). To the same effect is the decision of Chatterton, V. C., in *Wilde* v. *Walton* (5) that when an owner of property employs an estate-agent to procure a purchaser or tenant at a specified price, the agent has no implied authority to conclude a contract for sale. His duty is simply to find a purchaser or tenant and to communicate his offer to the owner. The Vice-Chancellor added that it was a common practice to place houses or estates on the books of a number of house or estate agents at the same time, and if each had authority to conclude a contract for the owner, the result would be that he might become bound to let or sell the same premises to several different parties at the same instant. The decision of Field, J., in *Saunders* v. *Dence* (6) is clearly distinguishable; there the vendor had himself bought only a right to the specific performance of a contract, and that was the matter which he agreed to sell through the auctioneer. The decision of Romilly, M. R. in *Wright* v. *Bigg* (7), also does not affect the present question. In that case, Tootel was authorised by the defendant to make a proposal of sale of some land to the plaintiff, but to be accepted within a week. The plaintiff wrote to Tootel within that time, accepting the offer but Tootel did not communicate the acceptance until long after. It was ruled that there was a valid contract which was not destroyed by the neglect of Tootel to communicate the acceptance to the defendant. There was no contention raised that Tootel had not the requisite authority to make the proposal of sale. The view we take is in harmony with that adopted by Ghose, J., in *Purna Chandra Duit* v. *Indra Chandra Roy* (8), and the decisions in *Koylash Chunder Doss* v. *Tariney Churn* (9), and *Hyam* v. *Gubbay* (10), undoubtedly do not militate against our conclusion. The essential question is, whether the agent employed is authorised to make a binding contract for sale. Such an authority may be expressly conferred, as in *Rosenbaum* v. *Belson* 11). As Buckley, J., points out, there is a substantial difference between an authority to sell and an authority to find a purchaser. Authorising a man to sell means an authority to conclude a sale; authorising him to find a purchaser means less than that; it means, to find a man willing to become a purchaser, not to find him and also make him a purchaser. On the other hand, in *Godwin* v. *Brind* (12), Bovill, C. J., held that where applications to treat and view were to be made to certain persons described, they had authority to enter into negotiations but not to enter into a contract for sale of the land. In the case before us, some stress has been laid on the sentence in the letter of authorisation from Singh to Bose, dated the 9th June 1919, which states that the letter would remain in force for a fortnight only to complete the transaction. But this does not advance the contention of the plaintiff; the transaction mentioned is that specified earlier in the letter, nameiy, to negotiate the sale and to secure a purchaser. We hold accordingly that the Subordinate Judge has correctly interpreted the terms of the agreement between the parties as disclosed in the correspondence.

The plaintiff, who is himself a Solicitor, appears to have realised the difficulty of the situation, and in his cross-examination he endeavoured to alter the foundation of his claim. He conceded that the broker had no authority to sell the property and that he could not have taken a conveyance or an agreement for sale from the broker. On this basis, it was contended before the Subordinate

(4) (1907) W. N. 170; 97 L. T. 239.
(5) (1878) 1 L.R. Ir. 402 at p. 405.
(6) (1885) 52 L. T. 644 at p. 646.
(7) (1852) 15 Beav. 592; 92 R. R. 568; 51 E. R. 668.
(8) 69 Ind. Cas. 978; 49 C. 389; (1922) A. I. R. (C.) 397.
(9) 10 C. 588; 5 Ind. Dec. (N. S.) 394.
(10) 32 Ind. Cas. 53; 20 C W. N. 66.
(11) (1900) 2 Ch. 267; 69 L. J. Ch. 569; 82 L. T. 658; 48 W. R. 522.
(12) (1889) 17 W. R. 29; 5 C. P. 299 *n.*; 39 L. J. C. P. 122 *n.*

Judge that the letter from the defendant was an offer by the latter and that the communication of his own willingness to purchase the property constituted an acceptance of that offer. The Subordinate Judge has rightly held that the plaintiff could not be permitted to depart from his pleadings in this manner. He has also pointed out that, in substance, there was at best an offer by the plaintiff to purchase, which was never accepted, and consequently did not ripen into a contract. In this view, it is not necessary to consider the decision of the Judicial Committee in *Harvey* v. *Facey* (13), which was mentioned in the course of argument and may require explanation.

Our conclusion is that the claim for specific performance cannot be sustained and that the suit has been rightly dismissed. The appeal is consequently dismissed with costs.

Appeal dismissed.

Z. K.

(13) (1893) A. C. 552; 62 L. J. P. C. 127; 1 R. 428; 69 L. T. 504; 42 W. R. 129.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL NO. 16 OF 1922.

June 1, 1922.

Present :—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Brasher.

SHIV GIR—PLAINTIFF AND ANOTHER—DEFENDANT—APPELLANTS

versus

KHAZAN GIR AND OTHERS—DEFENDANTS—RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Arts. 13, 35 (ii), applicability of—Penal Code Act (XLV of 1860), s. 403—Dishonest misappropriation—Suit to recover property—Small Cause Court, jurisdiction of.

It is an essential element of an offence under section 403 of the Penal Code that the accused should act dishonestly. There may be cases of misappropriation in which the defendant would be civily liable, but would incur no criminal liability at all.

Unless all the necessary ingredients of a criminal offence are stated in a plaint, the case cannot be excluded from the cognizance of a Court of Small Causes under Art. 35 (*ii*) of Schedule II to the Provincial Small Cause Courts Act.

Article 13 of Schedule II to the Provincial Small Cause Courts Act only relates to claims made against the person who is primarily liable to pay the cesses or dues.

Letters Patent Appeal against the judgment of Mr. Justice Abdul Raoof, dated the 12th December 1921.

Mr. *Mukund Lal Puri*, for the Appellants.

Lala *Fakir Chand*, for the Respondents.

JUDGMENT.—The question in this case is whether the suit as framed was cognizable by a Court of Small Causes and whether consequently no second appeal lay to this Court.

The plaintiff sued as manager of a temple for a share of the offerings and of the produce of the temple land. He alleged that he wes entitled to a one-third share and admitted that the defendant Khazan Singh was entitled to two-thirds. He also claimed the price of a mare which he alleged had been sent by a *zaildar* named Bhim Sain for the temple during the period at which the plaintiff was entitled to receive the offerings, and he further alleged that the defendants had taken away a cow and calf which had been the property of a former *Mahant*. It is said that the suit was not cognizable by a Court of Small Causes because it was one falling either under Art. 35 (*ii*) or Art. 13 of the Second Schedule to the Provincial Small Cause Courts Act. Article 35 (*ii*) excludes from the jurisdiction of a Small Cause Court a suit for compensation for an act which is, or save for the provisions of Chapter IV of the Indian Penal Code, would be, an offence punishable under Chapter XVII of the said Code. It is urged on behalf of the plaintiff-appellant that the acts which the defendants are alleged to have committed would constitute offences punishable under section 403, Indian Penal Code. It is, however, an essential element of this offence that the accused person should act dishonestly, and we are unable to find in the plaint any definite allegation that the defendants had the intention requisite for the commission of an

offence under this section. It is obvious that in many cases of this type a defendant might be civilly liable while he would incur no criminal liability at all, and unless all the necessary ingredients of a criminal offence are stated in the plaint the case cannot be excepted under Art. 35 (*ll*) Art. 13 also appears to be inapplicable. There is ample authority to show that the Article only relates to claims made against the person who is primarily liable to pay the cesses or dues.

We accordingly maintain the order passed by the learned Judge in Chambers and dismiss the appeal with costs.

Appeal dismissed.

Z. K.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 725 OF 1917.

July 30, 1923.

Present:—Sir Lallubhai Shah, Kt., Acting Chief Justice, and Mr. Justice Coyajee.

RAMCHANDRA MADHAVRAO GADRE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

TRIMBAK SHRIDHAR JAHAGIRDAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Inam *rights—Grant, construction of—Assessment, exemption from—Covenant, whether runs with land—Successor-in-title of grantor, whether liable.*

The predecessors-in-title of the defendants made a grant in favour of the plaintiffs' father which contained the following clauses:

"1. Exemption of the assessment of the said lands has been made in favour of you and your heirs;

2. In case there is any obstruction in respect of the *inam* and you have occasion to pay the assessment, the said sum of assessment will be paid by us without reference to each other."

The village authorities recovered the assessment from the plaintiffs and the latter sued to recover the sum from the defendants:

Held, that the grantors had made a gift to the grantee not only of their occupancy right in the land, but also of the *inam* rights which they had in connection with the land, and had granted for all time the exemption of assessment of the lands to the grantee and his descendants; [p. 563, col. 1.]

(2) that the grantee's right ran with the land and the *inamdars* for the time being were liable under the covenant; [p. 563, col. 2.]

(3) that the assessment having been recovered from the plaintiffs for the benefit of the defendant the latter were personally liable to re-pay the amount to the plaintiffs. [p. 563, col. 2.]

Second appeal from a decision of the District Judge, Khandesh, in Appeal No. 241 of 1915, confirming a decree passed by the Subordinate Judge at Chalisgaon, in Civil Suit No. 586 of 1913.

Mr. *P. B. Shingne*, for the Appellants.

Mr. *D. S. Varde* for Mr. *S. D. Joglekar*, for the Respondents.

JUDGMENT.—The question that arises in this second appeal relates to the construction of Exhibit 74 in the case which is described as a *sanad*. The plaintiffs, who claim under this document, sued for an order directing the defendants to pay into the treasury every year the amount of assessment plus the local fund tax in respect of the three lands mentioned in the plaint or to deduct that amount at the time of receiving the *jagir amal* from the treasury. The plaintiffs also claimed Rs. 456-1-0 with interest, being the amount rightly recovered by the village authorities as assessment in respect of the lands in suit, but wrongly retained by the defendants in respect of the years 1910-11-12. The defendants to the suit included defendant No. 14 who was one of the executants of this deed, Exhibit 74. The other defendants are either representatives of the other executants of the document, or purchasers of their shares in the *inam*. The defendants are the owners of the eight anna share of the *inami* rights in the village of Sindi.

The Trial Court disallowed the general prayers of the plaintiffs, but decreed their claim for Rs. 456-1-0 and costs to be recovered from defendant No. 14 personally, and from the estates of the other deceased executants of Exhibit 74.

The plaintiffs appealed to the District Court, and the only question raised in the appeal was whether a decree personally against all the defendants should have been passed or not. This point was decided against the plaintiffs-appel-

lants on the construction of Exhibit 74, and the decree of the Trial Court was confirmed.

The plaintiffs have preferred this second appeal; and the question is whether on a proper construction of Exhibit 74 they are entitled to a personal decree against those who hold the lands either as representatives of the holders of the eight anna share in the *inam*, or as purchasers of the interest of any of them.

It is not necessary to set forth the whole of the document, but after referring to the circumstances under which the *inam* of seventy *bighas* of excellent lands in the village was to be made in favour of the present plaintiffs' father Madhavrao Narayan Gadre, and after referring to the fact that he had selected certain lands in the village of that description, the document provides as follows:—

"The terms of the lands so given are:—

(1) Exemption of the assessment of the said lands has been made in favour of you and your heirs.

(2) In case there is any obstruction (made) by Bhaubands in respect of the *inam* of seventy *bighas* (in case) you have occasion to pay the assessment, we will pay it. If you have to pay it, the said sum of assessment will be paid by us without reference to each other....

Besides this if the lands or a portion thereof were to go from your possession owing to (the intervention of) Bhaubands or owing to any other cause, we shall indemnify you in respect of the loss caused to you. If we do not do so, we shall at our cost buy and give to you Government pro-notes which will yield to you the sum which you would have got by way of income of the said land."

On a proper construction of this document, it seems to us to be clear that the executants of this document made a gift, not only of their occupancy right in the land, but of the *inam* rights which they had in connection with the land, and they granted for all time the exemption of the assessment of the suit lands to Madhavrao and his descendants. Even if there was no further covenant with regard to making good the loss if the assessment were recovered from him, or if the lands were lost to him on account of the intervention of Bhaubands, it seems to us that those who are successors-in-title of those executants would be bound by the right given to the present plaintiffs in respect of the assessment of the suit lands. It is a substantial right created in favour of the plaintiffs in respect of the lands and it is a right which must in its very nature run with the lands.

The learned District Judge has taken the view that under the covenant, which is contained in clause 2 of the terms quoted above, only the executants of this documents would be personally liable to make good the loss. But here the position seems to be this. The assessment was in the ordinary course realized by the village officers to be paid over to the *inamdars*. The assessment which has been recovered from the plaintiffs must be taken to have been paid over to the present defendants as holders of the *inam* rights in respect of these lands, and if under this document they are not entitled to the benefit of that money, it is obligatory upon them to return the money to the plaintiffs. The substantial right created by this document being of this nature, it seems to us that the plaintiffs are entitled to a decree for the amount claimed by them in this suit against all the defendants. The question of adjustment of the rights of the defendants *inter se* with reference to this sum of Rs. 456-1-0 does not arise in this appeal, and we are not concerned with that question in any way. It is not alleged by any defendant in this suit that he has not received the benefit of the assessment recovered from the plaintiffs in respect of these lands. It is clear that only the defendant who receive the benefit would be liable to refund the amount; but in the present case no distinction on that score is suggested as regards any of the defendants.

We, therefore, vary the decree under appeal by ordering that the plaintiffs do recover Rs. 465-1-0 with costs throughout from the defendants.

Decree varied.

Z. K.

JOBEDA KHATUN *v.* TULSI CHARAN DAS.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 4 OF 1919.

July 27, 1922.

Present :—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Chotzner.

JOBEDA KHATUN—DEFENDANT NO. 1 —APPELLANT

versus

TULSI CHARAN DAS—PLAINTIFF— AND OTHERS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 144—Revenue sale, purchaser at—Suit to recover possession—Limitation, commencement of—Adverse possession—Delivery of possession, symbolical, effect of—Burden of proof.

On the failure of an owner to pay the Government assessment, his estate or interest in the land is determined, and under a sale for arrears of revenue what is sold is not the interest of the defaulting owner but the interest of the Crown, subject to the payment of the Government assessment. Limitation, therefore, for a suit by the purchaser to recover possession only commences to run from the date of the sale. [p. 566, col. 1.]

Surja Kanta v. *Sarat Chandra Roy*, 25 Ind. Cas. 309; 20 C. L. J. 563; 18 C. W. N. 1281; 16 M. L. T. 290; 27 M. L. J. 365; 1 L. W. 807; (1914) M. W. N. 757; 16 Bom. L. R. 925 (P. C.), followed.

A person in adverse possession who occupies the disputed land without payment of rent to the defaulting proprietor, is bound to surrender possession of that land to the revenue sale purchaser when the sale is confirmed, and if the land is not so surrendered, he renders himself liable for mesne profits, as he unlawfully keeps the purchaser out of possession. [p. 566, col. 1.]

Sashikanta Acharyya v. *Sarat Chandra Rai Chaudhuri*, 70 Ind. Cas. 6; 34 C. L. J. 415, followed.

Delivery of symbolical possession does not in any way affect the possession of or give start to a fresh period of limitation against persons who are not parties to the suit or execution proceedings. [p. 566, col. 2.]

Juggobundhu Mukerjee v. *Ram Chunder*, 5 C. 584; 5 C. L. R. 548; 3 Shome L. R. 68; 2 Ind. Dec. (N. S.) 979 and *Jaggobundhu Mitter* v. *Purnanund Gossami*, 16 C. 530; 8 Ind. Dec. (N. S.) 350 (F. B.), followed.

Symbolical possession is sufficient to interrupt adverse possession when the adverse possessor is a party to the execution proceedings in which the symbolical possession is given; as regards persons not so parties, only actual dispossession can interrupt their adverse possession. [p. 566, col. 2.]

Radha Krishna v. *Ram Bahadur*, 43 Ind. Cas. 268; 27 C. L. J. 191; 16 A. L. J. 33; 23 M. L. T. 26; 4 P. L. W. 9; 34 M. L. J. 97; 7 L. W. 149; 22 C. W. N. 330; (1918) M. W. N. 103; 20 Bom. L. R. 502 (P. C.), *Satish Chandra Sarkar* v. *Brojo Gopal Dutta*, 46 Ind. Cas. 104; 22 C. W. N. 807; *Ramjan Mahomed* v. *Chunder Mohan Aditya*, 7 C. L. J. 640; *Doyanidhi Panda* v. *Kelai Panda*, 11 C. L. R. 395. *Narain Das* v. *Lalta Prasad*, 21 A. 269; A. W. N. (1899) 56; 9 Ind. Dec. (N. S.) 880 and *Sudulla Mridha* v. *Joynabunnessa Bibi*, 32 Ind. Cas. 703, followed.

The same principle applies to purchasers at sales for arrears of revenue. [p. 566, col. 2.]

Mozuffer Wahid v. *Abdus Samad*, 6 C. L. R. 539; *Mir Wazir-ud-din* v. *Lala Deoki Nandan*, 6 C. L. J. 472, *Dursan Singh* v. *Bhawani Koer*, 19 Ind. Cas. 974; 17 C. W. N. 984 and *Sahodora Mudali* v. *Sarbosobha Dasi* [*Nabin Chand Boral*, 27 Ind. Cas. 258; 42 C. 638; 20 C. L. J. 494; 19 C. W. N. 103, followed.

A person in adverse possession of land whose title has not yet been perfected cannot be regarded as a defaulting proprietor for the purposes of a revenue sale, and cannot, therefore, be affected by a symbolical delivery of possession of the land to a purchaser at a revenue sales. [p. 566, col. 2; p. 567, col. 1.]

Baikuntha Nath v. *Basanta Kumari Dasi*, 34 Ind. Cas. 946; 23 C. L. J. 151; *Aftar Ali* v. *Brojendra Kishore Raj*, 37 Ind. Cas. 252; 24 C.L.J. 60, *Jitendra Kumar Pal* v. *Mohendra Chandra Sarma*, 37 Ind. Cas. 239; 24 C. L. J. 62 and *Mohim Chandra Debi* v. *Pyari Lal Das*, 39 Ind. Cas. 213; 44 C. 412; 25 C. L. J. 99; 21 C. W. N. 537, followed.

In cases governed by Art. 144 of Schedule I to the Limitation Act, if the plaintiff succeeds in proving a clear title, the burden lies on the defendant to prove adverse possession for the statutory period, and possession to be adverse must have all the qualities of adequacy, continuity and exclusiveness [p. 567, col. 2.]

Secretary of State for India in Council v. *Chelikani Rama Rao*, 35 Ind. Cas. 902; 43 I. A. 192; 39 M. 617; 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 224; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 486; 18 Bom. L. R. 1007; 25 C. L. J. 69 (P. C.); *Jai Chand* v. *Girwar Singh*, 52 Ind. Cas. 366; 41 A. 669; 17 A. L. J. 814, *Kuthali Moothavar* v. *Peringoti Kanharankutti*, 66 Ind. Cas. 451; 26 C. W. N. 666; 44 M. 883; 14 L. W. 721; (1921) M. W. N. 847; 41 M. L. J. 650; 30 M. L. T. 42; 48 I. A. 395; 24 Bom. L. R. 669; (1922) A. I. R. (P. C.) 181 (P. C.) and *Shiva Prasad Singh* v. *Hira Singh*, 62 Ind. Cas. 1; 6 P. L. J. 478; (1921) Pat. 305; 2 P. L. T. 487 (F. B.), relied on.

Appeal against a decree of the Subordinate Judge, 24-Parganahs, dated the 18th September 1918.

Messrs. *Sarat Chandra Rai Chauduri, Anilendra Nath Rai Chaudhuri* and *Pramatha Nath Banerjee*, for the Appellant.

Messrs. *Mohendra Nath Ray, Baransibasi Mukherjee, Harendra Prasad Sarbadhikari* and *Sarat Chandra Dey*, for the Respondents.

JUDGMENT.—This is an appeal by the first defendant in a suit for recovery of possession of land, with mesne profits, on declaration of title. The disputed property is a tenure situated in the eastern suburbs of Calcutta and held on payment of revenue to the Secretary of State. The holders of the tenure defaulted, with the

result that it was sold on the 18th February 1902, for recovery of arrears of revenue, under Act XI of 1859. The plaintiff became the purchaser at that sale for a sum of Rs. 1,900, and his purchase took effect from the 29th June 1901, that is from the date when the last proprietor had defaulted. The sale was confirmed on the 2nd May 1902, the sale certificate was granted on the 21st June 1902 and the property was delivered to the purchaser on the 1st June 1903, by beat of drum in the customary manner. The property was in the occupation of tenants, and the case for the plaintiff is that for some years after his purchase he was in possession by receipt of rent from them, but that, in 1915, a suit for rent brought by him in the Court of Small Causes was dismissed, with the consequence that all the tenants gradually got out of hand and withheld their rents. According to the plaintiff, this result was brought about by one Abdur Rahaman, the fifth defendant, a leading tenant who was disappointed when he could not secure from him a farming lease of the entire property. The plaintiff thereupon instituted the present suit on the 20th May 1915, for declaration of his tittle by purchase and for recovery of possession with mesne profits. The first defendant, who contested the claim, was a lady, set up by the tenant-defendants as their landlord. She asserted that she was the real owner of the disputed property, that her title had not been affected by the revenue sale, and that the suit was barred by limitation inasmuch as she had been in possession by receipt of rent from 1895. The Subordinate Judge has held that the plaintiff acquired an unimpeachable title by purchase at the revenu sale, that he was in possession by receipt of rent, and that such possession continued to a date within twelve years prior to the institution of the suit. The Subordinate Judge has further held that the title set up by the defendant had no foundation in fact, that the story of her possession since 1895 was a myth and that her interference with the enjoyment of the property by the plaintiff had not extended over a period of twelve years. In this view, the Subordinate Judge has decreed the suit. On the present appeal, the findings of the Subordinate Judge upon the question of title have not been controverted, and the argument has been restricted substantially to the question of limitation. It is plain, however, that when the evidence of possession is sctrutinised, the history of the title cannot be ignored.

It is indisputable that a two-thirds share of the property in suit was purchased on the 22nd January 1881 by one Hanif (for the benefit of himself and his co-sharers) in the name of his mother Bipatti. The remaining one-third share was perchased in the nam of Hanif himself on the 5th January 1896. The first defendant is one of the four daughters of this Hanif. But she repudiates the title of her father and asserts that the tenure was owned by her father-in-law Hingu. According to her the property belonged at one time to Sukurannessa, who was succeeded by her son Babu, from whom it passed by inheritance to his maternal uncle Hingu, who was the father-in-law of the defendant and made a verbal gift of the holding to her at the time of her marriage in or about the year 1895. The Subordinate Judge has pointed out that there is not a scrap of paper brought forward to support this story which he describes as "a tissue of falsehood of the blackest type." This view—so emphatically expresssed—has not been assailed on behalf of the defendant-appellant in this Court. This course has been wisely adopted, for an examination of the record leaves no room for doubt that the Subordinate Judge had ample reasons to disbelieve the evidence adduced by the defendants. There is further the remarkable fact that while, after the revenue sale, Hanif took every conceivable step for its carcellation, on the allegation that he was the proprietor, there is no trace that the appellant interested herself in the matter in the remotest degree. We agree with the Subordinate Judge that Hanif and his co-sharers were the propretors of the holding in suit at the time of the revenue sale; and that there is no foundation for the story that Hingu had

made a gift thereof to the defendant in 1895. This conclusion is, no doubt, not necessary to support the title of the plaintiff, inasmuch as he acquired an indefeasible title to the tenure by his purchase at the revenue sale, whoever might have been the proprietor at the time; but, as we shall presently see, the question of title has an important bearing upon the question of possession which must be investigated for the determination of the issue of limitation. In this connection, we may usefully re-call the rule enunciated by the Judicial Committee in *Surja Kanta* v. *Sarat Chandra Roy* (1), where Lord Atkinson observed as follows: "On the failure of an owner to pay the Government assessment, his estate or interest in the land is forfeited or rather determined and under a sale for arrears of revenue what is sold is not the interest of the defaulting owner but the interest of the Crown, subject to the payment of the Government assessment, and, therefore, the time limited by the Limitation Act only commences to run from the date of the sale." This principle was applied in a later stage of the same litigation, *Sashi-kanta Acharyya* v. *Sarat Chandra Rai Chaudhuri* (2), when it was ruled that a person in adverse possession who occupies the disputed land without payment of rent to the defaulting proprietor, is bound to surrender possession of that land to the revenue sale purchaser when the sale is confirmed, and if the land is not so surrendered, he renders himself liable for mesne profits, as he unlawfully keeps the purchaser out of possession. In the present case, however, while the sale took place on the 18th February 1902, and was confirmed on the 2nd May 1902, this suit was not instituted till the 20th May 1915, that is, after the lapse of more than twelve years from either of these dates. There has, consequently, been considerable discussion at the bar as to the legal effect of the delivery of possession which took place on the 1st June 1903, that is, within twelve years prior to the commencement of this litigation. The rule deducible from the judicial decisions relevant to the subject is that delivery of symbolical possession does not in any way affect the possession of or give start to a fresh period of limitation against persons who are not parties to a suit or execution proceedings. The decisions of the Full Benches in *Juggobundhu Mukerjee* v. *Ram Chunder* (3) and *Jaggobundhu Mitter* v. *Purnanund Gossami* (4), make this principle applicable to delivery of possession to decree-holders and execution purchasers. This position has since been approved by the Judicial Committee in *Radha Krishna* v. *Ram Bahadur* (5), where Lord Sumner stated that symbolical possession is sufficient to interrupt adverse possession when the adverse possessor is a party to the execution proceedings in which the symbolical possession is given; as regards persons not so parties, only actual dispossession can interrupt their adverse possession; see *Satish Chandra Sarkar* v. *Brojo Gopal Dutta* (6), *Ramjan Mahomed* v. *Chunder Mohan Aditya* (7), *Doyanidhi Panda* v. *Kelai Panda* (8), *Narain Das* v. *Lalta Prasad* (9), *Sadulla Mridha* v. *Joynabunnessa Bibi* (10). The same principle has been extended to the case of purchasers at sales for arrears of revenue, *Mozuffer Wahid* v. *Abdus Samad* (11), *Mir Wazir-ud-Din* v. *Lala Deoki Nandan* (12), *Dursan Singh* v. *Bhawani Koer* (13) and *Sahodora Mudali* v. *Sarbosobha Dasi* [*Nalin Chand Boral*] (14). Now, in the case before us, as the first defendant claims to have been an adverse possessor, the delivery of possession could not

(1) 25 Ind. Cas. 309; 20 C. L. J. 563; 18 C. W. N. 1281; 16 M. L. T. 290; 27 M. L. J. 365; 1 L. W. 807; (1914) M. W. N. 757; 16 Bom. L. R. 925 (P. C.).

(2) 70 Ind. Cas. 6; 34 C. L. J. 415.

(3) 5 C. 584; 5 C. L. R. 548; 3 Shome L. R. 68; 2 Ind. Dec. (N. S.) 979.

(4) 16 C. 530; 8 Ind. Dec. (N. S.) 350 (F. B.).

(5) 43 Ind. Cas. 268; 27 C. L. J. 191; 16 A. L. J. 33; 23 M. L. T. 26; 4 P. L. W. 9; 34 M. L. J. 97; 7 L. W. 149; 22 C. W. N. 330; (1918) M. W. N. 163; 20 Bom. L. R. 502 (P. C.).

(6) 46 Ind. Cas. 104; 22 C. W. N. 807.

(7) 7 C. L. J. 640.

(8) 11 C. L. R. 395.

(9) 21 A. 269; A. W. N. (1899) 56; 9 Ind. Dec. (N. S.) 880.

(10) 32 Ind. Cas. 703.

(11) 6 C. L. R. 539.

(12) 6 C. L. J. 472.

(13) 19 Ind. Cas. 974; 17 C. W. N. 984.

(14) 27 Ind. Cas. 258; 42 C. 638; 20 C. L. J. 494; 19 C. W. N. 1030.

operate to arrest the effect of the rule of limitation in her favour. It is worthy of note that she does not assert that her title had been perfected by adverse possession before the revenue sale; she cannot consequently be regarded as a defaulting proprietor, *Baikuntha Nath* v. *Basanta Kumari Dasi* (15), *Aftar Ali* v. *Brojendra Kishore Roy* (16), *Jitendra Kumar Pal* v. *Mohendra Chandra Sarma* (17), *Mohim Chandra Deb* v. *Pyari Lal Das* (18). We must accordingly investigate the question, whether the first defendant was in possession of the disputed tenure, and if so, from what date.

The case for the appellant is that she received the disputed property in or about the year 1805 by way of gift from her father-in-law who was the proprietor thereof and that she exercised acts of possession in her character as rightful owner. The theory that her father in-law was the owner and made a gift in her favour has, as we have seen, completely broken down. Consequently, if she did in fact exercise acts of possession in respect of the disputed land, they could not be attributed to a claim of title as rightful owner. Such evidence of possession as she has produced has been disbelieved by the Subordinate Judge. No intelligible hypothesis has been propounded why Hanif, who has been described as a rich merchant, should allow himself to be dispossessed by his daughter. Indeed, there is no tangible evidence to show that between 1895 and 1902, when Hanif was the proprietor, the first defendant interfered with his possession and collected rent from the tenants who occupied the land. If she had in fact been in possession, she might, in the normal course of events have been expected to exert herself to save the property after the sale for arrears of revenue. On the other hand, as we have seen, it was Hanif who took steps to set aside the sale, appealed to the Commissioner, applied for review, and when every effort failed, he applied for a refund of the surplus. We feel no doubt that Hanif was in possession as proprietor up to the date of the revenue sale. In the examination of the evidence on this part of the case, we should not lose sight of the principles enunciated by the Judicial Committee in *Secretary of State for India in Council* v. *Chellikani Rama Rao* (19) and *Kuthali Moothavar* v. *Peringati Kanharankutti* (20) where Lord Shaw pointed out that in cases governed by Art. 144 of the Schedule to the Indian Limitation Act, if the plaintiff has succeeded in proving a clear title, the burden lies on the defendant to prove adverse possession for the statutory period, and possession to be adverse must have all the qualities of adequacy, continuity and exclusiveness; see also *Jai Chand* v. *Girwar Singh* (21) and *Shiva Prasad Singh* v. *Hira Singh* (22). The evidence of possession by Hanif fits in with the state of the title; on the other hand, the story of the defendant that she was in possession because she was a donee from the rightful owner manifestly stands discredited. In such circumstances, the Subordinate Judge has rightly believed that Hanif was in possession up to the time of the sale. We have next to consider the question of possession after the revenue sale. The plaintiff asserts that he obtained delivery of possession from the Collector and got himself registered both in the Municipality and in the Collectorate. This has been proved beyond doubt. The plaintiff further asserts that Abdur Rahaman helped to collect the rent on his behalf and that the Municipal dues were paid on his account, till Abdur Rahaman was disappointed and set up the first defendant as the landlord of the property. This has been believed by the Subordinate Judge, and his view is fully sup-

(15) 34 Ind. Cas. 946; 23 C. L. J. 151.
(16) 37 Ind. Cas. 252; 24 C. L. J. 60.
(17) 37 Ind. Cas. 239; 24 C. L. J. 62.
(18) 30 Ind. Cas. 213; 41 C. 412; 25 C. L. J. 99; 21 C. W. N. 537.

(19) 35 Ind. Cas. 902; 43 I. A. 192; 39 M. 617; 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 224; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 486; 18 Bom. L. R. 1007; 25 C. L. J. 69 (P. C.).
(20) 66 Ind. Cas. 451; 26 C. W. N. 666; 44 M. 883; 14 L. W. 721; (1921) M. W. N. 847; 41 M. L. J. 650; 30 M. L. T. 42; 48 I. A. 395; 24 Bom. L. R. 669; (1922) A. I. R. (P. C.) 181 (P. C.).
(21) 52 Ind. Cas. 366; 41 A 669; 17 A. L. J. 814.
(22) 62 Ind. Cas. 1; 6 P. L. J. 478; (1921) Pat. 305; 2 P. L. T. 487 (F. B.).

ported by the evidence on the record. The plaintiff has been placed at a great disadvantage by reason of the death of his officer, Haripada Mookerjee; he died of smallpox and it is stated that the papers in his possession were destroyed after his death. This, we think, is by no means an improbable story. The Subordinate Judge has further pointed out that the evidence of the Municipal bailiffs and the endorsements on the Municipal bills show that Abdur Rahaman paid the Municipal tax as the agent of the plaintiff and not of the defendant. This arrangment went on till at least 1913 and the collection papers of the first defendant must have been got up to support an untenable story. The evidence has been minutely discussed before us, and we have arrived at the conclusion that the views of the Subordinate Judge upon the question of possession, both before and after the revenue sale, cannot be successfully assailed. We hold accordingly that Hanif was in possession up the time of the revenue sale, that the plaintiff thereafter obtained possession as purchaser, and that he was in such possession up to at least 1913. The suit is consequently not barred by limitation.

The decree of the Subordinate Judge is accordingly affirmed and this appeal dismissed with costs to the plaintiff-respondent.

z. k. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 560 OF 1921.

August 29, 1923.

Present:—Mr. Justice Odgers and Mr. Justice Hughes.

Khaji Mir NAJAVATH ALLI—DEFENDANT NO. 1—APPELLANT

versus

Khaji Mir MUJAFAR ALLI AND ANOTHER—PLAINTIFF AND DEFENDANT NO. 2—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 144—Khazi inam lands—Adverse possession against office-holder.

Where *Khazi inam* lands, which are inalienable and impartible, are held adversely to the office-holder for more than twelve years, the person in adverse possession acquires a prescriptive title to the lands as against the holder of the office and his successors. [p. 570, col. 2.]

Per *Hughes, J.*—Where an alienation of lands appretaining to an hereditary office, is good for the lifetime of the alienor, limitattion commences to run as against the successor not from the date of alienation but from the date of the alienor's death. It is otherwise when possession is adverse from the start. [p. 572, col. 2.]

Second appeal against a decree of the District Court, Kurnool, in Appeal Suit No. 31 of 1920, preferred against a decree of the Court of the District Munsif, Markapur, in Original Suit No. 116 of 1919.

Mr. *K. Ramnatha Shenai*, for the Appellant.

Messrs. *Imamuddin* and *Rafuddin*, for the Respondents.

JUDGMENT.

Odgers, J.—The plaintiff brought the suit to establish his right to half share in the properties of one Joram Bi deceased. As to items Nos. 3 to 6 in the plaint schedule, the defence is raised that they originally formed *Khazi inam* lands and that such lands were in fact inalienable and impartible. The Munsif found that these items were the properties of Joram Bi and were liable to partition and gave plaintiff a decree. This was confirmed on appeal by the District Judge. Joram Bi had been in possession for 40 years, and the District Munsif held that first defendant had failed to show that her enjoyment was permissive. He also held that the *Khazi inams* were divided among the several members of the *Khazi* family long long ago with the result that each member or group of members hold separate and defined shares. The District Judge also held that the several branches of the *Khazi* family were enjoying portions of the plaint items as their separate property. I am by no means certain that these findings are not sufficient to dispose of the appeal on the short ground that the *Khazi inam* lands have long ago become disannexed from the office and that the possessors have acquired an absolute right subject to any rights of resumption that Government might have.

The case has, however, been argued before us on the ground that Joram Bi's possession cannot be considered to be adverse as the land in question always appertained to the holder of the office and was resumable by him at any time.

The first case cited for the appellant (first defendant) is *Vidya Varuthi Thirtha Swamigal* v. *Balusami Ayyar* (1). There the possession sought to be declared adverse was continued by a series of leases, each valid for the lifetime of the grantors. The possession was clearly permissive. In *Bhaiaji Thakur* v. *Jharula Das* (2) it was decided that a person not qualified for an hereditary office had not taken possession of it by appropriating a share of the daily offerings to which he had acquired no title. Each such taking was a fresh actionable wrong. There was here no question of immoveable property or of adverse possession. In *Kamalathammal* v. *Krishna Pillai* (3) all that was decided was that the first defendant had not acquired a right to the office by possession of the lands for over twelve years. It was also held that *Gnanasambanda Pandara Sannidhi* v. *Velu Pandaram* (4) had not overruled *Mahomed* v. *Ganapati* (5). Further reference will be made to those cases. In *Idarapalli Dhanushkotirayudu* v. *Venkayala Venkataratnam* (6) it was held that Art. 144 applies to a case of this sort and that a person in adverse possession of lands annexed to the office of Karnam for over the statutory period acquires a prescriptive title against the holder of the office and his successors, following *Neelachalam* v. *Kamarazu* (7) and the Privy Council ruling in *Gnanasambandi Pandara Sannadhi* v. *Velu Pandaram* (4). With regard to the latter case, the High Court in *Velu Pandaram* v. *Gnanasambanda Pandara Sannadhi* (8) had held that plaintiff's right was not barred as that suit was brought within twelve years of the accrual of the right. The Privy Council reversed this decision on the ground that the respondent Velu was only entitled as heir to his father Natraja and the latter's claim was barred as he had alienated to a purchaser whose possession was adverse. In *Mahomed* v. *Ganapathi* (5) it was held that (page 280): "Subject to the Law of Limitation, the successive holders of an office, enjoying for life the property attached to it, are at liberty to question the dispositions made by their predecessors [*Papaya* v. *Ramana* (9), *Jamal Saheb* v. *Murgaya Swami* (10), *Modho Koery* v. *Tekait Ram Chunder Singh* (11)] and it is equally clear that time runs against the successor who challenges his predecessor's disposition not from the date of the disposition, but from the date of the predecessor's death, when only the successor became entitled to possession. Accordingly, Raman Pujari having died so recently as 1885, the plaintiff's suit cannot be barred by limitation.' In this case the plaintiff sought to eject the defendant as holding under an invalid alienation made by plaintiff's predecessor-in-office. In *Neelachalam* v. *Kamarazu* (7) it was held that the Privy Council ruling in *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (4) was applicable to lands alienated by the holder for the time being of the hereditary office of Karnam and, that possession adverse to the holder of the Karnam's office is adverse to his successors. The law thus seems perfectly clear. I must hold that this case falls under the rulings in *Neelachalam* v. *Kamarazu* (7), *Idarapalli Dhanushkottrayudu* v. *Venkayala Venkataratnam* (6) *Gnanasambanda Pandara Sannadhi* v. *Velu Pan-*

(1) 65 Ind. Cas. 161; 44 M. 831; (1921) M. W. N. 449; 41 M. L. J. 346; 3 U. P. L. R. (P. C.). 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 26 C. W. N. 537; 24 Bom. L. R. 629; 20 A. L. J. 497; (1922) A. I. R. (P. C.) 123; 48 I. A. 302 (P. C.).

(2) 24 Ind. Cas. 501; 42 C. 244; 18 C. W. N. 1029; 27 M. L. J. 100; 1 L. W. 549; 16 M. L. T. 210; (1914) M. W. N. 636; 12 A. L. J. 1176; 20 C. L. J. 360; 16 Bom. L. R. 845 (P. C.).

(3) 8 Ind. Cas. 998; 20 M. L. J. 781 at p. 783; 9 M. L. T. 73.

(4) 23 M. 271; 2 Bom. L. R. 597; 4 C. W. N. 329; 27 I. A. 69; 10 M. L. J. 29; 7 Sar. P. C. J. 671; 8 Ind. Dec. (N. S.) 591 (P. C.).

(5) 13 M. 277; 4 Ind. Dec. (N. S.) 905.

(6) 59 Ind Cas. 65; 38 M. L. J. 320; 11 L. W 453.

(7) 14 M. L. J. 438.

(8) 19 M. 243; 6 M. L. J. 39; 6 Ind. Dec. (N. S.) 874.

(9) 7 M. 85; 7 Ind. Jur. 595; 2 Ind. (Dec. (N. S.) 644.

(10) 10 B. 34; 5 Ind. Dec. (N. S.) 406.

(11) 9 C. 411; 11 C. L. R. 508; 4 Ind. Dec. (N. S.) 922.

darim (4). No question of limitation was raised by the pleadings or issues. It has, however, become necessary to consider the law in the light of appellant's contention that the first defendant's possession was permissive as to which the District Munsif found there was no evidence. *Prima facie* possession is adverse. One case remains to be considered In *Idarapilli Dhanushkotirayudu* v. *Venkayala Venkataratnam* (6) a reference is made to *Papaya* v. *Ramana* (9) where the decision in the latter case is said to be to the same effect as the decisions in *Neelachalam* v. *Kamarazu* (7). A little difficulty has been caused partly by the brief nature of the report. In *Papaya* v. *Ramana* (9) the third and fourth defendants leased in 1878 land belonging to the *mirasi* land of a Karnam's office to the father of plaintiff and this land was alleged to have been wrongfully taken possession of by the defendants Nos. 1 and 2. Those defendants pleaded that father of defendants Nos. 3 and 4 had mortgaged the land to them in 1861 and that the mortgage was still in force. The Munsif found that the mortgage-deed dated 1865 was unregistered and lost, not that defendants had acquired a title by adverse possession for twelve years. On appeal it was held that deed of 1865 was not a mortgage and defendant held under the mortgage of 1861 "admitted by them." The High Court held the alienation (of 1861) by the father of the defendants Nos. 3 and 4, though no doubt good for his lifetime, could not bind his successor and that no adverse possession had been acquired against his successors as the suit had been brought within twelve years of their accession to office. There the possession did not begin to be adverse till the accession. In the present case the possession is found to have been adverse for a very long time, 30 years at least. The decision (Exhibit IV) in 1876 can only be applicable in this case as *res judicata* and as such this was not pressed before us. It is obvious that it cannot operate as such. The only point decided was that the plaintiff in that suit was not entitled to a separate share of the lands, fees and etc., belonging to the office of Khazi. It does not assist us to determine the question in this appeal and is, in our opinion, irrelevant. The second appeal fails and must be dismissed with costs.

Hughes, J.—This appeal relates only to items Nos. 3 to 6 of the plaint schedule. These items form a portion of the *Khazi inam*. The members of the *Khazi* family divided the *inam* lands amongst themselves many years ago and since then the members of the family have been in possession of separate portions of the *Khazi inam*. Exhibit III shows that the *inam* was divided half a century before 1861. As the result of this division Akkumeah, husband of Joram Bi, was enjoying items Nos. 3 to 6 and after his death his widow Joram Bi was in possession of them for more than 30 years. Joram Bi died in 1919 without issue and the plaintiff's case is that plaintiff and respondents Nos. 1 and 2 are the heirs but defendants are preventing the plaintiff from getting his share and hence the suit. The defendants do not dispute the right of plaintiff to half a share of the other properties of Joram Bi but they maintain that since the first defendant is the *Khazi*, having been appointed to that office after the death of the previous *Khazi*, the first defendant is alone entitled to items Nos. 3 to 6 as they are *inam* lands and only the person who holds the office of *Khazi* has a right to the lands and *patta* is issued only in his name. First defendant claims that the *inam* lands are inalienable and impartible and he explains the division that admittedly took place by saying that *dayadies* enjoyed some portions of the lands with the consent of the persons who were doing *Khazi* service.

In the present case there is no evidence that the possession of Joram Bi was permissive. Assuming then that *Khazi inam* lands are inalienable and impartible the real question for decision is whether when *inam* lands are held adversely to the office holder for more than twelve years the person in adverse possession acquires a prescriptive title to the lands as against the holder of the office and his successors. The District Judge has found that the items Nos. 3 to 6 became the property of Joram Bi.

The appellant (first defendant) relies upon the Privy Council case, *Venkata*

Jagannadha Sarma v. *Veerabhadrayya* (12) but the only point decided in that case was that when Karnam service *inam* lands have been enfranchised the lands are the separate property of the enfranchise and not subject to any claim for partition by other members of the family. No question relating to adverse possession was considered therein.

The next case quoted by the appellant is the case *Bhaiaji Thakur* v. *Jharula Das* (13) but that is not applicable here, in that case it was decided that a person who adversely appropriated a share of the daily offerings due to *shebait* was not thereby constituted a *shebait* and every occasion of such wrongful taking was a fresh actionable wrong and so there was no limitation. In the same volume at page 827* there is another case *Vusa Chandrakantam* v. *Vusa Subbarayudu* (14). No doubt it is therein stated that even if the plaintiff's alleged joint possession with the office-holders was regarded as adverse, this would not give him a title even to a share of the income of the lands and for that position the learned Judges refer to the case at page 549* quoted *supra*. But they found as a matter of fact that his enjoymant was permissive.

In the Privy Council case *Gnanasambanda Pandra Sannidhi* v. *Velu Pandaram* (4) it was decided that the sale of the lands forming the endowment of a certain religious foundation, by one Nataraja was invalid and Velu, the son of Nataraja, could not claim to have been entitled otherwise than as heir to, and from and through his father, in whose lifetime the title had been extinguished by lapse of time and adverse possession of the defendant, and consequently Velu's suit was barred.

The Privy Council case was followed in *Neelachalam* v. *Kamarazu* (7). In that case it was decided that in regard to lands alienated by the holder for the time being of the hereditary office of Karnam the case of *Velu Pandaram* v. *Gnanasambanda Pandara Sannadhi* (8) is as much applicable as to lands alienated by the holder of the hereditary office of trustee and limitation runs from such date "not only against the alienor but also against his immediate and other successors."

These principles will also apply to the case of alienation by a *Khazi* who holds office hereditarily.

The case on which the respondent chiefly relied is very much in point. It is *Idarapalli Dhanushkotirayudu* v. *Venkayala Venkataratnam* (6). In that case it was held specifically that a person in adverse possession of lands annexed to the office of Karnam, for over the statutory period acquires a prescriptive title to the lands as against the holder of the office and his successors. In arriving at that decision, the learned Judges followed the case in *Neelachalam* v. *Kamarazu* (7) and also *Velu Pandaram's case* (8). But they also referred to the case of *Papaya* v. *Ramana* (9) as being to the same effect. This has occasioned some difficulty because in the case of *Papaya* v. *Ramana* (9) it was laid down that that suit was in time as it had been brought within twelve years from the date when the succession to the office devolved on the plaintiffs. It is argued, therefore, that every successor-in-office has the right to sue from the date he becomes entitled to possession. This argument based on *Papaya* v. *Ramana* (9) was in fact placed before the Privy Council in *Velu Pandaram's case* (8) but the Privy Council did not specifically refer to that case and evidently considered it had no application and the reason is obvious when we examine closely the case of *Papaya* v. *Ramana* (9). That case is quite consistent with the theory that Art. 144 of the Limitation Act applies. The point is that one has to ascertain when the possession became adverse. The possession in the case of the defendants in *Papaya* v. *Ramana* (9) was traced to a usufructuary mortgage and would not, therefore, be adverse to the mortgagor but

(12) 61 Ind. Cas. 667; 44 M. 643; 41 M. L. J. 1; 34 C. L. J. 16; 14 L. W. 59; (1921) M. W. N. 401; 30 M. L. T. 14; 26 C. W. N. 302; (1922) A. I. R. (P. C.) 96.

(13) 24 Ind. Cas. 501; 1 L. W. 549; 18 C. W. N. 1029; 27 M. L. J. 100; 16 M. L. T. 210; (1914) M. W. N. 636; 12 A. L. J. 1176; 20 C. L. J. 360; 16 Bom. L. R. 845; 42 C. 244 (P. C.).

(14) 25 Ind. Cas. 685; 1 L. W. 827; 16 M. L. T. 347; (1914) M. W. N. 745.

*Pages of 1 L. W.—[*Ed.*]

would become adverse to his successor from the date of the death of the mortgagor, in other words from the date when the succession devolved on him. In *Velu Pandaram's case* (8) the possession was adverse *ab initio*.

A similar explanation accounts for the decision in *Mahomed* v. *Ganapati* (5) in which case also the possession originally permissive under a lease, became adverse only when the successor became entitled to question the disposition of his predecessor, that is, at the date of his predecessor's death. The case of *Mahomed* v. *Ganapati* (5) was referred to in *Chidambaram Chetti* v. *Minammal* (15) and was considered to be consistent with the view that adverse possession held during the last office-holder's time bars his successors too. In the same case, reference was made to the decision of the High Court in *Velu Pandaram's case* (8) and it was pointed out that the decision might not be reconcilable with the rule so stated, and the Privy Council later on reversed the decision in *Velu Pandaram's case* (8).

In fact, so long as the alienation is good for the lifetime of the alienor, limitation commences to run as against the successor not from the date of alienation but from the date of alienor's death.

It is otherwise when possession is adverse from the start.

There is only one other case to which reference need be made as it has been relied upon by the appellant and that is the Privy Council case in *Vidya Varuthi Thirtha Swamigal* v. *Balusami Ayyar* (1). But the decision is against him. It is clear, therefore, that a lessee has not adverse possession under Art. 144 during the life of the head of the Mutt who granted the lease and if the lessee's possession is consented to by the succeeding head, that consent can be referable only to a new tenancy created by him and there is no adverse possession until his death.

Applying the principles which appear to be settled by the cases referred to *supra* and specially by *Idarapalli Dhanushakotirayudu* v. *Venkayala Venkataratnam* (6) the present case can be easily disposed of. Joram Bi, of course, was never *Khazi* and did not hold the land by virtue of the *Khazi* office nor did her husband before her. Joram Bi held possession of the land adversely for over 30 years, and the fact that she and her husband were members of the *Khazi* family makes no difference, since only one member of the family could be *Khazi* and, therefore, entitled to the *inam* lands. Since the partition many years ago, the various members have held the various portions allotted to them as separate properties and, therefore, adversely to each other. By this adverse possession Joram Bi acquired title to the land and on her death plaintiff became entitled to half share. I agree with my learned brother that the appeal must, therefore, be dismissed with costs.

V. N. V.

Appeal dismissed.

(15) 23 M. 439; 9 M. L. J. 8; 8 Ind. Dec. (N. S.) 708.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 272 OF 1922.

May 1, 1923.

Present:—Mr. Justice Ryves and Mr. Justice Daniels.

Babu BISHAMBHAR NATH—PLAINTIFF—APPELLANT

versus

MUHAMMAD UBAID ULLAH KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 58 (a) (c)—Construction of document—Sale—Mortgage by way of conditional sale—Intention of parties—Surrounding circumstances—Lapse of time—Burden of proof—Question of law and fact—Oral evidence, admissibility of—Evidence Act (I of 1872), s. 92.

The definition of a mortgage is given in clause (*a*) of section 58 of the Transfer of Property Act, and the subsequent clauses are merely particular cases of this definition. [p. 574, col. 1.]

Before a document can be treated as a mortgage by conditional sale it must first be shown to be a mortgage, that is the property must have been transferred as security for a debt. [p. 573, col. 2.]

The test of whether a document is a sale or a mortgage is the intention of the parties at the time of entering into the transaction. [p. 573, col. 2.]

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In determining the intention of the parties as expressed in the deed the Court must keep two principles in view, first, that the intention of the parties must be gathered from the terms of the deed itself and the surrounding circumstances, oral evidence being excluded by the provisions of section 92 of the Evidence Act; and, secondly, that where a deed is attacked after a long period of years the burden of proving that it is not what it purports to be lies heavily on the person attaching it. [p. 574, col. 1.]

So far as the nature of the contract is to be gathered from the language used in the deed it is a question of construction which is a question of law. So far, however, as it is to be gathered from external facts proved in evidence, it is a question of fact. [p. 575, col. 1.]

Case-law discussed.

A document which was on the face of it a sale-deed contained a condition that if the purchase-money and any arrears of rent which happened to remain due at the time of re-payment were re-paid to the vendee on the last day of *Jeth* sixteen years after the purchase, the vendors would be entitled to get back the property, but it was clearly stipulated that unless payment was made on the day fixed no right of re-purchase would be reserved to the vendors:

Held, that there was nothing in the document to suggest that the parties intended to create a mortgage by way of conditional sale.

Second appeal from a decree of the District Judge, Shahjahanpur, dated the 4th February 1922.

Dr. *S. N. Sen* and Mr. *N. P. Asthana*, for the Appellant.

Mr. *B. E. O'Conor*, Sir *Tej Bahadur Sapru*, Messrs. *P. N. Sapru* and *Iqbal Ahmad*, for the Respondents.

JUDGMENT.—The question for decision in this appeal is whether a deed dated 25th June 1886 executed by Durga Prasad and others in favour of one Qudrat Ullah Khan was an out and out sale or a mortgage by conditional sale. There is a subsidiary question as to whether this issue is *res judicata* between the parties by reason of the decision in Suit No. 124 of 1886. The document was on the face of it a sale-deed with a condition that if the purchase-money and any arrears of rent which happened to remain due at the time of re-payment were re-paid to the vendee on the last day of *Jeth* sixteen years after the purchase, the vendors would be entitled to get back the property. It was clearly stipulated that unless payment was made on this particular date no right of re-purchase was reserved to the vendors.

The question has been argued on the footing that the test of whether the document was sale or mortgage was the intention of the parties at the time of entering into the transaction. This rule was originally laid down by the Privy Council in *Bhagwan Sahai* v. *Bhagwan Din* (1) and was re-affirmed by their Lordships in *Jhanda Singh* v. *Wahid-ud-din* (2).

Dr. Sen in one portion of his very able argument on behalf of the appellant took the position that any deed which professes to be a sale-deed with a condition allowing the vendor to re-purchase came within the definition of a mortgage by conditional sale contained in section 58 (*c*) of the Transfer of Property Act, and must be presumed to be such unless the surrounding circumstances were such as absolutely to exclude the possibility of a mortgage having been intended. This idea is supposed to derive some support from the decision in *Mohindra Man Singh* v. *Maharaj Singh* (3). A reference to section 58 (*c*) is sufficient to show that this is a misreading of the law. A mortgage by conditional sale is there defined as a mortgage in which the mortgagor "ostensibly sells the property on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment (*i.e.*, payment of the mortgage-money) being made the sale shall become void, or on condition that on such payment (again referring back to the payment of the mortgage-money) being made the buyer shall transfer the property to the seller."

The repetition of the terms "payment of the mortgage-money," or "such payment" in each clause of the definition makes it clear that before a document can be a mortgage by conditional sale it must first be a mortgage, *i.e.*, the property must be transferred as security for

(1) 12 A. 387; 17 I. A. 98; 5 Sar. P. C. J. 557; 6 Ind. Dec. (N S.) 992 (P. C.).

(2) 36 Ind. Cas. 38; 38 A. 570; 31 M. L. J. 750; 21 C. W. N. 66; 20 M. L. T. 529; 14 A. L. J. 1189; (1916) 2 M. W. N. 570; 19 Bom. L. R. 1; 5 L. W. 189; 25 C. L. J. 524; 10 Bur. L. T. 131; 43 I. A. 284 (P. C.).

(3) 70 Ind. Cas. 132; 20 A. L. J. 810; (1923) A. I. R. (A.) 48; 45 A. 72.

a debt. The definition of a mortgage is given in clause (*a*) of the section and the subsequent clauses are merely particular cases of this definition. The neglect of this obvious fact has in some cases led to serious confusion. The view suggested by Dr. Sen was rejected by a Full Bench of the Madras High Court in *Muthuvelu Mudaliar* v. *Vythilinga Mudaliar* (4).

In determining the intention of the parties as expressed in the deed two principles have been laid down for the guidance of the Courts. The first is that the intention of the parties must be gathered from terms of the deed itself and the surrounding circumstances. Oral evidence is excluded by section 92 of the Evidence Act. This was laid down by the Privy Council in *Balkishen Das* v. *W.F. Legge* (5). The second is that where a deed is attacked after a long period of years the burden of proving that it is not what it purports to be lies heavily on the person attacking it. This rule was originally laid down by Lord Cranworth in the case of *Alderson* v. *White* (6) and has been followed and approved by the Privy Council both in *Bhagwan Sahai* v. *Bhagwan Din* (1) and in *Jhanda Singh* v. *Wahid-ud-din* (2). In the first of these two cases the document in suit was 30 years old. In the present case it was 32 years old at the time of the institution of the suit, and sixteen years had elapsed from the date fixed for re-purchase before it occurred to any one to treat the document as a mortgage and not as a sale. The present plaintiff is a speculator who has purchased a half share in the property from the original vendors or mortgages in return for financing the litigation.

Now here the document is very clearly expressed to be a sale. The language is not of that technical and obscure kind referred to in the concluding portion of the judgment in *Muhammad Hamid-ud-din* v. *Fakir Chand* (7). The language used is clear beyond all possibility of misconception and the words "sale" "purchaser" "purchase-money," and "property sold" are repeated again and again in the course of the deed.

What then are the circumstances relied on to prove that the transaction was not what it appears to be. Three such circumstances have been mentioned.

1. That at the time of re-purchase the vendors were to pay in addition to the purchase-money any arrears of rent that might at that time be outstanding against the tenants.

2. That one of the parties to the transaction was a Muhammadan.

3. That if the purchaser had been put to loss by having to pay any undisclosed incumbrance on the property or in any similar way, he should be indemnified for this at the time of re-purchase.

The fourth argument that the document must necessarily, or at any rate until the contrary is shown, be treated as a mortgage by reason of the definition contained in section 58 (*c*) of the Transfer of Property Act has already been dealt with.

Neither of the three points relied on by the appellant is at all decisive. As regards the first, if the document was a mortgage and the rents represented the interest payable on the land no doubt this condition would find a place in it. It was, however, equally natural if the transaction was one of re-purchase, as it purports to be, that if the re-purchase was made at a time when the rents for the half year were largely outstanding, the original purchaser who was parting with the property should receive those rents before doing so. The same argument applies to the condition of repayment of loss to which the first purchaser had been put by reason of there being a prior incumbrance or in any other similar way. The purchaser was making a concession in allowing the vendor an opportunity of buying the property back and was entitled to see that he got full value.

One of the parties being a Muhammadan may in a doubtful case lend some addi-

(4) 50 Ind. Cas. 205; 42 M. 407; 9 L. W. 365; 25 M. L. T. 332; (1919) M. W. N. 393; 36 M. L. J. 385.

(5) 22 A. 149; 4 C. W. N. 153; 2 Bom. L. R. 523; 27 I. A. 58; 7 Sar. P.C. J. 601; 9 Ind. Dec. (N. S.) 1130 (P. C.).

(6) (1858) 2 De G. & J. 97 at p. 105; 4 Jur. (N. S.) 125; 6 W. R. 242; 119 R. R. 38; 44 E. R. 924.

(7) 58 Ind. Cas. 717; 42 A. 437; 18 A. L. J. 478; 2 U. P. L. R. (A.) 341.

tional probability in favour of a document being construed as a mortgage, but it does not in any way do away with the rule laid down by the Privy Council that a document is to be construed in accordance with the intention of the parties as evidenced by its terms. It may be remarked here that if the intention of the parties had been to effect a mortgage and the document had been drawn in this particular form solely out of regard to the susceptibilities of the mortgagee one might have expected more regard to be paid to the interests of the alleged mortgagors. There was, for instance, no reason why the right of re-purchase should be limited, as is the case here, to one single date at the expiration of sixteen years from the date of the mortgage.

One further observation falls to be made at this point. So far as the nature of the contract is to be gathered from the language used this is a question of construction which is a question of law. So far, however, as it is to be gathered from external facts proved in evidence it is a question of fact, and the judgment of the Court below is that the intention of the parties was to effect an out and out sale and not a mortgage. If the test is, as has been laid down in *Bapu* v. *Bhavani* (8) and other cases, whether a debt remained outstanding which was to be repaid on redemption of the property, there is nothing in the circumstances relied on by the appellant to establish the existence of such debt. In most of the cases which have been cited on behalf of the appellant such circumstances were apparent. In the recent case of *Mohindra Man Singh* v. *Maharaj Singh* (3) the word "mortgage-money" was used in the deed and was indeed deliberately substituted for the term "sale price" and this the learned Judges pointed out brought the case exactly within the definition in section 58 (*c*) of the Transfer of Property Act. In the Privy Council case of *Balkishen Das* v. *W. F. Legge* (5) it was found that a debt on account of certain factories was consolidated with the principal sum mentioned in the deed and the Bankers were given a security on the property for this amount. This as their Lordships of the Privy Council themselves pointed out in *Jhanda Singh* v. *Wahid-ud-din* (2) was probably the determining factor in the case. In *Muhammad Hamid-ud-din* v. *Fakir Chand* (7) there was a distinct covenant for the payment of interest at 10 annas per month at the time of re-sale and this in itself was quite sufficient to confer on the transaction the character of a mortgage. In the case of *Wajid Ali Khan* v. *Shafkat Husain* (9) the vendor was to get back the property at any time after the expiry of six years when the consideration money was tendered by him. The strongest case on behalf of the appellants is the decision in *Ali Ahmad* v. *Rahmat Ullah* (10). In that case, however, the learned Judges who decided it strongly hinted that the case of *Bhagwan Singh* v. *Bhagwan Din* (1), had been wrongly decided by the Privy Council owing to certain important considerations not having been placed before them. It is quite clear from the decision in *Jhanda Singh* v. *Wahid-ud-din* (2) that the Privy Council have not adopted this view. On the contrary in the later case the remarks in *Bhagwan Din's case* (1) are repeated and reaffirmed.

An argument has been based by the learned Counsel for the appellant on the fact that the date of re-payment was the date of the full moon in the month of *Jeth*, which is the date on which usufructuary mortgages are usually made payable. The reason for this date being chosen is the same in both cases, namely, that it is the time of the year in which there is no crop on the land at which a transfer of possession can be made with the least possible disturbance to the outgoing possessor. It may also be noted that in the case of a usufructuary mortgage the mortgage-money is usually made payable on the full moon of *Jeth* in any year whereas in this case it is limited to one particular year and there is a special covenant that unless payment is made on this date the right of re-purchase shall be lost. It has not been suggested that the price paid under the deed was in any way inadequate to the value of the

(8) 22 B. 245; 11 Ind. Dec. (N. S.) 746.

(9) 7 Ind. Cas. 911; 33 A. 122; 7 A. L. J. 998.
(10) 14 A. 195; A. W. N. (1892) 42; 7 Ind. Dec. (N. S) 495.

property at the time when the sale was effected. On the contrary according to the pleadings it represents sixteen years purchase on the income of the property. It is common ground that the property has since increased very greatly in value, and the appeal to this Court was valued at over Rs. 11,000.

For all these reasons our conclusion is that the document is very clearly expressed to be a sale and that there is nothing either in its terms or in surrounding circumstances to show that it was really a mortgage.

It remains to refer briefly to the question of *res judicata*. It is in evidence that when the document was originally executed the vendors refused to get it registered and it was compulsorily registered at the instance of the purchaser. The vendors also failed to deliver possession to the purchaser and he was compelled to bring a suit (Suit No. 124 of 1886). Copies of the pleadings and judgment in that case are on the record. The plaintiff based his claim very clearly on his proprietary title as purchaser under the sale-deed. The defendants in their written statement did not contest the nature of the deed as drawn. They pleaded, however, that the contract between the parties had been one of usufructuary mortgage, and alleged that the plaintiff had fraudulently altered its terms and got a deed drawn up which did not represent the real contract between the parties. On these pleadings the case went to trial. Two issues were framed. The first was as to whether one particular defendant, *Musammat* Jit Kunwar, had joined in executing the deed. The second was whether the other defendants agreed to a transaction of "*bai mashrut*" or to one of mortgage with possession. The judgment is in Urdu. The words '*bai mashrut*" used in the issue and in the finding literally mean "a conditioned sale". They may refer, as the appellant wishes us to interpret them, to a mortgage by conditional sale. They may also refer to a sale with a condition of re-purchase. It appears to us that they must be interpreted with reference to the pleadings on which the parties went to trial, and on those pleadings there can be no doubt that the contest between the parties was whether the document was as alleged by the plaintiff, a sale-deed with a condition of re-purchase, or whether the true contract between the parties was, as alleged by the defendants, one of possessory mortgage. The finding of this issue was in favour of the plaintiff. It seems to us doubtful, however, whether this finding can operate as *res judicata* in the present suit, because the plaintiff was entitled to recover possession of the property on the basis of his sale-deed on the case of fraud set up by the defendants being rejected, whether the document was an out and out sale or a mortgage by conditional sale. At the same time the pleadings in the case serve to show how the document was understood by the parties at the time. Neither party asserted that the deed actually prepared was a mortgage. The plaintiff sued on it as a sale. The defendants asserted that when a mortgage had been agreed on, the plaintiff had fraudulently caused a sale-deed to be prepared.

For the reasons already given we dismiss this appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

Z. K.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1949 OF 1920.

June 22, 1922.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Chotzner.

MOHESH CHANDRA MISSRA—PLAINTIFF—APPELLANT

versus

Srimati NISTARINI DASSYA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 42—Suit to declare decree fraudulent, maintainability of—Consequential relief—Injunction, prayer for, whether necessary.

To entitle a plaintiff to maintain a suit for declaration under section 42, Specific Relief Act, he must prove that he has a present existing interest, and no cause of action accrues to him until there is some infringement or threatened infringement

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of his right; in other words, the cloud must be cast before he can ask for its removal. He must allege and prove hostility on the part of the defendant, for no Court will move on purely speculative grounds. [p. 578, col. 2; p. 579, col. 1.]

Plaintiff was the sub-lessee of a certain holding. The landlord brought a suit for rent in respect of the holding against a fictitious tenant, obtained a decree and brought the holding to sale. Plaintiff thereupon brought a suit against the landlord and the purchaser for a declaration that the decree and sale were fraudulent and collusive:

Held, that the suit was maintainable under section 42 of the Specific Relief Act and the plaintiff was not bound to sue for an injunction by way of consequential relief. [p. 577, col. 2.]

Case-law discussed.

Appeal against a decree of the District Judge, Bankura, dated the 10th June 1920, reversing that of the Munsif Second Court at Bankura, dated the 24th of January 1920.

Babu *Manmotha Nath Roy*, for the Appellant.

Babu *Hemendra Chandra Sen*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff in a suit for declaratory relief, instituted under section 42 of the Specific Relief Act. The case for the plaintiff is that he holds a tenancy at a rent of Rs. 13 a year in respect of the disputed land under the Biswases and the Deys who hold under the first defendant, and that the first defendant ignored the interest of the Biswases and the Deys as also his own interest in the property and fraudulently instituted a rent suit against the third defendant as if the third defendant was his tenant in respect of the disputed land at a rent of Rs. 13 a year. This suit was decreed *ex parte* on the 15th June 1916 and at the sale which followed the second defendant became the purchaser of the tenancy on the 14th November 1916. On the 20th February 1918 the plaintiff instituted the present suit for declaration that the disputed tenancy was held by him under the Biswases and the Deys and not by the third defendant under the first defendant. He further prayed for a declaration that the decree obtained by the first defendant against the third defendant and the sale in consequence thereof were fraudulent and collusive. The Courts below have concurrently found that the allegations made by the plaintiff are substantiated by the evidence on the record. The District Judge has come to the conclusion that the suit for rent was instituted against an imaginary tenant for recovery of an imaginary debt and that the said decree and the subsequent sale were collusive and fraudulent. But while the Court of first instance held that the present suit was maintainable, the District Judge held that the suit was barred under the provisions of section 42 of the Specific Relief Act. We are consequently called upon to decide, whether upon the facts found the plaintiff is entitled to the declaratory relief he seeks.

There can be no question that the claim for rent, the suit for rent and the sale for arrears of rent were all fraudulent and collusive and that the entire proceedings taken by the first defendant against the third defendant fulfilled the requirements of a collusive and fraudulent proceedings so graphically described by Lord Brougham in the case of *Bandon* v. *Becher* (1) and applied in *Surendra Nath Ghose* v. *Kali Gopal Mozoomdar* (2), *Akhil Prodhan* v. *Manmatha Nath Kar* (3), *Radha Madhab Patkara* v. *Kalpataru Roy* (4), *Rajab Ali* v. *Hedayet Ali* (5). But notwithstanding this the first defendant has strenuously contended that the plaintiff should not have instituted this suit, and, that if he did institute this suit, he should have asked for an injunction by way of consequential relief. He has further urged that as upon the death of the third defendant, the imaginary tenant, as the District Judge described her, her representatives were not brought upon the record, the suit must be deemed not to have been properly constituted and should have been dismissed on that ground alone. We are of opinion that there is no foundation whatever for these contentions.

(1) (1835) 3 Cl. & Fin. 479 at p. 510; 9 Bligh (N. S.) 532; 6 E. R. 1517

(2) 42 Ind. Cas. 431; 26 C. L. J. 333; 22 C. W. N. 367; 45 C. 920.

(3) 22 Ind. Cas. 86; 18 C. L. J. 616.

(4) 16 Ind. Cas. 811; 17 C. L. J. 209.

(5) 29 Ind. Cas. 699; 22 C. L. J. 197; 19 C. W. N. 1151.

MOHESH CHANDRA MISSRA v. NISTARINI DASYA.

Section 42 of the Specific Relief Act provides that any person entitled to any legal character or to any right to any property may institute a suit against any person denying or interested to deny his title to such character or right, and the Court may, in its discretion, make therein a declaration that he is so entitled and the plaintiff need not, in such circumstances ask for any further relief, provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title omits to do so. There can be no question that the plaintiff is a person entitled to a right in the disputed property, namely, he is entitled to the tenancy in respect of the disputed land held on payment of an annual rent of Rs. 13 There is also no question that the first defendant is a person who has denied and whose interest it is to deny the title of the plaintiff to such right. It is, consequently, difficult to appreciate how section 42 is a bar to the suit.

Reliance has been placed on behalf of the respondent upon the judgment of Sir Lawrence Jenkins, C. J., in *Deokali Koer* v. *Kedar Nath* (6) where section 42 was analysed, and it was pointed out that a declaration should be made only where the case falls strictly within the scope of that section. In the present case, as we have just indicated, the facts of this litigation render the suit subject to the operation of section 42, Specific Relief Act. If any authority be needed for this view, reference may by made to the decision in *Gobind Prasad Tewari* v. *Udit Chand Rana* (7). In that case it was urged, as it has been urged here; that as the plaintiff was not a party to the previous suit, he was not bound by the decree made therein and that consequently it was needless for him to seek a declaratary relief. The answer was given by Markby, J., in the following words; "We think the suit will lie. The defendant has asserted a title to land which is altogether inconsistent with that of the plaintiff. He has asserted it in a Court of Justice, and obtained relief upon the strength of it. It is true that the plaintiff is in one sense not affected by those proceedings, because he was not a party to them, but in another way he is, for he could scarcely make any use of his title in the market after such a decision in favour of the defendant. This is a case in which the action of the defendant is itself injurious, and in which the declaration of the Court will be in itself a relief. We see no reason why that relief should not be granted." The decision in *Jamna Prasad* v. *Jagdeo* (8) where the document impeached did not cover the property of the plaintiff is plainly distinguishable.

It has, however, been insistently urged here, on behalf of the first defendant, that the plaintiff need not have been in a hurry to seek the protection of the Court inasmuch as the execution purchaser had not, up to the date of institution of the suit, attempted to take possession of the property. This is clearly no answer to the suit. The same contention was urged in the case of *Harendra Lal Roy Chowdhury* v. *Nawab Salimullah Bahadur* (9). To adopt the language used in that case to the facts of the present litigation, we may say that it has been suggested that the plaintiff need not have rushed into Court and might have waited till his title was challenged. But the plaintiff was not bound to wait till he actually found himself in jeopardy. The allegation of fraud and conspiracy upon which his case rests was dependent, for its proof, mainly upon oral evidence. If he had waited for twelve years, it is not improbable that much of the evidence available might have disappeared. It would obviously have been an act of inexcusable folly on the part of the plaintiff had he risked delay It is perfectly true that to entitle a plaintiff to maintain a suit for declaration under section 42, Specific Relief Act, he must prove that he has a present existing interest, and no cause of action accrues

(6) 15 Ind. Cas. 427; 39 C. 709; 16 C. W. N. 838.
(7) 6 B. L. R. 320; 2 Sup. Vol. 182.
(8) 1 Ind. Cas. 83; 6 A. L. J. 11; 5 M. L. T. 56; A. W. N. (1908) 163.
(9) 7 Ind. Cas. 21; 12 C. L. J. 336.

to him until there is some infringement or threatened infringement of his right, in other words, the cloud must be cast before he can ask for its removal. He must allege and prove hostility on the part of the defendant, for no Court will move on purely speculative grounds. But it can not be suggested here that the defendant is not interested in denying the title of the plaintiff nor can it be contended that the plaintiff had no business to bring him into Court. This view is supported by *Shivram Chintaman* v. *Jivu* (10) and was adopted in the case of *Gandla Pedda Nagamma* v *Sivanappa* (11), where Seshagiri Ayyar, J., observed as follows:—

"The object of the section is really to perpetuate and strengthen the testimony regarding the title of the plaintiff so that adverse attacks upon it may not weaken it. The policy of the Legislature is not only to secure to a wronged party possession of the property taken way from him, but also to see that he is allowed to enjoy that property peacefully. In other words, if a cloud is cast upon his title or legal character, he is entitled to seek the aid of the Court to dispel that cloud. What we have to consider in this case is whether the decree obtained by the first defendant against the second defendant denies the plaintiff's title to his property. It has been said that it is not the function of the Court to enunciate abstract truisms of law. Following that reasoning it may be argued that as the fraudulent decree can in no way affect plaintiff's rights, the Court should not lend itself to the task of declaring what is obviously indisputable. But although the decree may not affect plaintiff's rights *in presenti*, it is evidence which if allowed to stand may result at some future time in disturbing the plaintiff's title. I think that is a sufficient grievance which the Courts should remedy under section 42, Specific Relief Act." A similar view had been taken in the case of *Birj Mohan Singh* v. *The Collector of Allahabad* (12) where Sir Robert Stuart, C. J., held that a suit for declaration was maintainble by the lessor. This conclusion was adopted on the ground that the denial of the title of the lessee might ultimately throw doubt upon the title of the lessor himself; see also *Bromley* v. *Holland* (13), *Kenaram Chuckerbutty* v. *Dinonath Panda* (14).

It has finally been urged that the suit is barred under the proviso to section 42, Specific Relief Act, and that the plaintiff should have asked for an injunction; *Thakur Prosad* v. *Punkal Singh* (15). This was clearly unnecessary. The plaintiff is not bound by the decree. If the purchaser attempts to take possession in execution, he may be successfully stopped, if the plaintiff takes recourse to the procedure prescribed in O. XXI, r. 99, Civil Procedure Code. The plaintiff cannot be defeated in this action on the plea that he should have asked for an injunction, when it is not necessary for him to ask for an injunction to protect his possession.

As a last resort, it has been contended that the suit is not properly constituted, because the representatives of the imaginary tenant are not before the Court. There is manifestly no substance in this contention. The fictitious tenant, set up by the first defendant has never appeared either in the previous litigation or in the present suit. She has taken no interest whatsoever, for the reason that she has no interest in the land. The decree which may be made in this litigation would not bind her or her representatives, and the absence of her representatives cannot entitle the first defendant who has been at the root of this fraudulent procedure to defeat the action of the plaintiff.

The result is that this appeal is allowed and the decree made by the District Judge set aside. It will be declared that the plaintiff is a tenant in respect of the disputed land under the Biswases and the Deys, and that the tenancy in the third defendant set up by the first defendant has no existence whatsoever. It will further be declared that the decree which was obtained by the first defend-

(10) 13 B. 34; 7 Ind. Dec. (N. S.) 23.
(11) 26 Ind. Cas. 232; 38 M. 1162; 16 M. L. T. 310; 27 M. L. J. 520.
(12) 4 A. 102 at p. 112; A. W. N. (1881) 148; 3 Ind. Dec. (N. S.) 710.
(13) (1802) 7 Ves. Jur. 3; 6 R. R. 58; 32 E. R. 2.
(14) 9 W. R. 325.
(15) 8 C. L. J. 485.

ant against the third defendant and the consequent sale were fraudulent and collusive and did not in any way affect the title o the plaintiff. The plaintiff is entitled to his costs in all the Courts as against the first defendant.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

LETTERS PATENT APPEAL NO. 13 OF 1922.

April 23, 1923.

Present:—Sir Walter Salis Schwabe, KT., Chief Justice, Mr. Justice Oldfield and Mr. Justice Ramesam.

SINNAM CHETTY AND ANOTHER—APPELLANTS

versus

G. S. ALAGIRI AIYER AND OTHERS—RESPONDENTS.

Conversion—Property whether passes—Judgment for value of property converted, effect of—Set-off—Insolvency—Proof of claim in insolvency, effect of.

Plaintiff, who was the owner of a ring of the value of Rs. 1,000, lent it to the first defendant. Plaintiff was liable to first defendant on a pronote for Rs. 2,500 and first defendant was liable to plaintiff in a sum of Rs. 2,072-8-0 in respect of another transaction. Plaintiff presented an insolvency petition against first defendant alleging that the latter was indebted to him in all in a sum of Rs. 3,072-8-0 including the value of the ring which first defendant was stated to have refused to return and that after giving credit for Rs. 2,500 payable by the plaintiff there was a sum of Rs. 572-8-0 due by first defendant. Three days after the presentation of the insolvency petition, first defendant pledged the ring with second defendant who took it without any notice of the plaintiff's claim. First defendant was, on plaintiff's petition, adjudicated an insolvent and in the bankruptcy proceedings plaintiff's proof for the debt of Rs. 572-8-0 was admitted. Subsequently plaintiff discovered that the ring was in possession of the second defendant, and sued the latter for its recovery:

Held, (1) that the adjudication of the first defendant as an insolvent must be looked upon as a judgment for the conversion of the ring by failure to deliver it up on demand; [p. 583, col. 1.]

(2) that the title to the ring, however, remained with the plaintiff and did not pass to first defendant; [p. 583, cols. 1 & 2.]

(3) that the plaintiff by alleging that the first defendant owed him Rs. 1,000 as a liquidated amount and setting about half that amount against a debt due from him to the insolvent and then using the balance as a liquidated claim to support his insolvency petition, had definitely elected to abandon all right to the ring in favour of the first defendant and limiting his remedy to proof in insolvency proceedings; [p. 585, col. 1.]

(4) that even if first defendant had no title to the ring on the date of the pledge in favour of second defendant he got one on the date of adjudication on the principle of feeding the estoppel or forwarding the title; [p. 585, cols. 1 & 2.]

(5) that the plaintiff had no title to the ring and the *bona fide* pledge in favour of the second defendant was good and valid. [p. 585, col. 2.]

Whitehorn v. *Davison*, (1911) 1 K. B. 463; 80 L. J. K. B. 425: 104 L. T. 234 and *In re Debtor, Ex parte Petitioning Creditor*, (1907) 97 L. T. 140; 14 Manson 198; 23 T. L. R. 618, relied on.

Per *Schwabe, C. J.*—It is only in respect of liquidated demands that insolvency petitions can be presented by creditors. There is no principle on which a debtor can turn himself into a creditor for the purpose of presenting an insolvency petition by setting off the value of the property unlawfully detained or converted by his creditor against a liquidated claim by the creditor against him and so leave a balance due to him in respect of the dealings between them. [p. 583, col. 1.]

A judgment in conversion does not pass the property to the defendant unless and until it is satisfied. [p. 583, col. 1.]

Brinsmead v. *Harrison*, (1871) 6 C. P. 584; 40 L. J. C. P. 281; 24 L. T. 798; 19 W.R. 956, *In re Gunsburg, Ex parte Trustee*, (1920) 2 K. B. 426; 89 L. J. K. B. 725; (1920) B. & C. R 50; 123 L. T. 353; 64 S. J. 498; 36 T. L. R. 485 and *In re Ware, Ex parte Drake*, (1877) 5 Ch. D. 866; 46 L. J. Bk. 105; 36 L. T. 677; 25 W. R. 641, followed.

Bradley & Cohn Limited v. *Ramsay & Co.*, (1912) 106 L. T. 771; 28 T. L. R. 338, followed.

Nor does mere proof in bankruptcy amount to satisfaction so as to pass the property; and part satisfaction by execution or by receipt of dividend in bankruptcy has no higher legal effect. [p. 584, col. 2.]

In re Ware, Ex parte Drake, (1877) 5 Ch. D. 866; 49 L. J. Bk. 105; 36 L. T. 677; 25 W. R. 641.

But a plaintiff can after judgment elect to look only to his chance of obtaining satisfaction by execution or by proof in bankruptcy and give up his claim to the property. [p. 584, col. 2.]

In re Debtor, Ex parte Petitioning Creditor, (1907) 97 L. T. 140; 14 Manson 198; 23 T. L. R. 618, followed.

Forms of action, detinue and conversion, explained.

Letters Patent Appeal against the judgment of Mr. Justice Krishnan, in A. A. O. No. 418 of 1921, preferred to the High Court against the order of the District Court, Salem, dated the 3rd February 1921, in A. S. No. 172 of

1918, preferred against the decree of the Court of the Principal District Munsif, Salem, in O. S. No. 713 of 1916.

Mr. *T. M. Krishnaswamy Aiyar* (with him Mr. *N. Sivarama Krishna Iyer*) for the Appellants.—The decision of Mr. Justice Venkatasubba Rao is right. The creditor after adjusting against the sum due to my client from him ranked himself as a creditor and but for such adiustment, far from being a creditor entitled to adiudicate the debtor an insolvent he shou'd have been a debtor to the insolvent's estate. Having thus unequivocally wiped off and discharged the debt due to the insolvent's estate by adiusting the value of the ring, he is not now entitled to come forward and say that he has received the value of the ring and is entitled to the property in it.

The decision in *In re Debtor, Ex parte Petitioning Creditor* (1) is directly in point and is entirely in my favour. The property in the cup there was held to have passed to the debtor by the creditor signing judgment for damages instead of the actual cup itself.

Proof in bankruptcy is equivalent to a judgment. Bankruptcy is merely a branch of the law of execution. *In re Ware, Ex parte Drake* (2). See also Buck's Bankruptcy Cases.

In the case of a judgment for recovery of the ring or its value when once the judgment-creditor abandons unequivocally the alternative character of the judgment and ranks himself as a judgment-creditor for value of the ring, he thereby abandons the property in the ring.

A judgment-creditor for ring or its value cannot come into Insolvency Court with a petition to adjudicate the debtor an insolvent without in the first instance abandoning his right to the ring and making himself only a simple money creditor. The question in each case is whether there is an election to the creditor and if so whether the election has been made.

By the presentation of the petition in bankruptcy and by proof of the plaintiff's debt in bankruptcy (which was accepted by the Court) the election is finally made.

Furthermore the plaintiff by his previous conduct is now estopped from contending that the property in the ring did not pass from him. It is not open to the plaintiff to contend that the bankruptcy proceedings which he has brought about was an utter nullity.

Mr. *S. Panchapagesa Sastry*, for the Respondents.—The case of *Brinsmead* v. *Harrison* (3) which is still regarded as good law establishes the position that a judgment in trover or detinue does not pass the property in the goods until satisfaction of the judgment.

Treating the plaintiff's proof in bankruptcy as a judgment for the value of the ring, in the absence of any proof that that debt has been discharged the property in the ring cannot be paid to have passed to the insolvent.

Vide *In re Gunsburg, Ex parte Trustee* (4).

Further proof in bankruptcy does not create an estoppel.

In re Ware, Ex parte Drake (2).

The defendant had no title to the property on the date of the pledge or the adiudication and plaintiffs' title must be held to prevail.

Mr. *T. M. Krishnaswamy Aiyar* in reply.—Even though mere proof in bankruptcy may not create an estoppel the recognition by the Court of the plaintiff as a money creditor in respect of the ring quite like a mere decree for money as in *Bradley & Cohn Limited* v. *Ramsay & Co.* (5) will prevent the plaintiff from claiming the ring.

It is unnecessary to rely for this purpose on the well-known rule as to election in *Scarf* v. *Jardine* (6) and other cases.

(1) (1907) 97 L. T. 140; 14 Manson 198; 23 T. L. R. 618.
(2) (1877) 5 Ch D. 866; 46 L. J. Bk. 105; 36 L. T. 677; 25 W. R. 641.
(3) (1871) 6 C. P. 584; 40 L. J. C. P. 281; 24 L. T. 798; 19 W. R. 956.
(4) (1920) 2 K. B. 426; 89 L. J. K. B. 725; (1920) B. & C. R. 50; 123 L. T. 353; 64 S. J. 498; 36 T. L. R. 485.
(5) (1912) 106 L. T. 771; 28 T. L. R. 388.
(6) (1882) 7 A. C. 350; 51 L. J. Q. B. 612; 47 L. T. 358; 30 W. R. 893.

SINNAM CHETTY v. ALAGIRI AIYER.

JUDGMENT.

Schwabe, C. J.—This suit having been dismissed on the ground that on the facts stated by the plaintiff, there was no cause of action, we must assume for the purpose of this appeal that those facts are correct. On this assumption, the plaintiff was the owner of a ring of the value of Rs. 1,000 and lent it to the 1st defendant. The plaintiff was liable to the 1st defendant on a promissory-note for Rs. 2,500 and the 1st defendant was liable to the plaintiff for Rs. 2,072-8-0 being the 1st defendant's contribution in respect of a joint bond which the plaintiff had discharged. The 1st defendant assigned the promissory-note to one Mikka Pillai who brought an action on it, O. S. No. 21 of 1915, in the Salem District Court against the plaintiff. On the 7th of March 1913 the plaintiff presented an insolvency petition against the 1st defendant. In that petition he alleged that the 1st defendant was indebted to him in Rs. 3,072-8-0 made up of the Rs. 2,072-8-0 and Rs. 1,000, the value of the ring which he alleged the 1st defendant refused to return. He alleged that there was no consideration for the assignment of the promissory-note to Mikka Pillai and that it was a fraud on the creditors and he proposed to set it off against his claim, which would thereby be reduced to Rs. 572-8-0. Three days after the presentation of the petition the 1st defendant pledged the ring with the 2nd defendant, who is now represented by the 5th and 6th defendants, it is said for Rs. 725. The second defendant took it without notice of any claim to it by the plaintiff. In O. S. No. 21 of 1915 the plaintiff set up against Mikka Pillai's claim on the promissory-note the Rs. 2,072, due by the 1st defendant and also Rs. 1,000, the value of the ring, no doubt on the basis that Mikka Pillai was not a holder in due course of the note.

The Insolvency petition was heard, the 1st defendant not appearing, and he was on the 2nd of December 1915 adjudicated insolvent; the District Judge holding that the assignment of the promissory-note to Mikka Pillai was fraudulent and also holding, though he gave no reasons, that the plaintiff was entitled to Rs. 1,000 in respect of his ring with the result that he became a creditor of the insolvent for Rs. 572-8-0 instead of being his debtor in Rs. 427-8-0, the difference against him in respect of the two other cross-claims for Rs. 2,500 and Rs. 2,072-8-0.

In due course, the plaintiff put in his proof for Rs. 572-8-0 and it has been admitted. Subsequently he alleges that he discovered that the ring was in possession of the 2nd defendant and brings this suit for its recovery. Owing to certain criminal proceedings the ring is in fact in the custody of the Magistrate's Court at Attur, but for the purpose of this suit it must be treated as still in the possession of the pledgee, the 2nd defendant. The 2nd defendant contends that the plaintiff has definitely elected to treat the ring as the property of the 1st defendant, first by his petition in insolvency and subsequent proof whereby he has treated the value of it as a debt due to him and used part of it as a set-off against the balance of the insolvent's claim against him, and on the other part has filed his insolvency petition, and that the Court by allowing the petition and subsequently admitting the proof has accepted his contention, and that this involves a decision that the property in the ring has passed to the 1st defendant from which it follows that the plaintiff has no longer any claim to it. Secondly reliance was placed on the plaintiff having in the suit by Mikka Pillai used the Rs. 1,000 or part of it, as a debt due from the 1st defendant and, therefore, available for him as an answer to Mikka Pillai's claim on the promissory-note. I think there is nothing in the latter contention. Apparently Mikka Pillai had no claim at all, and no such set-off has in fact been allowed against him, it being unnecessary to consider the question in view of the fact that the negotiation to Mikka Pillai has been held to be fraudulent. We have not got the full facts as to this before us. But I assume this to be the position from the fact that the plaintiff has only been allowed to prove on the basis that he is indebted on the promissory-note to the 1st defendant and not to

Mikka Pillai. But the use that the plaintiff has made of his right against the 1st defendant in respect of the ring in the insolvency petition stands on a different footing and gives rise to a difficult question in respect of which there is little authority.

The District Munsif has held that the plaintiff has lost his title to the ring and the District Judge has held to the contrary; and on appeal Krishnan, J., agreed with the District Judge and Venkatasubba Rao, J., with the District Munsif.

The matter is not rendered more easy by the fact that in my judgment the first defendant ought not to have been adjudicated on this petition. I know of no principle on which a debtor can turn himself into a creditor for the purpose of presenting an insolvency petition, by setting off the value of property unlawfully detained or converted by another, against a liquidated claim by that other against him, and so leave a balance due to him in respect of the dealings between them. For, it must be remembered that it is only in respect of liquidated demands that insolvency petitions can be presented. But he has been allowed to do so in this case and we must deal with it accordingly. The plaintiff cannot by this apparently irregular order of adjudication be in a better position than he would have been, if he had recovered judgment for Rs. 1,000, damages for conversion of the ring, and in my judgment, we must look upon the adjudication as equivalent to such a judgment for the conversion of his ring, by failure to deliver it up on demand, and we must look upon that judgment as satisfied to the extent of Rs. 427-8-0, by being used to that extent, to extinguish the balance which would otherwise be due from the plaintiff to the first defendant, for the balance of this claim for Rs. 1,000. The plaintiff has attempted to obtain satisfaction by proof in the insolvency; but so far has received nothing by way of dividend in respect thereof.

The question then arises whether a judgment in conversion passes the property to the defendant, unless and until it is satisfied. I think not. The leading case on the subject is *Brinsmead* v. *Harrison* (3). In that case there had been an action for conversion and detention of a piano which resulted in a money judgment for an amount, presumably the value of the piano, and the judgment being unsatisfied, a second suit was brought in detinue, to recover the piano from another person in whose possession it was. The defendant set up that by the judgment in the former suit the property in the piano passed to the defendant in that suit and that, therefore, the plaintiff could not sue. But the Court of Common Pleas held that the property did not pass under such a judgment without satisfaction, the judgment being treated as an assessment of the value and the satisfaction of the judgment as the payment of the price. This case has always been treated as good law. It is worth calling attention to the fact that there are two distinct forms of action which could be brought against a defendant who has or should have moveable property of the plaintiff in his possession. They are known as detinue and conversion, the latter being in the old law also called trover. In the former the suit is primarily for the return of the chattel, to which is usually added a claim for its value in default of its return. The decree in such an action takes two alternative forms with the same effect. One is for the return to the plaintiff within a limited time of the chattel or its value together with damages if any for its detention, and the other is for a sum, being the value plus the damages for its detention to be reduced as to the damages, only if the chattel is returned in a certain time. In either case, the option to return, or to pay, is in the defendant, but the Court may in proper cases order the specific delivery of the chattel which the defendant must comply with, on pain of contempt, or it may order the issue of a writ of delivery to the Sheriff, directing him to seize the chattel. The action for conversion or trover is for damages only and is as a rule for the value of the chattel and is based on an allegation that the defendant has converted the chattel to his own use by some wrongful dealing with it; one instance of which is the refusal to deliver up on demand, and on a

decree of this kind the defendant has no option to deliver up the chattel nor has the plaintiff a right to demand it.

I have called attention to this distinction because it has been suggested that the rule in *Brinsmead* v. *Harrison* (3) applies only to actions in detinue and not to actions in conversion. I confess that to me the suggestion is attractive, but in my judgment the weight of authority is against it. *Brinsmead* v. *Harrison* (3) itself is a clear authority to the contrary. In *In re Gunsburg, Ex parte Trustee* (4) Sterndale, M. R., says "The order he has obtained amounts to no more than judgment in detinue or trover for the value of the goods and it has not been satisfied. It has been clear law since the case of *Brinsmead* v. *Harrison* (3) that such a judgment unsatisfied does not operate to transfer the property to the person against whom judgment was obtained, or prevent the true owner from suing a third person, not the original wrongdoer, for the return of the plaintiff's goods which that third person continues to detain from him. That was the exact point determined upon the new assignment in *Brinsmead* v. *Harrison* (3) and that decision is conclusive against the appellants on this point." It is true that Warrington, L. J., at page 447 says: "I think it is settled that a judgment for the recovery of goods or their value or for the value of the goods to be reduced if the goods are delivered, does not of itself transfer the property to the defendant, but only if and when it is satisfied by actual payment of the value: *Brinsmead* v. *Harrison* (3)," thus confining his judgment to cases of detinue. In *In re Ware, Ex parte Drake* (2) which is not unlike the present case, in which *Brinsmead* v. *Harrison* (3) was followed, it was unnecessary to discuss this point as the previous action had been in detinue.

Some doubt, however, is thrown on the matter by *Bradley & Cohn Limited* v. *Ramsay & Co.* (5). In that case Phillimore J., held that the principle of *Brinsmead* v. *Harrison* (3) applied only to cases of detinue, and in the Court of Appeal Kennedy, L. J., with whose judgment Cozens-Hardy, M. R., agreed says that he agreed with Phillimore, J. on this point. But he adds that the earlier judgment obtained was for the price of the goods in question and that, therefore, the judgment obtained was different from the judgment in *Brinsmead* v. *Harrison* (3) and prevented the plaintiff suing again. But Pudlejy, L. J., points out that the judgment in that case was not a judgment for damages, but for the price of the goods as on a sale, and he so explains the judgment of Phillimore, J. The defendant in the earlier case had at one time, at any rate, had the property from the plaintiff on sale or return, and I think that the decision in that case can be explained, without in any way cutting down the effect of the judgment in *Brinsmead* v. *Harrison* (3) on the ground that the earlier judgment was based on the election by the plaintiff to treat a contract of sale or return of the goods, which had in fact been determined, as still alive and resulting in a sale; for the judgment was for the price and not for damages, as is quite clear from the fact that the value as opposed to the price, which would be the measure of damages for conversion was not considered. It may be that if this point ever comes before the highest Tribunal, the operation of the principle of *Brinsmead* v. *Harrison* (3) will be confined to the judgment in detinue. But in the present state of authorities I do not think we can so limit it.

Mere proof in bankruptcy does not amount to satisfaction, so as to pass the property. See *In re Ware, Ex parte Drake* (2). Nor does it seem, would part satisfaction by execution or by receipt of dividend in bankruptcy have that effect.

It is, however, clear from *In re Ware, Ex parte Drake* (2) that the plaintiff can after judgment elect to look only to his chance of obtaining satisfaction by execution or by proof and give up his claim to the property. In *In re Debtor, Ex parte Petitioning Creditor* (1) the plaintiff obtained judgment for the return of a cup forthwith, or for payment of £ 50, its value and for £ 5 5-0 for damages and for costs. The cup not being returned, he signed judgment for the full amount and issued a bankruptcy notice for non-compliance with that judgment. After that date the debtor sent the cup to the plaintiff and on the hearing of the

petition claimed that there was no longer a good petitioning creditor's debt as it ought to be treated as reduced by the value of the cup. The Court ordered adjudication and Bigham, J., said: "It has been contended that the property in the cup is still in the petitioning creditor. I think, however, that by issuing the bankruptcy notice and presenting the bankruptcy petition the creditor finally elected to abandon his property in the cup to the debtor, and that it now vests in him and will form part of his estate on his bankruptcy.' This was not necessary for the decision of the case because the debtor failed to exercise the option that was given of returning the cup forthwith with the result that the judgment became a money judgment and he having lost his option, was liable for the full amount of the judgment and could properly be adjudicated for non-compliance, and I am not satisfied that if the plaintiff had subsequently found the cup in the hands of a third party, he could not, on the principle of *Brinsmead* v. *Harrison* (3), have sued that person for it. But, however that may be, I think there is much more here. The plaintiff when he petitioned in insolvency had no judgment at all, nor anything equivalent to one. But what he did was to allege that the 1st defendant owed him Rs. 1,000 as a liquidated amount, and set off about half of that amount against a debt due from him to the insolvent and then used the balance as a liquidated amount to support his insolvency petition; and in my judgment, that amounts to a definite election to abandon all right to the ring, in favour of the 1st defendant and to look only to the advantage of getting rid of the balance of his own debt to the 1st defendant, and the hope by the pressure of insolvency proceedings of getting payment of the balance from the 1st defendant. It follows that at the date of the pledge to the 2nd defendant the 1st defendant had a good title to the ring and the plaintiff had none, or that at least on the date of the adjudication the plaintiff gave up all further interests in the ring and that if the 1st defendant had no title at the date of the pledge, he got one on the date of adjudication on the principle of feeding the title as it is called in *Whitehorn* v. *Davison* (7), or forwarding the title as it is called by Phillimore, J., in *In re Debtor, Ex parte Petitioning Creditor* (1), that principle was if there is a sale or pledge to a *bona fide* purchaser or pledgee for value by one who has no title, if that person subsequently obtains a title, it enures to the benefit of the purchaser or pledgee.

On these grounds I think that the judgment of the District Munsif and Venkatasubba Rao, J., are correct and that the appeal must be allowed with costs throughout.

Oldfield, J.—I agree.

Ramesam, J.—I agree.

Appeal allowed.

V. N. V.

(7) (1911) 1 K. B. 463; 80 L. J. K. B. 425; 104 L. T. 234.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 55 OF 1923.

May 21, 1923.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Martineau.

RAM SINGH—DECREE-HOLDER—APPELLANT

versus

WARYAM SINGH—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 2 (11)—Legal representative, who is—Manager of shrine—Successor, whether legal representative—Decree against manager personally, whether can be executed against successor—Letters Patent Appeal—Point not raised before Single Judge, whether can be taken.

The expression legal representative, as defined in section 2 (11) of the Civil Procedure Code, means a person who in law represents the estate of a deceased person, and includes any person, who intermeddles with the estate of the deceased and, where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued. [p. 586, col. 1.]

The interest of the manager of a shrine in the shrine and the property attached to it comes to an end on his death, and a person who is appointed to succeed him in the management

of the property cannot be said to be his legal representative. Therefore, a decree obtained against the former in his personal capacity cannot be executed against the latter. [p. 586, col. 2.]

A point not taken before the Judge in Chambers cannot be agitated in an appeal under the Letters Patent against his decision. [p. 586, col. 2.]

Letters Patent Appeal against an order of Mr. Justice Campbell passed in Civil Appeal No. 1170 of 1922, on the 11th January 1923, reversing that of the Additional District Judge, Ferozepore, dated the 25th January 1922.

Bakhshi *Tek Chand*, Mr. *Manohar Lal*, Lala *Kanshi Ram* and Bawa *Kahan Singh*, for the Appellant.

Dr. *Nand Lal*, for the Respondent.

JUDGMENT.—On the 20th November 1916 the appellant, Ram Singh, brought an action against one Gurmukh Singh on the allegation that the said Gurmukh Singh, whom he had appointed to manage the shrine called Hareke Kalan Dera and the property attached to that shrine, had been guilty of mismanagement; and he accordingly asked for a decree for the removal of the defendant from the management of the shrine and for possession of the property attached to it. On the 24th of December 1919 the Subordinate Judge granted a decree in accordance with the prayer contained in the plaint; but it appears that Gurmukh Singh had died about six months before the date of that decree. In view, however, of r. 6, of O. XXII of the Civil Procedure Code, the Court considered it unnecessary to bring his legal representative on the record before pronouncing the judgment.

The decree-holder now seeks to execute the decree against one Waryam Singh on the ground that the latter is the legal representative of the deceased judgment-debtor. Now, the expression legal representative, as defined in section 2 (11) of the Civil Procedure Code, means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and, where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued. It is conceded that Waryam Singh does not in law represent the estate of the deceased Gurmukh Singh; but it is contended that he must be deemed to be the legal representative of the deceased,

(1) because he has intermeddled with the estate of the deceased, and

(2) because Gurmukh Singh was sued in a representative capacity and his estate has devolved on Waryam Singh.

Now, it is true that Waryam Singh is in *de facto* possession of the shrine and the property appertaining thereto, but he claims that he has been appointed *Mahant* of the shrine by the *Bhek*. Whether this claim is well-founded or not, there can be no doubt that he has not intermeddled with the estate of Gurmukh Singh. Whatever interest Gurmukh Singh possessed in the shrine and the property attached to it came to an end on his death, and the shrine with its property cannot by any stretch of argument be deemed to be the estate of Gurmukh Singh. Waryam Singh may be a trespasser, but he has not intermeddled with any estate belonging to the deceased.

Nor are we prepared to hold that Gurmukh Singh was sued in a representative character. A perusal of the plaint makes it perfectly clear that Gurmukh Singh was described therein as the manager of the *Dera* and its property, and that the acts complained of were done by him in his personal capacity and not as the representative of the congregation. As defendant to such a suit Gurmukh Singh represented no one but himself.

On neither of the grounds urged by the learned Counsel for the appellant can Waryam Singh be treated as the legal representative of the deceased Gurmukh Singh. It is, however, contended that as the decree directed, *inter alia*, the delivery of certain boxes containing documents belonging to the appellant, the defendant, Waryam Singh, must be regarded as an intermeddler with the estate of the deceased in so far as these boxes are concerned. This point was not raised before the Single Judge, and cannot, therefore, be agitated in an appeal under the Letters Patent.

For the aforesaid reasons we concur in the conclusion of Mr. Justice Campbell and dismiss the appeal with costs.

Z. K. — *Appeal dismissed.*

JAGESHWAR KUER *v.* TILAKDHARI SINGH.

PATNA HIGH COURT.

MISCELLANEOUS APPEAL NO. 243 OF 1922.

May 21, 1923.

Present :—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Foster.

Musammat JAGESHWAR KUER—PLAINTIFF—APPELLANT

versus

TILAKDHARI SINGH—DEFENDANT—RESPONDENT.

Chota Nagpur Tenancy Act (V I B. C. of 1908), *s.* 139—*Civil Procedure Code (Act V of* 1908), *O. V I I, r.* 10—*Jurisdiction of Civil and Revenue Courts —Ejectment of tenant, suit for, whether cognizable by Civil Courts—Ejectment of trespasser, suit for—Defendant held to be tenant—Procedure—Return of plaint—Dismissal of suit.*

Under section 139 of the Chota Nagpur Tenancy Act a suit to eject a tenant of agricultural land is not cognizable by a Civil Court. [p. 588, col. 1.]

Where in a suit for ejectment filed in a Civil Court, which is based on the allegation that the defendants are trespassers, the Court finds that the defendants are not trespassers but non-occupancy *raiyats* the proper procedure is not to return the plaint for presentation to the proper Court but to dismiss the suit altogether, as the allegation on which it is based has not been upheld. [p. 588, col. 2.]

Miscellaneous appeal from an order of the Subordinate Judge, Ranchi, dated the 16th September 1922, reversing that of the Munsif, Palamau, dated the 10th March 1921.

Messrs. *Balkuntha Nath Mitter* and *Ram Prasad*, for the Appellant.

Messrs. *Lachmi Narayan Sinha* and *Devaki Prasad Sinha*, for the Respondent.

JUDGMENT.

Miller, C. J.—The only question for determination in this appeal is whether the learned Subordinate Judge was right upon the facts found in the case in arriving at the conclusion that the Munsif had no jurisdiction to hear and determine the suit.

The suit was instituted by the plaintiffs as proprietors against the defendants as tenants or rather as the persons who had been in possession of the land as tenants under a three years' lease and whose lease had expired, to eject them from the land. Other defendants who it was alleged had been put in by the first defendant as their tenants were also made parties but they disclaimed all interest in the property and they need not, therefore, be any longer considered. The case put forward by the plaintiffs was that the defendants' lease having expired they were trespassers and, therefore, could be ejected.

Various defences were raised and amongst others the defendants contended that they had been in occupation of this land many years before the lease and were in fact occupancy *raiyats*. The plaintiffs on the other hand contended that their right under the lease was merely that of tenure-holders and that they had no *raiyati* right at all.

The learned Munsif decided in favour of the plaintiffs. He came to the conclusion that the evidence of the defendants as to occupation of the land before the lease in question could not be accepted, that they had in fact been cultivating some of this land before that period under what is known as an *utakar* lease which gave them no rights of occupancy and that the land granted under the lease of three years, which had expired, could not be identified with the land of which the defendants had previously been in possession.

When the case came before the learned Subordinate Judge on appeal, although he agreed with the facts as found by the Munsif as to what had previously taken place, on considering the terms of the lease under which the defendants had been admittedly in possession for three years and somewhat longer period to the institution of the suit, was of opinion that the defendants' rights, under the lease, were the rights of a *raiyat*, that is to say the right of taking the land into their own cultivation and not the rights of a tenure-holder or *thikadar* granted for the purpose of putting others in possession of the land in order to cultivate it. He refers to the terms of the lease and if his reference is accurate as one must presume it is, because the lease has not been produced in this Court so as to challenge it, then there can be no doubt that the learned Judge was right in coming to the conclusion that the interest of the defendants was that of *raiyats*, and although they had acquired no occupancy title they were in fact non-occupancy

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raiyats On reference to the provisions of the Chota Nagpur Tenancy Act it appeared to the learned Subordinate Judge that a suit to eject a tenant of agricultural land or to cancel any lease of agricultural land was not cognizable by the Civil Court because under section 139 of the Chota Nagpur Tenancy Act it is provided, *inter alia*, that suits of the nature which I have just mentioned :

"Shall be cognizable by the Deputy Commissioner, and shall be instituted and tried or heard under the provisions of this Act, and shall not be cognizable in any other Court, except as otherwise provided in this Act."

The Act further provides machinery for trying cases of that sort before the Deputy Commissioner with certain powers of appeal to his superior officer. Moreover the grounds upon which a non-occupancy *raiyat* shall be liable to ejectment are set out in section 41 and other places in the Act. A special procedure is provided for trying cases of that sort and it is only by the Tribunals, prescribed in the Act that such a suit can be tried. Having arrived at that conclusion, as the learned Sudordinate Judge did, it seems to me that he was bound to dismiss the suit. The suit as framed, was one to eject terspassers, but on the facts found the defendants were not trespassers but non-occupancy *raiyats*. As no suit to eject non-occupancy *raiyats* could be tried in the Civil Court the question of the plaintiffs' rights against them could not be determined in the present suit. The learned Judge should have contended himself with dismissing the suit but he ordered the plaint to be returned for presentation in the proper Court. This could not be done as the suit was not framed as one for the ejectment of *raiyats*. It was nevertheless rightly dismissed and in that respect his decree should be affirmed. Subject to this modification of the Sudordinate Judge's order the appeal is dismissed with costs to the respondents who have appeared.

Foster, J.—I agree.

Order modified.

Z. K.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND APPEAL No. 1909 OF 1921.

Feburary 9, 1922.

Present:—Mr. Justice LeRossignol.

THI RAJ AND ANOTHER—DEFENDANTS —APPELLANTS

versus

KHEAUSI AND OTHERS—PLAINTIFFS AND *Musammat* RAMI—DEFENDANT—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 44—Minors, suit against—Compromise by guardian ad litem—Suit by minor to recover property—Limitation.

Where a suit is compromised on behalf of a minor by his guardian *ad litem* with the sanction of the Court, a suit by the minor to recover the property effected by the compromise must be brought within three years of his attaining majority. The minor cannot sue to recover the property by ignoring the compromise altogether.

Miscellaneous second appeal from an order of the District Judge, Hissar, dated the 16th July 1921, reversing that of the Munsif, Second Class, Hissar, dated the 8th December 1920.

Mr. *Nihal Chand Mehra*, for the Appellants.

Lala *Jagan Nath*, for the Respondents.

JUDGMENT.—In the course of litigation between the parties in 1910, a compromise was arrived at and a decree issued upon the compromise.

At that time the plaintiffs were minors and were represented by their mother, the compromise was scrutinized by the Court which found it beneficial to the minors and gave leave to the guardian. In consequence of that compromise and decree, the present defendants paid a sum of money and were granted occupancy rights in the area now in dispute.

The present suit is brought by the *quondam* minors for possession of that area, which they alleged was alienated by their mother without necessity.

They ignored the decree of the Revenue Court in 1910.

The First Court found that the suit was time-barred as the plaintiffs had not sued within three years of attaining majority, but the District Judge has disagreed and holds that the decree of 1910 can be ignored and finds that the limitation for the suit is 12 years.

SANT PRASAD SINGH *v.* SHEODUT SINGH.

He drawsa distinction between a decree on adjudication and a decrec by consent which I do not follow and refers to certain remarks in *Sant Kumar* v. *Deo Saran* (1) which divorced from the facts of that case quite different from those of this case robbed it of their value.

I do not agree with the learned District Judge that the decree of 1910 can be ignored till it is set aside, it is binding on the plaintiffs and their suit to set it aside and so regain possession of the area in suit is barred by time.

I accept the appeal and dissmiss the suit with costs throughout.

Z. K. *Appeal accepted.*

(1) 8 A. 365; A. W. N. (1886) 129; 5 Ind. Dec. (N. S.) 135.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 149 OF 1922.

May 7, 1923.

Present:—Mr. Justice Das and Mr. Justice Kulwant Sahay.

SANT PRASAD SINGH—DECREE-HOLDER—APPELLANT

versus

SHEODUT SINGH—JUDGMENT-DEBTOR—RESPONDENT.

Provincial Insolvency Act (V of 1920), ss. 2 (1) (d), 28, 47—Receiver, suit against—Leave of Court whether necessary—Secured creditor, position of—Hindu Law—Joint family—Co-parcener, interest of, whether passess to Receiver—Question of title—Insolvency Court, duty of.

A Receiver in insolvency proceedings is not in the same position as a Receiver in a suit. His position is that of an assignee in bankruptcy, and it is not necessary for a party to obtain the leave of the Court to proceed against a Receiver appointed under the provisions of the Provincial Insolvency Act. [p. 605, col. 2; p. 606, col. 1.]

Amrita Lal Ghose v. *Narain Chandra Chakrabarti*, 53 Ind. Cas. 973; 30 C. L. J. 515, relied on.

In insolvency proceedings a secured creditor stands on a different footing from that which is ordinarily occupied by unsecured creditors. [p. 590, col. 1.]

A secured creditor may do one of three things: he may enforce his security and prove for the balance that may be due to him; or he may relinquish his security for the general body of creditors and prove for the whole debt that may be due to him, or he may value his security and receive a dividened for the balance that may be due to him, subject to the right of the Court to redeem the security. He may also ignore the Insolvency Court altogether, in which case he must be content only with his security, and will be debarred from claiming any dividend, if his security should prove to be insufficient. [p. 590, col. 2; p. 591, col. 1.]

A member of a joint *Mitakshara* family has no interest in the family property which is capable of passing to a Receiver upon insolvency. [p. 591, col. 1.]

Sahu Ram Chandra v. *Bhup Singh*, 39 Ind. Cas. 280; 39 A. 437; 44 I. A. 126; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L.R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213 (P. C.), followed.

It is always desirable that a question of paramount title raised in insolvency proceedings should be decided by the Court and not by the Receiver. [p. 592, col. 1.]

Appeal from an order of the District Judge, Saran, dated the 4th April 1922.

Messrs. *Lakshmi Kant Jha* and *Har Narayan Prasad*, for the Appellant.

Messrs. *Nirsu Narain Sinha* and *Raghunandan Prasad*, for the Respondent.

JUDGMENT.

Das, J.—The parties have entirely misunderstood the provisions of the Provincial Insolvency Act, 1920, and the result is that there has been a serious failure of justice in this case.

The appellant obtained a mortgage decree against Shew Dutt Singh on the 19th February 1917. Sometime in 1918 Shew Dutt Singh filed his schedule in insolvency and, on the 7th January 1919 a Receiver was appointed under the provisions of the Provincial Insolvency Act to take charge of the properties of the insolvent. Having obtained the mortgage decree, the appellant caused the mortgaged properties to be sold; but on the objection of the Receiver the sale was set aside. It appears that the appellant did not make the Receiver a party to the execution proceedings; and the result was that the sale was properly set aside.

On the 24th January 1921 the appellant filed a petition in the Insolvency Court. He stated in his petition that he desired to have the properties sold and he asked for permission of the Court to add the Receiver as a party to the execution proceedings. In my opinion the appellant entirely misconceived his remedy. A Receiver, in insolvency proceedings, is not in the same position as a Receiver in a suit. His position is that

of an assignee in bankruptcy, and it is well settled that it is not necessary for a party to obtain the leave of the Court to proceed against a Receiver appointed under the provisions of the Provincial Insolvency Act of 1920 [see *Amrita Lal Ghose* v. *Narain Chandra Chakrabarti* (1)].

As I have stated the appellant applied for leave to continue the execution proceedings against the Receiver. Thereupon the learned District Judge called upon the Receiver to appear and to show cause why the execution proceedings should not be continued as against him. The Receiver appeared and objected to the execution proceedings. On the 22nd of April 1922 the learned District Judge passed an order directing the Receiver to take possession immediately of the property of the insolvent and to have it sold for the benefit of the creditors, and he directed that the appellant should be given priority in the payment of the debts. In my opinion the learned Judge was not right in passing the order which he did pass. It is well established that a secured creditor stands on a different footing from that which is ordinarily occupied by unsecured creditors. The position of a secured creditor is dealt with in section 28, paragraph (6), and section 47 of the Provincial Insolvency Act. Section 28 provides that on the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court, or in a Receiver, and shall become divisible among the creditors, and that thereafter, except as provided by the Act, no creditor to whom the insolvent is indebted in respect of any debt proveable under the Act shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceedings, except with the leave of the Court and on such terms as the Court may impose. Paragraph (6) provides as follows:

"(6) Nothing in this section shall affect the power of any secured creditor to realise or otherwise deal with his security, in the same manner as he would have been entitled to realise or deal with it if this section had not been passed."

Paragraph (6) is very emphatic in providing that the provisions of the Provincial Insolvency Act should not in the least touch a secured creditor who is entitled to realize or deal with the security in any way he chooses unhampered by the provisions of the Provincial Insolvency Act. Section 47 provides as follows:

(1) "Where a secured creditor realises his security, he may prove for the balance due to him, after deducting the net amount realised.

(2) Where a secured creditor relinquishes his security for the general benefit of the creditors, he may prove for his whole debt.

(3) Where a secured creditor does not either realise or relinquish his security, he shall, before being entitled to have his debt entered in the schedule, state in his proof the particulars of his security, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed.

(4) Where a security is so valued, the Court may at any time before realisation redeem it on payment to the creditor of the assessed value.

(5) Where a creditor, after having valued his security, subsequently realises it, the net amount realised shall be substituted for the amount of any valuation previously made by the creditor, and shall be treated in all respects as an amended valuation made by the creditor.

(6) Where a secured creditor does not comply with the provisions of this section he shall be excluded from all share in any dividend."

Speaking broadly, a secured creditor may do one of three things: he may enforce his security and prove for the balance that may be due to him, or he may relinquish his security for the general body of creditors and prove for the whole debt that may be due to him, or he may value his security and receive a dividend for the balance that may be due to him, subject to the right of the Court to redeem the security. He may also ignore the Insolvency Court altogether,

(1) 53 Ind. Cas. 973; 30 C. L. J. 515.

in which case he must be content only with his security, and will be debarred from claiming any dividend, if his security should prove to be insufficient.

Now, in the proceedings which are before us, it does not appear that the appellant elected at any time to relinquish his security for the general body of the creditors. That being so, the learned District Judge had no jurisdiction to direct that the property should be sold and that Sant Prasad Singh should merely be given priority in the payment of the debts. It is of course open to the appellant to consent to the property being sold in the insolvency proceedings, but we do not find that the appellant, at any time, consented to the properties being sold by the Insolvency Court, or that he surrendered his security in favour of the general body of creditors. In my opinion the order of the learned Judge, dated the 22nd April 1922, in so far as he directed the Receiver to take possession of the mortgaged properties and to sell the mortgaged properties, is wholly erroneous.

But the difficulty does not end here. On the 7th of September 1921 *Musammat* Anupa Kuer, the wife of the insolvent, on behalf of her minor children, filed an objection, the object of which was to have three-fourths share of the properties wholly exonerated from any liability. She alleged in her petition that her husband was a man of immoral character and was addicted to every sort of vice and that the money borrowed by him was not for the benefit of the joint family, and that the shares of the minors had not vested in the Receiver and could not be sold by the Receiver. Stopping here for a moment, it is necessary to point out that if the position taken up by the infants be at all right then nothing at all has vested in the Receiver. Under the Provincial Insolvency Act property is defined to inculde any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit. Section 28 of the Act provides that on the making of an order of adjudication the whole of the property of the insolvent, that is to say, property as defined in the Act shall vest in the Court or in a Receiver as provided in the Act and shall become divisible amongst the creditors. The question then arises, did the insolvent have any property at all which could vest in the Receiver, assuming that the infants are right, that the family was a joint *Mitakshara* family. If the minors are right in their contention, there was nothing in the possession of the insolvent over which, or the profits of which, he had a disposing power which he could exercise for his own benefit. If, therefore, this issue be decided in favour of the minors then it must follow that, not the three-fourths share of the properties, but the entirety must be exonerated from all liability. No doubt there is a line of cases, long before *Sahu Ram Chandra* v. *Bhup Singh* (2) was decided by the Judicial Committee, which held that the member of a joint *Mitakshara* family has an interest which is capable of passing to a Receiver upon insolvency, but *Sahu Ram Chandra's case* (2) authoritatively decides that that view can no longer be maintained. If we are, therefore, to uphold the decision of the learned District Judge, dated the 4th April 1922 it would be necessary for us to direct that the entirety of the property that has vested in the Receiver be exonerated from all liability.

We have now to consider the propriety of the order of the learned District Judge of the 4th April 1922. I have already stated that on the 7th September 1921 *Musammat* Anupa Kuer, on behalf of her minor children, filed a petition claiming that three-fourths of the property should be exonerated from liability. The learned District Judge thereupon called upon the Receiver to report on the objection filed by *Musammat* Anupa Kuer. The Receiver took evidence and came to the conclusion that the contention of *Musammat* Anupa Kuer was right and he recommended to the learned District Judge that three-fourths should be excluded from sale. The learned District Judge, without considering the matter at all, (for there is nothing in the short order which he has passed which shows that he judicially considered the evi-

(2) 39 Ind. Cas. 280; 39 A. 437; 44 I. A. 126; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C L. J. 133; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213 (P. C.).

dence which was laid before the Receiver) accepted the report of the Receiver and exonerated the share of the minor children from sale.

It is always desirable that a contention of this nature should be decided by the Court and not by an officer that may be appointed by the Court. The question raised on behalf of the minors was a question of paramount title and, therefore, a question raising a very important matter between the insolvent and the general body of creditors. It was, in my opinion, necessary that the learned District Judge himself should have disposed of the matter. I am, therefore, unable to uphold the order of the 4th April 1922. I would accordingly set it aside, remand the matter to the learned District Judge, and direct that he do proceed to deal with it himself. So far as the appellant is concerned, he is entitled to pursue his remedy in the way he desires, either without the assistance of the Insolvency Court, or under the provisions of the Provincial Insolvency Act.

We make no order as to costs.

Kulwant Sahay, J.—I agree.

Z. K.

Case remanded.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 106 OF 1921.

November 3, 1921.

Present:—Mr. Daniels, A. J. C.

CHATUR—DEFENDANT—APPELLANT

versus

RUKMANGAD SINGH—PLAINTIFF—OPPOSITE PARTY.

Transfer of Property Act (IV of 1882), ss. 108 (h), 117—Landlord and tenant—Agricultural lease—Tenant, whether entitled to cut trees planted by himself.

Though section 108 (*h*) of the Transfer of Property Act does not, by reason of section 117 of the Act, apply to agricultural leases, it lays down a principle which is applicable to such leases in the absence of any special custom to the contrary.

Trees planted by a tenant of agricultural land on the land of the tenancy with the permission of the landlord, may be cut and removed by the tenant during the continuance of his tenancy.

Revision against a decree of the Munsif, Hardoi, sitting as Small Cause Court Judge, dated the 27th July 1920.

Mr. *Mohammad Yusuf Ali*, for the Appellant.

Mr. *Ghulam Hasan*, for the Opposite Party.

JUDGMENT.—This is an application under section 25 of the Provincial Small Cause Courts Act. It raises the question of the right of a tenant to cut down a tree planted by himself on his holding. It may be assumed that the tree was planted originally with the permission or at any rate the acquiescence of the *zemindar* as it was planted long ago in the time of the fathers of the parties. If this lease were governed by the Transfer of Property Act the tenant would under section 108 (*h*) clearly have the right to remove the tree during the continuance of his tenancy. The Bombay High Court in a judgment with which I am in entire accord has laid it down that though section 108 (*h*) of the Transfer of Property Act does not, by reason of section 117 of the same Act, apply to an agricultural lease it lays down a principle which does apply in the absence of any special custom to the contrary. The English Law regarding fixtures has no application to this country. I am of opinion, therefore, that the learned Judge of the Court below was wrong in holding that apart from any special custom the tenant had no right to cut the tree. The learned Judge had decreed the suit on another ground. The *wajib-ul-arz* which the plaintiff produced records a custom allowing a tenant to cut down a tree planted by him in front of his door or in his courtyard or on waste land generally. The learned Judge considered that this negatived the defendant's right to cut the tree. It appears to me that this clause has no application to the case of a tree planted on holding and that the *wajib-ul-arz*, therefore, does not apply to the case before me. On both grounds, therefore, I consider the learned Judge's decision erroneous and I accordingly allow the application for revision and dismiss the suit with costs in both Courts.

Z. K.

Revision dismissed.

UDHAO V. EMPEROR.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION NO. 204-B OF 1923.

November 2, 1923.

Present:—Mr. Kinkhede, A. J. C.

UDHAO AND OTHERS—

—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 342 (1)—Examination of accused—Omission—Illegality—Examination, how to be made—Written statement filed by accused—Examination, whether unnecessary.

Section 342 (1) of the Criminal Procedure Code contemplates that the accused should be examined after all the witnesses for the prosecution are examined and cross-examined, and before he is called on for his defence. [p. 596, col. 2.]

The provisions of section 342 (1), Criminal Procedure Code, being mandatory, an omission to question the accused generally on the case as required by the latter part of the section, is not a mere irregularity, but it is an illegality which vitiates the whole trial. However, if the Magistrate discharges the accused without framing a charge, the non-examination of the accused would not vitiate the proceedings. [p. 595, col. 2; p. 597, col. 1.]

Case-law reviewed.

In examining the accused under section 342 of the Criminal Procedure Code it is incumbent upon the Magistrate, not to put him the general question "You have heard the prosecution witnesses against you, say what you have to say," but to communicate to him by appropriate questions everything that is alleged against him in the evidence for the prosecution to its full extent, with a view to ascertain from him what explanation or defence in law or in fact he wishes to put forward in respect thereof. [p. 598, col. 2.]

Written statements filed by the accused do not take the place of evidence, nor of such examination of the accused as is contemplated by section 342 of the Code of Criminal Procedure. [p. 595, col. 2.]

Criminal revision against the decision of the Sessions Judge, East Berar, Amraoti, in Criminal Appeal No. 112 of 1923, dated the 27th June 1923.

Dr. H. S. Gour and *Mr. M. Y. Sharif*, for the Applicants.

Mr. G. P. Dick, Standing Counsel, for the Crown.

ORDER.—The facts which gave rise to the prosecution of Udhao Patel, the accused concerned in this case, and sixteen other accused concerned in the 16 other connected Revision Petition Nos. 205-B to 220-B of 1923 are as follows:—

The Police Station House Officer, Gopal Singh P. W. No. 3, of Yeotmal got news on 9th January 1923 that a cock fighting Bazar was going to be held that day at the village of *Mouza* Bhari belonging to accused Udhao. The village is at the distance of three miles from Yeotmal. Gopal Singh with some other constables formed themsleves into a party and went to the spot reaching there at about 2-30 P. M. They saw in what is styled as an open space in front of Udhao Patel's *Bada* that the game of cock fighting was going on and a large number of people had assembled there. The crowd began to disperse at the sight of the Police party. Gopal Singh and one Iswar Aiyar, P. W. 6, noted the names of the gamesters. Some of the gamesters are said to have entered the *Bada*. Some time after the crowd had formed themselves into an armed mob as the prosecution story goes, the accused Udhao Patel and his brother Damria exorted the mob to attack and belabour the Police and to rob them of their papers and other things and ultimately succeeded in even confining the Policemen in some lane shown on the map filed in the case. Mr. Pimple, the Deputy Superintendent of Police P. W. No. 1 of Yeotmal, got news of this attack on the Police party and he hastened to the scene of the occurrence to rescue the confined but before he arrived on the scene the Policemen were released and when they were on their way back to Yeotmal they met Mr. Pimple's party and both those parties then came over to Bhari. There they found the crowd still assembled and in the midst of opposition and stoning they succeeded in making arrests of 15 persons. Out of them 14 were put on trial and one was later on released by Police. Arrests of some more accused were made; they are accused Nos. 15 to 18, other more persons were suspected and their names were put in the Police *challan* as accused Nos. 19 to 22 but they are still untraced, having absconded in the meanwhile.

2. (*a*) The case against the 18 accused was started before Mr. H. A. R. Dewey, a section 30 Magistrate of Yeotmal, on 24th January 1923 and proceedings under sections 147, 332, 342 and 398 of the Indian Penal Code and section 13 of the Gambl-

ing Act commenced. Mr. Dewey at the request of the prosecution visited the site of offences on 8th February 1923 with a view to have a clear idea of the situation and a satisfactory map of the site prepared on the spot. The Revenue Inspector who was apparently not present at the spot was to be ordered to prepare the map. From time to time 19 witnesses for the prosecution were examined. The Revenue Inspector who was the 20th witness was examined on 16th February 1923 with reference to the map he was ordered to prepare, that map is Exhibit P-3. On this day the 18 accused were examined and remanded to Jail custody and the case was adjourned to the next hearing. On the following day the arguments were heard and the charges against the accused framed and the pleas of the accused recorded. The accused desired that prosecution witnesses Nos. 1 to 25 should be re-called for cross examination. Accused Tanya (No. 5) was on this day released on bail while the rest of the accused were remanded to Jail custody. The cross-examination of prosecution witnesses Nos. 2 to 15 was finished on 20th to 23rd February 1923 and Mr. Pimple, P. W. No. 1, only remained. The accused through their Counsel pressed for their release on bail this day. The Magistrate considered that there were no reasonable grounds for believing that the accused excepting Udhao (accused No. 1) had committed any non-bailable offence, but there were sufficient grounds for further enquiry, into their guilt. They were accordingly ordered to be released on bail. Udhao alone was remanded to Jail custody. For Mr. Pimple's cross-examination the case remained hanging till 13th March 1923 when he was cross-examined at length and re-examined. On this day the Prosecuting Inspector requested permission to examine three additional witnesses who were not previously named for prosecution and though the Counsel for the accused objected to new witnesses being produced or examined at this stage, the Magistrate, overruling the objection, allowed the prosecution to examine one Sahadeo (P. W. No. 21) who was apparently present at the hearing, and as for the other two witnesses who were absent at the hearing and for the other two new witnesses who were absent the case stood adjourned to 19th March 1923. They were examined on 19th March 1923 as P. W. No. 22 and P. W. No. 23. The accused were "put on their defence" on this day.

(*b*) The examination of the defence witnesses extended over seven hearings and their last witness was No. 41. The case was then argued on 14th April 1923 and was closed for judgment to be delivered on 17th April 1923. Before the judgment was delivered the Magistrate examined the accused Udhao Patel with regard to the previous conviction under section 292, Indian Penal Code, in 1914, as the additional statement dated the 17th April 1923 in the memorandum of his examination shows.

(*c*) As a result of the trial accused No. 5, Tanya, was acquitted. Udhao, accused No. 1, was also acquitted of the offence under section 13 of the Gambling Act and, along with all the remaining prosecuted accused, of the offence of dacoity. The Magistrate, however, on the evidence found that all the prosecuted accused except Tanya, were guilty, as charged, of rioting, voluntarily causing hurt to deter public servants from their duty, and wrongful confinement of Policemen and convicted them (except Tanya) under sections 147, 332 and 342 of Indian Penal Code respectively, read with section 34 of the same Code and sentenced each of the said accused to be rigorously imprisoned for one year for the first offence, 18 months for the second offence and six months for the remaining offence, *i. e.* three years in all for the said three offences. Accused Udhao was found guilty of a further offence of robbery though not dacoity and was convicted under section 392, Indian Penal Code, as well, and as an old offender previously convicted to six months' rigorous imprisonment and Rs. 500 fine for another robbery in 1914, he was sentenced to one years rigorous imprisonment for the robbery committed at Bhari on 9th January 1923.

3. Against these convictions 17 appeals were filed on 28th April 1923 by the 17 accused and they are numbers 112 to 128 of 1923 of the file of the Sessions Judge, Amraoti. Applications for bail were

made but they were all refused by the Sessions Judge that very day. At the date of hearing fixed for 9th July 1923 the Pleader for the accused filed the following additional grounds of appeal and the case was then argued on 19th June 1923 to which date it stood adjourned:—

1. That the learned Magistrate failed to examine the accused after the close of the prosecution evidence in accordance with section 342 of the Code of Criminal Procedure, and this non compliance with the provisions of section 342 of the Code of Criminal Procedure vitiates the trial.

2. That the learned Magistrate erred in not mentioning or specifying the common object of the unlawful assembly.

3. That the learned Magistrate failed to comply with the provisions of section 233 of the Code of Criminal Procedure.

4. The learned Sessions Judge fully realised the existence of those mistakes in the Trial Magistrate's proceedings but has tried to show that they were not such as vitiated the trial in spite of the fact that the Magistrate had failed to comply with the mandatory provisions of section 342, Criminal Procedure Code. He held, relying upon the report of an Allahabad ruling, that the omission to examine the accused after the close of the prosecution evidence was a technical omission and would not vitiate the trial. As regards ground No. 2, the learned Seissons Judge observed that the common object "may possibly not have been specified in the charges but there can be no doubt what the common object was and the accused were well aware of that. The common object was to beat the Police and to deter them from doing their duty." Similarly as regards ground No. 3 it was observed that "there was an improper lumping together of separate offences but that this may be a technical error." Having in this manner brushed aside the legal objections to the defects in the trial the lower Court addressed itself to the consideration of the question of the severity of the sentences pronounced and held that there also the Magistrate committed only a technical error and justified the award on the ground that the maximum sentence for one of the offences only, *viz.*, the offence under section 332, Indian Penal Code, was not exceeded by the total sentence of three years' rigorous imprisonment; he thus thought that the sentences were not illegal. The technical error was considered to be such as did not vitiate the trial. In the end the Sessions Judge found it necessary to upset the finding of the Trial Magistrate on the point of the place of the occurrence being a private or a public place and held it to be a "public place." He confirmed the convictions and sentences also on the view that the offences were "very serious and a deliberate revolt against authority occurred." The attitude of Udhao was characterised as "specially contumacious." The appeals were accordingly dismissed on 27th June 1923.

5. The 17 accused have on 7th August 1923 moved this Court in a revision against the adverse decision of the Sessions Judge, Amraoti, who dismissed their appeals. The principal grounds of the petition for revision are grounds Nos. 1, 2, 3, 5, 6, 7 and 12 which deal with the aforesaid questions of law. Rest of the grounds involve more or less questions of fact. Grounds Nos. 1 and 2 deal with the effect of the omission to question the accused generally on the case after the witnesses for prosection had been examined and before they were called on for their defence. Grounds Nos. 3, 5 and 6 deal with the omission to justify the common object in the charges framed. Grounds Nos. 7 and 12 deal with the question of severity of the sentences.

6. On 10th August 1923 the accused got my predecessor Kotval, A. J. C., to issue a Rule *nisi* against the District Magistrate, Yeotmal, calling upon him to show cause why the convictions and sentences should not be set aside, and the accused acquitted or a re-trial ordered on the grounds set forth in the applications for revision. The District Magistrate Mr. Conrie in his letter dated 5th October 1923 urged that no doubt the Trying Magistrate erred in fact examining the accused after the evidence of P. Ws. Nos. 21, 22 and 23 was recorded but maintained that the omission did not prejudice the accused because the evidence of the new witnesses was not material and did not appear to have

influenced to Magistrate. He also pointed out that as the accused had put in their written statements it was extremely improbable that the second examination of the accused would have been more fruitful. He referred to his own experience that the members of the Bar discourage the questioning of the accused if the latter had either filed their written statements or left the case in the hands of their Counsel. As regards grounds Nos. 3, 5 and 6 Mr. Comrie's explanation is not quite satisfactory. He maintains each offence should ordinarily have a separate head and charge but that their lumping up together in the present case was not misleading. He further contended that the charges were set forth in a reasonable manner and the accused had no justification for pleading that they did not know what they were tried for. As regards grounds Nos. 7 and 12 he maintained that the circumstances of the case were of an exceptional kind and that a deterrent punishment was called for, particularly as the offences committed were the outcome of a determined effort to resist the Police authority.

7. The arguments were addressed in the case of the principal accused Udhao Patel and as the points to be decided in all the cases are common, the order in Udhao's case will govern the rest of the cases Nos. 205-B to 220-B of 1923. The learned Counsel for the applicants contended that serious injustice has been done to his clients by reason of the Trying Magistrate's failure to comply with the several mandatory provisions of the Criminal Procedure Code and that the whole trial has become vitiated on that account. I will, therefore, deal with grounds Nos. 1 and 2 which involve questions of law first of all. What I have narrated in paragraph 2 of this order about the proceedings of the Trial Court will show that in the present case although the Magistrate was bound to question the accused generally after the additional witnesses Nos. 21, 22 and 23 were examined and Mr. Pimple (P. W. No. 1) was cross-examined and re-examined, before the accused were put on their defence, he did not do so. The question is whether the Trial Magistrate has failed in the discharge of any imperative duty which the law had cast on him and whether this has vitiated the whole trial.

8. Section 342 (*i*) of Criminal Procedure Code says "for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of an enquiry or trial without previously warning the accused, put such questions to him as the Court considers necessary and shall, for the purpose aforesaid, question him generally on the case *after* the witnesses for the prosecution have been examined, and before he is called on for his defence." The plain provisions of this section clearly contemplate that there is in the trial of every case a stage for questioning the accused 'generally on the whole case" and that stage is "after the witnesses for the prosecution have been examined, and before he is called on for his defence." This must mean after all the witnesses for the prosecution have been examined and after the cross-examination, if any, of such witnesses as are re-called is finished, for ordinarily the accused is not called on for his defence until the case for prosecution is closed. That the above mentioned provision is mandatory and must be complied with is laid down in a series of cases of the Bombay, Calcutta, Madras and Patna High Courts, and it must now be taken as settled law that the omission to question the accused generally on the case as required by the later part of section 342 (*i*) of Criminal Procedure Code, is not a mere irregularity but it is an illegality which vitiates the whole trial: *Tani* v. *Emperor* (1) and Criminal Reference No. 6-B of 1918 decided on 19th June 1918, *Emperor* v. *Sawalya* (2), *Basapa Ningapa* v. *Emperor* (3) *Amritalal Hazra* v. *Emperor* (4), *Mahomed*

(1) 48 Ind. Cas. 487; 20 Cr. L. J. 12.
(2) 9 Bom. L. R. 356; 5 Cr. L. J. 332.
(3) 31 Ind. Cas. 365; 17 Bom. L. R. 892; 16 Cr. L. J. 765
(4) 29 Ind. Cas. 513; 42 C. 957 at p. 1027; 21 C. L. J. 331; 16 Cr. L. J. 497; 19 C. W. N. 676.

Hossein v. *Emperor* (5), *Fernandez* v. *Emperor* (6), *Gulabjan* v. *Emperor* (7), *Mazahar Ali* v. *Emperor* (8), also *In re Varisai Rowther* (9), *Raghu Bhumij* v. *Emperor* (10), *Fatu Santal* v. *Emperor* (11), *Gulam Rasul* v. *Emperor* (12), *Gurudat Singh* v. *Emperor*, Criminal Appeal No. 45 of 1923, *In re Maruda Mathu Vannian* (13), *Promotha Nath Mukhopadhya* v. *Emperor* (14) and *Gangadhar Goala* v. *Reed* (15). It is needless to say that section 342 makes the examination of the accused obligatory only in cases where the accused is called on for his defence. If the Magistrate discharges the accused without framing a charge the non-examination of the accused would not vitiate the proceedings. But where a Magistrate or a Judge of the Sessions Court thinks that the prosecution witnesses have made out a case which the accused has to meet, it is incumbent upon him not to put him the general question "You have heard the prosecution witnesses against you, say what you have got to say," but to communicate to the accused by appropriate questions everything that is alleged against him in the evidence for the prosecution to its full extent, which may be found necessary to communicate in each particular case, with a view to ascertain from him what explanation or defence in law or in fact he wishes to put forward in respect thereof: *Tani* v. *Emperor* (1) and Criminal Reference No. 6-B of 1918, decided on 19th June 1918 by a Bench of this Court.

9. In the case of *Emperor* v. *Savalya* (2) Chandavarkar and Pratt, JJ., had occasion to interpret the word "shall" as used in section 342 of Criminal Procedure Code. They held that the term "shall" makes the questioning of the accused by the Court mandatory and not discretionary only. They observed that the Legislature intended thereby to enable the accused to explain any circumstances in the evidence against him, and that the omission on the part of the Court to perform such a duty in a criminal trial must be presumed to have seriously prejudiced the accused. They also laid down that the utmost strictness must always be observed and forms must be closely complied with where the liberty of the subject is at stake, when from the Statute prescribing those forms it appears that the Legislature prescribed them in the interest of the accused. To say that there has been no prejudice or miscarriage of justice by the absence of accused's answers given on examination under section 342 (*j*) is, as they put it, to beg the question. The Judges observe that in criminal trials the Courts are bound to draw no inference of waiver against an accused person especially in the case of omission by the Court to perform a duty imposed on it in express terms by the Legislature in the interest of the accused, unless the accused waived it expressly. The following observations of the Judicial Committee in the case of *Subrahmanya Ayyar* v. *King-Emperor* (16) are very pertinent to this case:—

"Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity.....The remedying of mere irregularities is familiar in most systems of jurisprudence but it would be an extraordinary extension of such a branch

(5) 22 Ind. Cas. 766; 41 C. 743 at p. 745; 15 Cr. L. J. 190; 18 C. W. N. 1247.

(6) 59 Ind. Cas. 129; 45 B. 672; 22 Bom. L. R. 1040; 22 Cr. L. J. 17.

(7) 64 Ind. Cas. 669; 46 B. 441; 23 Bom. L. R. 1203; 23 Cr. L. J. 45; (1922) A. I. R. (B.) 250.

(8) 71 Ind. Cas. 662; 50 C. 223; 36 C. L. J. 417; 27 C. W. N. 99; 24 Cr. L. J. 198; (1923) A. I. R. (C.) 196.

(9) 73 Ind. Cas. 163; 46 M. 449; 44 M. L. J. 567; 17 L. W. 722; 32 M. L. T. 385; (1923) M. W. N. 477; (1923) A. I. R. (M.) 609; 24 Cr. L. J. 547 (F. B.).

(10) 58 Ind. Cas. 49; 5 P. L. J. 430; 1 P. L. T. 241; 21 Cr. L. J. 705.

(11) 61 Ind. Cas. 705; 6 P. L. J. 147; 2 P. L. T. 288; 22 Cr. L. J. 417.

(12) 61 Ind. Cas. 715; 6 P. L. J. 174; 22 Cr. L. J. 427; 2 P. L. T. 390.

(13) 71 Ind. Cas. 252; 43 M. L. J. 402; 16 L. W. 420; (1922) M. W. N. 601; 45 M. 820; (1922) A. I. R. (M.) 512; 24 Cr. L. J. 124.

(14) 71 Ind. Cas. 792; 27 C. W. N. 389; (1923) A. I. R. (C.) 470; 24 Cr. L. J. 792; 50 C. 518.

(15) 64 Ind. Cas. 665; 25 C. W. N. 609; 33 C. L. J. 503; 23 Cr. L. J. 41.

(16) 25 M. 61 at p. 97; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 2 Weir 271; 8 Sar. P. C. J. 160 (P. C.).

of administering the Criminal Law to say that when the Code positively enacts that such a trial as that which has taken place here, shall not be permitted that this contravention of the Code comes within the description of error, omission, or irregularity."

Their Lordships also remarked that the course pursued by the Trial Magistrate which was to try the accused, on an indictment in which he was charged with not less than 41 charges, extending over a period of two years, in contravention of the provisions of section 234 of the Code which provided that a person may be tired for only three offences of the same kind if committed within a period of 12 months, and which was plainly illegal could not be amended by arranging afterwards that which ought to have been done in the first instance. The mischief sought to be avoided by the Statute having been done it vitiated the whole trial and their Lordships had to set aside the conviction on that ground. This clearly shows that how very particular the Legislature is to see that the interest of the accused is not in any way prejudiced by any illegality.

10. In the case of *Basapa Ningapa* v. *Emperor* (3) Batchelor and Hayward, JJ., also held that the omission to question the accused under section 342 of the Criminal Procedure Code is an illegality which vitiated the trial. They pointed out that to omit to examine the accused is to convict him and send him to prison without asking him for his explanation about the matters appearing against him. Such omission was treated as going deeper than the illegality which was committed in *Subrahmania Ayyar's case* (16) for they say it was repugnant to one's natural sense of justice that a man should be convicted without being heard. They further observed that it was no answer to the objection to say that the appellant had an opportunity of making a statement before the Committing Magistrate. In the case before me both the Sessions Judge and the District Magistrate have tried to justify this omission to question the accused on the ground that when the accused filed their written statements it was extremely improbable that the second examination would have been more fruitful. The District Magistrate also referred to his own experience about the members of the Bar discouraging the questioning of the accused. Suffice it to say that although the procedure of filing written statements may be in accordance with the universal practice obtaining, of course, in these Provinces, still I deem it my duty to point out that such written statements do not take the place of evidence nor of such examination of the accused as is contemplated by section 242 of the Code of Criminal Procedure: *Amritalal Hazra* v. *Emperor* (4).

11. In *Mahomed Hossein* v. *Emperor* (5) it was observed that in all warrant cases there must be an examination of the accused and that although section 342 subsection (2) gives the accused a right to refuse to say anything if he choses, it is the bounden duty of the Court to question the accused generally on the case. In *Fernandez* v. *Emperor* (6), it was held by Shah and Crump, JJ., that the provisions of section 342 were of general application and as that section was based on the solutary principle that the accused person should have an opportunity to furnish an explanation before he is convicted, the Magistrate was bound even in a summons case to examine the accused under section 342 before convicting him. The same view was taken in *Emperor* v. *Gulabjan* (7), where it was held that the omission to examine the accused after the close of the trial was an irregularity which vitiated it.

12. The Calcutta High Court has in *Mazahar Ali* v. *Emperor* (8) held the same view as that of the Bombay High Court, about the provisions of law on the point, which they have expressed in every emphatic terms. It is laid down by that High Court that "under section 342, Criminal Procedure Code, it is obligatory on Magistrates to question the accused generally on the case after the close of the prosecution case, *i.e.*, when all the prosecution witnesses have been examined in chief, cross-examined and re-examined although the accused has stated that he intends to file a written statement and has done so. The examination of the accused after the charge and examination-in-chief of only some of the prosecution

witnesses, and again after the cross-examination of only some of such witnesses, is not a compliance with the law, and the trial is vitiated, although the accused has not been thereby prejudiced on the merits." In this Calcutta case on behalf of the Crown it was argued that the accused were examined twice and that they had filed their written statements and that they had said all they had desired to place before the Court and have not been prejudiced in any way. This argument was however, not allowed to prevail in the face of the mandatory provisions of section 342 and the result was that the Rule issued to the District Magistrate was made absolute and the convictions and sentences were set aside. In the very recent case of *In re Varisai Rowther* (9) decided by a Full Bench of five Judges of the Madras High Court it was held that the latter part of section 342 clasue (1) was mandatory and a failure to comply with the terms of that section was an illegality vitiating the trial and was not a mere irregularity which could be cured under section 537 of the Code of Criminal Procedure. It was pointed out at page 467* of the report that if before the whole of the prosecution evidence is taken the accused is asked to disclose his defence the prosecution witnesses who remain to be examined may change their version in order to meet the defence of the accused. It is open no doubt, to the accused not to make any statement. The law does not cast upon him the duty of making a statement. What we are concerned with is "the duty of the Court under section 342 and not with the option of the accused." To the same effect are the decisions of the Patna High Court: see *Raghu Bhumij* v. *Emperor* (10), *Fatu Sintal* v. *Emperor* (11) and *Gulam Rasul* v. *Emperor* (12). In the case of *Mitarjit Singh* v. *Emperor* (17) it was held that the Court must question the accused generally on the case after the cross-examination and re-examination of the prosecution witnesses. Even in this Court Hallifax, A. J. C., has in a very recent case decided on 4th May 1923, *Gurudat Singh* v. *Emperor*, Criminal Appeal No. 45 of 1923, set aside the conviction and sentence without actually following the cases of *Raghu Bhumij* v. *Emperor* (10) *In re Maruda Mathu Vannian* (13), *Muzahar Ali* v. *Emperor* (8), *Promotha Nath Mukhopadhya* v. *Emperor* (14) and *Gangadhar Goala* v. *Reed* (15).

13 In view of so many authorities I do not at all feel myself free to take any other view about the Trial Magistrate Mr. Dewey's failure to comply with the imperative provisions of section 342 of the Criminal Procedure Code and uphold either the contention of the learned Counsel for the Crown or the view of the District Magistrate and the Sessions Judge that the omission was a mere irregularity covered by section 537 of the Criminal Procedure Code. I hold that it was an illegality which has vitiated the whole trial. It was argued that the evidence of the three witnesses P. Ws. Nos. 21, 22 and 23 was not material and did not appear to have influenced the Magistrate's decision, but I am not at all impressed by the argument in face of the plain provisions of the section. The next point to be considered is whether in this view of the case I should set aside the convictions as wholly unsustainable on the simple ground that no one can be condemned unheard or I should order a remand. In the majority of the cases above referred the convictions were set aside and according to the circumstances of each case the accused were either acquitted or their retrial ordered, while in the Criminal Appeal No. 15 of 1923, Hallifax, A. J. C., remanded the case with directions for questioning the accused generally and for giving him the opportunity to call additional witnesses when calling upon him again to make a defence; all the evidence already taken was allowed to stand and it was directed that no new witnesses for the prosecution were to be called. Dr. Gour on behalf of the accused pressed for convictions being set aside and the accused acquitted while Mr. Dick, Counsel for the Crown, has pressed that I should follow the precedent laid down in Mr. Hallifax, A. J. C.'s judgment. In view of the observations in

(17) 63 Ind. Cas. 825: 6 P. L. J 644; 2 P. L. T. 520; (1922) Pat. 7; (1922) A. I. R. (Pat.) 158; 22 Cr. L. J 697.

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Subrahmania Ayyar v. *King-Emperor* (16) and with due deference to the view of my learned colleague I must say that the latter course does not in the circumstances of this case commend itself to me. I, therefore, set aside the convictions and sentences in the case of all the 17 accused.

14. I do not, therefore, find it necessary to go into any other questions of law raised in the other grounds of the petition of revision. As I do not want to pronounce any opinion on the facts it is difficult for me to say which way the truth lies. But I leave it open to the District Magistrate to take such action as the justice of the case may require in respect of such offences or offence only as would in his opinion be established and against such individuals as are guilty and are likely to be successfully convicted in case prosecution were started against them or any of them.

15. With these remarks the convictions and sentences are set aside and the accused are discharged. Let information of the result of these applications be sent to the accused through the Superintendent of the Jail where they or any of them at present may be.

Convictions set aside.

G. R. D. & S. D.

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 63 OF 1923.

February 23, 1923.

Present :—Mr. Justice Scott-Smith and Mr. Justice Fforde.

Musammat DAULAT BAI—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 302—Circumstantial evidence—Benefit of doubt—Murder—Poisoning—Possession of food vessels containing poison.

Where the circumstantial evidence relied on does not exclude the reasonable possibility of some person other than the accused having committed the crime, the accused must be given the benefit of the doubt. When a man dies as the result of arsenic poisoning, the mere fact that food vessels and a grinding stone for the preparation of food produced by the wife of the deceased contained arsenic, does not necessarily exclude the possibility of the poison having been introduced by some outside agency. [p. 602, col. 1.]

Criminal appeal from an order of the Sessions Judge, Mianwali, dated the 19th December 1922.

Mr. *Anant Ram Khosla*, for the Appellant.

The Public Prosecutor, for the Respondent

JUDGMENT.—The appellant, *Musammat* Daulat Bai, has been convicted of having murdered her husband Dassu Ram by administering to him arsenic in his food and has been sentenced to death under section 302 of the Indian Penal Code.

The facts are shortly these:—The appellant is a young woman of 20 who was living alone with her husband. Formerly she and her husband formed a joint household with her mother-in-law, *Musammat* Piari Bai, a widow and her two other sons. Owing to the poverty of this household the house had to be sold and thereupon the deceased Dassu Ram and his wife took up their residence in a separate house and *Musammat* Piari Bai and her remaining sons occupied a house about 80 *karams* distant. *Musammat* Piari Bai in her evidence at the trial gives no other reason for splitting up the families than that it was necessitated by the impoverished state of their affairs. But in her First Information report she states that the reason of the family being separated was that the appellant had become a bad character, by which she meant that she had formed illicit relations with a certain Duni Chand. In fact she concludes the First Information Report with the statement that the appellant had given poison to the deceased in consultation with this Duni Chand. This charge, however, does not appear to have been believed by the Police as no steps were taken against this man, but a certain Sora Ram was arrested for complicity in the crime and was tried with the appellant but was acquitted. There is no evidence on the

record in proof of this charge of sexual immorality outside this First Information Report, beyond a statement elicited from *Musammat* Piari Bai in cross-examination to the effect that she had frequently seen illicit intercourse taking place with the appellant and this man Duni Chand who, she repeated, was the real culprit.

This charge against her character has obviously been introduced for the purpose of showing motive. But there is not a shadow of evidence to support it beyond the statement of the mother-in-law who is obviously bitterly hostile and prejudiced towards the appellant. For these reasons her evidence must be scrutinised with great care. As to the actual charge of poisoning there is no direct evidence. In common with nearly all poisoning cases the evidence is purely circumstantial and in the present case particularly meagre. The principal witness for the prosecution is the mother-in-law who states that the appellant came to her house at about midnight on the 20th September accompanied by two men and told her that Dassu Ram was in great pain. Thereupon she accompanied the appellant to her son's house and found him moaning and obviously suffering greatly. Upon asking him what had happened he said that something had been given to him but he did not know what. On further asking him if he was poisoned he said he was. The witness says that she then sent for her other sons and for *Hakim* Moban Lal. This *Hakim* administered something which appeared to have no good effect and he left after a few minutes. Thakar Das another *Hakim* then appeared on the scene, but before he could experiment with anything in his turn upon the unfortunate victim the latter died. This was about 4 A. M. The two sons Khem Chand and Tola Ram merely testify to the incident in the house of the dying man, Khem Chand says that upon enquiring from Dassu Ram as to what had happened to him the latter replied that *Musammat* Daulat Bai had given him something to eat in his *kheer* and *halua*. This the witness regards as an accusation against the appellant. Tola Ram states that the deceased said his wife had given him something to eat in his food but he did not know what it was. The only other witness in this connection is Mohan Lal who very shortly describes his visit and says that the deceased told him that he had eaten *gol gappas* and *kheer*, and he adds, in cross-examination, that he did not suspect at the time that the deceased had been poisoned, and further adds that nobody told him he had been poisoned. This evidence does not support the suggestion of the three relatives of the deceased that he had made a specific charge against his wife, and we think it highly probable that any statements he did make at the time were such complaints as a man invarially expresses when suffering from poisoning but does not necessarily convey with it a suggestion that the poisoning is other than accidental. We think from the evidence it is reasonably clear that the deceased did not believe that he had been purposely poisoned but rather that something in the food had upset him.

That he had in fact been deliberately poisoned with arsenic is indisputable but to fix the guilt for the act with any reasonable certainty is a matter of extreme difficulty. On the 21st September the appellant produced to the Police a brass plate and two metal bowls and stated that the deceased took his meal in these utensils. Upon chemical examination it was found that arsenic was present in all these three articles. On the 25th September a pounding stone was produced by the appellant and this also upon examination was found to have contained some arsenic.

This is practically the entire of the circumstantial evidence upon which it has been sought to fix the guilt for the crime upon the appellant. No evidence has been produced of the purchase by the appellant of any arsenic and no evidence that she had prepared or cooked the food, nor is there, indeed, any evidence that she administered the food. No cooking utensils appear to have been examined, and the pounding stone, which is a very significant piece of silent evidence, was not produced until some four days after the occurrence, and the record is entirely silent as to the circum-

stances under which it came to be discovered. The appellant herself states that on the date in question she was suffering from a feminine complaint which made it impossible for her to prepare or administer food to her husband, and she adds that a certain Lakhmi Bai, Sona Ram's aunt mixed her husband's food on the night in question and served to him. This Sona Ram, she says, used to pay her visits, and she states that *Musammat* Lakhmi Bai was in the habit of cooking food for them during day and night. It is possible that this story may be true; it is possible that Sona Ram may have been a paramour of the appellant and may have made his aunt the innocent medium of giving poison to the deceased. On the other hand it is quite possible that the appellant herself deliberately poisoned her husband. But the circumstantial evidence is as consistent with her story as it is with that of the prosecution. If it were Sona Ram who committed the crime it would have been quite easy for him to have done it through the medium of *Musammat* Lakhmi Bai. The fact that food vessels and a grinding stone for the preparing of food contained arsenic points with strong suspicion towards the appellant, but the fact of these articles being produced from the possession of the appellant does not necessarily exclude the possibility of the poison having been communicated by some outside agency. We are not satisfied that the circumstantial evidence excludes the reasonable possibility of some other person having committed the crime in question, and that being so we must give the appellant the benefit of the doubt. We, therefore, accept the appeal and setting aside the conviction and sentence direct that the appellant be released forthwith.

Z. K. *Appeal allowed.*

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 69 OF 1923.

February 23, 1923.

Present:—Mr. Justice Scott-Smith and Mr. Justice Fforde.

BARHATI—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 342—Examination of accused—Court, power of—Cross-examination, whether permissible—Penal Code (Act XLV of 1860), s. 302—Murder—Evidence—Accused carrying toka—*Blood on* toka—*Agriculturists.*

Section 342 of the Criminal Procedure Code allows a Court at any stage of an enquiry or trial to put such question to the accused as the Court considers necessary, but the object of putting such questions is to enable the accused to explain any circumstances appearing in the evidence against him, and the Court has no power under this section to cross-examine an accused person in order to extract a confession from him. **[p. 603, col. 2; p. 604, col. 1.]**

Many *zemindars* carry *tokas* which are used for their ordinary work as agriculturists and there is nothing significant in the fact that the accused left his house with a *toka* in his hand shortly after the deceased had gone out and that the latter was subsequently found to have been killed as the result of numerous wounds inflicted on him with a sharp-edged instrument. [p. 604, col. 2.]

A *zemindar* in the use of a *toka* might very easily cut himself and in this way get blood on it. The presence of a little blood on a *toka*, therefore, produced by a person accused of murder is not a very suspicious circumstance. **[p. 604, col. 2.]**

Criminal appeal from an order of the Additional Sessions Judge, Lahore, dated the 20th December 1922.

Messrs. *Narinjan Das* and *Ishar Das Khanna*, for the Appellant.

The Public Prosecutor, for the Respondent.

JUDGMENT.—This is an appeal from the order of the Additional Sessions Judge, Lahore, convicting Barhati of the murder of Allah Ditta under section 302, Indian Penal Code, and sentencing him to death. The case is also before us for confirmation of the sentence under section 374 of the Criminal Procedure Code. Along with Barhati were tried Sundar Shah, his father and Nawab, the brother-in-law of Sundar Shah, but they were acquitted by the Court below. Allah Ditta deceased was the brother of Sundar Shah and the husband of *Musammat* Barhati, P. W. No. 2, a young girl aged about 16. Allah Ditta himself was some 40 years of age and the theory of the prosecution is that

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Musammat Barhati was not willing to live with her middle aged husband; that the latter refused to divorce her, that she had an intrigue with Barhati, appellant, and that Allah Ditta was murdered in order to free her to marry her paramour. The first piece of evidence relied upon by the lower Court in support of the conviction is that of *Musammat* Barhati that on the evening before the night of the occurrence Allah Ditta went out from the house where he and the three accused persons lived to watch his fields and that shortly afterwards appellant took a *toki* and Nawab a *dang* and themselves left the house. The murder was committed on the night between the 26th and 27th of March 1922 and there is evidence that on the 28th of March, the appellant produced a *toki* from a hole in the ground near his house on the scrapings from which the Imperial Serologist detected human blood, and that a blood stained *chadar* was found in his house. The only other piece of evidence relied upon is a retracted confession of Barhati which was recorded by the Committing Magistrate on the 30th of March 1922 but was retracted by the appellant at the next hearing on the 10th of April.

Musammat Barhati gave evidence that on the night of the 26th March, Allah Ditta was sent out to watch the fodder fields and Sundar Shah then conversed in low tones with appellant and Nawab and was overheard by *Musammat* Barhati to say "*ainwin nahin jandi, Allah Ditta da faisala mukao, phir main bhej dunga*" (she will not go thus, settle with Allah Ditta. After that I will send her). Now the learned Sessions Judge rejected that part of her evidence about this conversation, but he believed the part about Allah Ditta having left the house and being followed shortly afterwards by the appellant who was armed with a *toka*. The most important piece of evidence against the appellant is his so called confession which, as already stated, was recorded by the Committing Magistrate on the 30th of March 1922. We find from the record that on that day an incomplete *chalan* was put up before the Committing Magistrate, appellant being the only person then accused. Sundar Shah, his father who was subsequently made an accused person was then examined as a witness but gave no evidence tending to implicate the appellant. *Musammat* Barhati was also examined as a witness and gave the same evidence as she gave at the trial. Muhammad Ali, Head Constable. P. W. No. 3, was then examined and deposed to the production of the *toka* and *dang* by the appellant. One other formal witness was examined and then Barhati was questioned. The first question put to him was whether he had murdered Allah Ditta. To this he replied "I did not kill Allah Ditta, Nawab, my companion, did it." He was then asked what he himself had done and he said "I struck Allah Ditta with the iron mounted *dang*. Exhibit P. 3 and gave him one blow on the back." He was then asked why he hit Allah Ditta, and replied "My father Sundar Shah sent me and Nawab to kill the deceased because the deceased would not divorce *Musammat* Barhati as was desired by us." When the case next came up on the 10th of April he put in a written statement in which he said that the statement previously made by him was made at the instance and on the pressure of the Police and that that statement was totally wrong and that he had no knowledge of the murder. It is contended on behalf of the appellant that we should reject the confession of the 30th of March on the ground that it was not made voluntarily but under Police presure. It is urged that appellant, who is a boy of 19 years of age, was probably told by the Police that if he implicated Nawab and Sundar Shah and said that he himself took a minor part in the affair he would be made a witness and would get off. There is considerable force in this argument. The very fact that an incomplete *chalan* was put up in such a hurry before the Magistrate and that the Magistrate recorded the appellant's statement in the way he did, makes it probable that the Police knew he would make some statement if examined at once, but thought that he probably would not admit anything if the Magistrate waited until he had recorded the whole of the prosecution evidence. Now section 342 of the Criminal Procedure Code no doubt allows the Court, at any stage of any

enquiry or trial, to put such questions to the accused as the Court considers necessary but the object of putting such questions is, as laid down in the section, "for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him." In our opinion the Committing Magistrate in the present case made an improper use of his power of questioning the accused under this section. It cannot be said that the questions which he put to him were for the purpose of enabling him to explain any circumstances appearing in the evidence against him. What he might have asked him was "*Musammat* Barhati has deposed to such and such a conversation between you and Nawab and Sundar Shah. Have you any explanation to give in regard to it." Or the Magistrate might have asked "what is your explanation as to the production of the *toka* and *dang*." The appellant being a boy of only 19 years of age might, in our opinion, easily have been persuaded by the Police to make an incriminating statement under the impression that if he did so he would get off. He retracted his statement on the very first opportunity and, in our opinion, it would be extremely unsafe to rely upon it. After full consideration we are of opinion that it was not a voluntary statement. The learned Sessions Judge himself did not believe the whole of it and states in his judgment: "I hold that the statement of the 30th of March is to a certain extent true. He can only say that it is only necessary to extract from Barhati's confession the portion which is true. I consider that, the true portion of his confession is that Barhati went out by night and alone waylaid Allah Ditta and killed him with his *toka*." This, however, forms no part of the statement made by Barhati on the 30th of March. It appears that the learned Sessions Judge has read into the statement what he considers that Barhati probably did on the night in question but which he never admitted he had done.

Now, once the confession is excluded from consideration there is very little evidence on which a conviction could be based. The mere fact that the appellant left the house with a *toka* in his hand after Allah Ditta had left it on the night of the murder is not a very material point. Many *zemindars* carry *tokas* which are used for their ordinary work as agriculturists and there is nothing significant in the fact that the appellant had a *toka* in his hand when he left the house. There certainly is reliable evidence that on the 28th of March he produced a *toka* which was buried in the ground near his house, and that on this human blood was found, but there is no evidence to show to whom this *toka* belonged. A *zemindar* in the use of a *toka* might very easily cut himself and in this way get blood on it, and the presence of a little blood on a *toka* is not a very suspicious circumstance. The only remaining piece of evidence is that a blood-stained *chadar* was found lying in the house in which the appellant lives doubtless along with his father. There is evidence, however, (see the statement of Bachan Singh, *Lambardar*, P. W No. 11), that after the Police arrived Barhati and others helped to lift the dead body of Allah Ditta on to the *charpoy*. Allah Ditta had numerous wounds on his body from which blood had followed and Barhati might easily have got some blood on his *chadar* when he helped to lift the body. The assessors were unanimously of opinion that there was no sufficient evidence on which a conviction could be based and we have no hesitation in agreeing with them. We, therefore, accept the appeal and setting aside the conviction and sentence, acquit Barhati and direct that he be released from custody.

Z. K. *Appeal allowed.*

SIND JUDICIAL COMMISSIONER'S COURT.

SESSIONS CASE NO. 35 OF 1923.

December 13, 1923.

Present:—Mr. Kennedy, A. J. C.

EMPEROR—PROSECUTOR

versus

MITHOO—ACCUSED.

Criminal Procedure Code (Act V of 1898), as amended by Criminal Procedure Code Amendment Act (VIII of 1923), ss. 4 (j), 266, 305, 307—Judge of Judicial Commissioner's Court sitting in Sessions—Disagreement with Jury—Power to refer to High Court—Jurisdiction.

EMPEROR *v.* MITHOO.

A Judge of the Court of the Judicial Commissioner of Sind sitting in Sessions has under section 307 of the Criminal Procedure Code no power to differ from the verdict of a Jury and refer a case to the Court sitting in it High Court jurisdiction.

The words "except in sections 376 and 307" in section 266, Criminal Procedure Code, do not extend the powers of a Judge of the Court of the Judicial Commissioner of Sind to refer. On the contrary the provisions of section 305, Criminal Procedure Code, direct the Trial Judge, except under special circumstances, to give effect to the verdict of the Jury.

Mr. *P. S. Shahani*, for the Accused.

Mr. *Partabrai D. Punwani*, Assistant Public Prosecutor, for the Crown.

JUDGMENT.—In this case the Jury found the accused not guilty and I took time to consider whether I had power to refer this case to the High Court under section 307. As the matter is of some importance, I have recorded my reasons, given below at some length, for holding that a Judge of this Court sitting in Sessions has no such power. The matter may be of some importance to the allied questions of confirmation and appeal.

Section 7 of the Criminal Procedure Code requires that every province outside the Presidency Towns, should be divided into Sessions Divisions and requires that there should be a Sessions Court in each Sessions Division and maintains the existing Sessions Courts provided by section 9. That Act also by section 1 preserves any powers conferred on any existing Courts by any special or local law in so far as it is not directly affected by the Criminal Procedure Code. Bombay Act XII of 1866 as amended, gives to the members of this Court the powers of a Sessions Judge in the Sessions Division of Karachi. So far then it would appear that this Court is still a Sessions Court and apart from any special provisions, in the case of any case tried before the Court of Session, then sections 306 and 307 would apply. And I am of opinion that it is arguable that this Court is still a Court of Sessions except in so far as the procedure is modified in respect of trials before it by section 266. For I do not regard the definition of High Court in section 4(*j*), as, at any rate in the case of Indians, having any reference to the original jurisdiction of a Judge of this Court.

But as regards the question of reference, that power is granted to a Sessions Court by sections 306 and 307, which are sections included in this very Chapter XXIII, for purpose of which, in accordance with section 266, the Trial Court is to be deemed a High Court, Therefore, for the purposes of section 366, this Court is not acting as a Sessions Court, and, therefore, under section 307, the Judge of this Court is not presiding over a Court of Sessions and has no power to refer. It was at first somewhat difficult to understand the exception of section 307 in section 266 and the drafting is no doubt somewhat complicated but the exception of section 307, by which 'High Court' in that section does not mean a Judicial Commissioner's Court, must clearly refer to the Court to which reference is made, not to the Court making it and what the combined effect of sections 266 and 307 must be is, that in case of a reference by some Sessions Court qualified to refer, that reference cannot be heard by a Single Judge of this Court unless otherwise empowered; consequently the exception does not extend the powers of a Judge of this Court to refer. On the contrary the provisions of section 305 are clear and unmistakable and they direct the Trial Judge except under certain special circumstances to give effect to the verdict of the Jury. In accordance with this section, therefore, I must in accordance with the verdict of the Jury acquit and discharge the accused.

Accused discharged.

P. B. A.

SHER *v.* EMPEROR.

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 535 OF 1923,
July 6 1923

Present:—Mr. Justice Moti Sagar.

SHER AND OTHERS—CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 366—Abduction by near relatives—Sentence.

Accused who were near paternal relations of a girl over sixteen years of age and were admittedly entitled to her custody as against her mother with whom she was living carried her away forcibly in order to marry her to one of themselves. The mother admitted their superior right to have the custody of the girl but complained that she should have been paid compensation before she was deprived of her daughter's custody:

Held (1) that the accused were guilty of an offence under section 366 of the Penal Code; [p. 607 col. 1.]

(2) that having regard to the relationship of the accused with the abducted girl and the view which her mother took of the incident, the offence was only a technical one and a nominal sentence would meet the ends of justice. [p. 607, col. 1.]

Criminal appeal from an order of the Magistrate, First Class, with section 30 powers, Mianwali, dated the 21st April 1923.

Mr. *M. L. Puri*, for the Appellants.

JUDGMENT.—This is an appeal from certain convictions under section 366 of the Indian Penal Code. The complainant is one *Musammat* Sher Bano, and the girl alleged to have been kidnapped from lawful guardianship is her daughter *Musammat* Khatun. The accused are closely related to each other, and were ten in number. Out of these ten accused *Musammat* Bano, widow of Umari and mother of accused Nos. 1 to 3, was not proceeded against, and her name was struck off from the list of the accused from the very beginning. Ahmad accused No. 2 and Ghulam Ahmad, accused No. 9 were discharged.

The remaining seven accused were found guilty and sentenced, Sher to five years' rigorous imprisonment and the others to three years' rigorous imprisonment each. The story for the prosecution which is set out in the judgment of the learned Magistrate is very simple and may briefly be stated as follows:—

On the 8th of August 1922 *Musammat* Alam Khatun, the girl abducted, had taken food for her step-father Sultan in the fields. While she was returning home in the evening she was way-laid by the accused and carried away with intent that she may be forced into a marriage with Sher, accused No. 1. The abduction was witnessed by Muhammad *Chowkidar* who gave information of this fact to the mother in the evening. This fact was, however, subsequently denied by this man when he appeared as a witness in the case, and he stated that he had given no such information to the mother. The matter was immediately reported to the Police, but the latter refused to take any action and directed the complainant to take civil proceedings against the accused. *Musammat* Sher Bano then instituted the present complaint under section 366, Indian Penal Code, and succeeded in obtaining an order for the issue of warants against all the accused. Sher had absconded and proceedings were taken against him under section 512 of the Criminal Procedure Code. The others after having been arrested appeared in Court, and denied that they had taken any part in the alleged abduction. After some time Sher was also arrested by the Bannu Police along with the girl and brought to Mianwali to take his trial under section 366, Indian Penal Code, along with the other accused. *Musammat* Khatun was produced as a witness in the case, and stated that she had been forcibly abducted by all the accused and forced into a marriage with Sher, accused No. 1 in this case. Some other witnesses were also produced who stated that they saw the party taking away the girl by force and that they had been implored by the latter to rescue her.

All the accused pleaded not guilty. The defence of Sher, accused No. 1, was that the girl had been given to him by her father and that she had voluntarily accompanied him. He further stated that he subsequently married the girl with her consent.

It has been found by the Court that the girl was not below 16 years of age, and from certain documents in the guardianship record, to which reference has

been made in arguments by the learned Counsel for the appellants, it is indeed clear that the girl must have been between 18 and 20 years of age at the time when she had been abducted. The other accused pleaded an *alibi* and produced some witnesses in support thereof. The learned Magistrate, who tried the accused, did not put any reliance upon the statements of these witnesses, and after carefully going through their evidence I have no hesitation in holding that the witnesses were utterly false. It has been argued that the evidence with regard to abduction is not very satisfactory and that the accused are entitled to an acquittal. I am not inclined to agree with this contention. There is no reason why the girl and the other persons, who have come forward as witnesses, should be giving a false statement and I am of opinion that the accused have entirely failed to establish that the girl accompanied them voluntarily and that she had been given in marriage by her father Sultan to Sher, accused No. 1. At the same time it appears to me that this was not a case in which a very serious view of the crime alleged to have been committed should have been taken. There is no doubt that an offence was technically committed and that the accused were guilty under section 366, Indian Penal Code, but having regard to the fact that the parties are very close relations and that the mother herself did not take a very serious view of the matter when she lodged the First Information Report, a nominal sentence would have been quite sufficient to meet the ends of justice. The report made by the mother to the Police was to the effect that the accused being the nearest paternal relations had certainly a superior right to the possession of the girl but that they had no right to take her away forcibly without paying (the mother) some compensation for the trouble and expense that she had incurred in bringing up the girl. This clearly shows that even according to the complainant the matter was not very serious. It is also clear that the girl had not been abducted with the object that she may be seduced to illicit intercourse but with the object that she may be lawfully married to Sher who is the brother of Nur Khan, the husband of *Musammat* Alam Khatun's own sister *Musammat* Kali. Having regard to all these facts and the fact that the girl was actually married to Sher I am inclined to take a somewhat lenient view of the matter, and maintaining the convictions I reduce the sentence of Sher from one of five years' rigorous imprisonment to one of six months' rigorous imprisonment only. The sentences of the other accused are also reduced to those of three months' rigorous imprisonment each.

Z. K. *Sentences reduced.*

PATNA HIGH COURT.

CRIMINAL APPEAL NO. 148 OF 1921.

December 2, 1921.

Present :—Mr. Justice Jwala Prasad and Mr. Justice Ross.

ABMBIKA SINGH—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 149, 325—Grievous hurt caused by some members of assembly—Unlawful assembly not established—Responsibility—Offence.

An old man who was being attacked by the deceased with a stick cried out for help and a large number of persons went to his rescue. Some of them inflicted grievous injuries on the deceased as the result of which he died :

Held, (1) that as there was no unlawful assembly only those persons who had actually inflicted the injuries on the deceased were liable for them;

(2) that as the persons who had actually inflicted the injuries could not be ascertained, there could be no conviction in the case.

Criminal appeal from convictions and sentences passed by the Sessions Judge, Gaya, dated the 14th September 1921.

Mr. *Manuk* (with him Mr. *S. P. Verma*), for the Appellant.

Mr. *Manohar Lal* (Assistant Government Advocate), for the Crown.

AMBIKA SINGH *v.* EMPEROR.

JUDGMENT.

Ross, J.—The five appellants have been convicted under section 147 of the Indian Penal Code on a charge of rioting with the common object of assulting one Balbhadra Singh. Three of them, Righo Singh, Haribar Singh, and Mutru Singh, have also been convicted under section 323 in respect of hurt caused to certain persons. The sentences under section 147 are two years' rigorous imprisonment each, and those under section 323 are three months' rigorous imprisonment each, the latter sentences running consecutively to the former.

The learned Counsel for the appellants does not contest the convictions under section 323, but argues that on the findings of the learned Sessions Judge there ought not to have been any conviction under section 147.

The case for the prosecution was that the complainant's party are cultivators of a certain holding and the accused's party represent *ijaradars*. The complainant's party had applied for commutation of rent and this is said to have enraged the accused. On the evening of the 12th of June last about 50 or 60 persons came to the house of Balbhadra and an altercation took place as a result of which Balbhadra was struck on the head a severe blow which caused his death. Certain other persons received slight injuries.

The finding of the learned Sessions Judge does not support the prosecution as regards the occasion of the assault. He finds that Kirpal Singh, one of the accused, who is an old man of 65, had gone to invite Balbhadra to dinner on some social occasion. There had been a question of outcasting and taking back into caste on which Balbhadra differed from Kirpal's view. Balbhadra, therefore, refused the invitation whereupon there was an altercation which led to Balbhadra's attacking Kirpal Singh and inflicting two injuries upon him with a stick. Kirpal cried out for help and a tumult of people came, and Balbhadra received a fatal injury.

The contention of the learned Counsel for the appellants is that on these facts there was no common object to assault Balbhadra; that the object of the accused was to rescue Kirpal Singh; and that if any of them in the course of effecting that object inflicted grievous injuries he was answerable for the injuries he caused, but the assembly did not become thereby an unlawful assembly. In my opinion this contention is sound. This was not a riot. The accused and others ran to rescue Kirpal Singh and it is impossible to say that if they had not come on hearing Kirpal's cries, he would not have been further assaulted. Excessive force was used by some persons in the course of this transaction and for that these persons have been made answerable. It has not been ascertained who caused the injury to Balbhadra, the prosecution having failed to prove its allegation on this point; but the fact that Balbhadra was fatally hurt by some unascertained person is no reason for convicting all the members of the assembly of rioting.

I would, therefore, uphold the convictions and sentences of the three persons, Haribar Singh, Righo Singh, and Mutru Singh under section 323 and would set aside all the convictions of rioting and the sentences passed against all the appellants under section 147. The appellants Ambika Singh and Jagnarain Singh will be released at once.

Jwala Prasad, J.—I agree.

Z. K. *Order modified.*

KUNDAN LAL *v.* MAKUNDI KUNWAR.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 30 OF 1920.

April 26, 1923.

Present:—Mr. Justice Lindsay and Mr. Justice Sulaiman.

KUNDAN LAL—PLAINTIFF—APPELLANT

versus

MAKUNDI KUNWAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VIII, r. 5—Admission by one of several defendants, effect of—Plaintiff, failure of, to prove issue against other defendants—Procedure.

Order VIII, r. 5, of the Code of Civil Procedure, which regards allegations of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted, as taken to be admitted, gives a discretion to the Court to require any facts so admitted to be proved otherwise than by such admission. [p. 611, col. 1.]

A Court cannot in the same suit record one finding in favour of the plaintiff based on the admission of one of the defendants to the suit, and another finding on the same issue against him based on the evidence. [p. 610, col. 2.]

Janki Das v. *Ahmad Husain Khan*, 25 A. 159; A. W. N. (1902) 218, followed.

Plaintiff sued several defendants for the recovery of certain properties basing his title on a certain adoption. One of the defendants admitted the *factum* of the adoption but denied its validity and the rest denied the *factum* also. The Court held that the defendant had failed to prove the *factum* of the adoption:

Held, that on this finding the plaintiff's suit must fail *in toto* and he could not succeed as against the defendant who had admitted the *factum* of the adoption. [p. 611, col. 1.]

First appeal from a decree of the Additional Subordinate Judge, Saharanpur, dated the 27th of October 1919.

Dr. *Surendra Nath Sen*, Babus *Lalit Mohan Banerji* and *Surendra Nath Gupta*, for the Appellant.

Messrs. *B. E. O'Conor*, *Nihal Chand*, *J. M. Banerji*, Munshi *Girdhari Lal Agarwala*, Babu *Piari Lal Banerji*, Dr. *Kailas Nath Katju* and Munshi *Janki Prasad*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for recovery of possession of considerable property, together with mesne profits, against several sets of defendants. The plaintiff's case was that one Maheshwar Dayal son of Sri Kishen Das, was the last male owner of the property and died in the year 1895. On his death he was succeeded by his mother, *Musammat* Gomti Kunwar, who died in 1903; and on her death his grandmother, *Musammat* Darab Kunwar, remained in possession till 1906 when she also died. On the death of this second limited owner the plaintiff claimed to succeed as Maheswar Dayal's nearest collateral, alleging that he was connected with him through Jwala Datt, who was Harsukh Rai's daughter's son and was alleged to be his adopted son also.

The suit was instituted just within twelve years of the death of *Musammat* Darab Kunwar. In the plaint there was no express mention as to when the alleged adoption of Jwala Datt took place, nor was it stated whether he had been adopted by Harsukh Rai himself or by his widows after his death, and in the latter case, whether the widows had any authority to adopt. The plaintiff contented himself by simply stating that he was the heir of Maheshwar Dayal according to the genealogical table given in the plaint. By subsequent oral pleadings the plaintiff asserted that Jwala Datt had been adopted after the death of Harsukh Rai by his widows with his authority, and that there was a custom among Vaish Agarwals to adopt a daughter's son.

Separate written statements were filed on behalf of various defendants. *Musammat* Makundi Kunwar and *Musammat* Lachchi Kunwar, defendants Nos. 1 and 2, pleaded that Nihal Chand and Sri Kishen Das had been joint, that Jwala Datt had never been adopted by Harsukh Rai's widows, nor had the widows any authority to adopt him, nor could an adoption of a daughter's son be valid. They further set up the adoption of Jai Bhagwan Sarup, defendant No. 3, thereby denying that the plaintiff was the nearest collateral. Jai Bhagwan Sarup, defendant No. 3, asserted that *Musammat* Lachchi Kunwar, the widow of Bisheshwar Dayal, had adopted him and thus he became the nearest heir of Sri Kishen Das or Maheshwar Dayal and would in any case exclude the plaintiff. He also pleaded that the plaintiff was estopped from denying his adoption and urged that the claim was barred by time. Lala Fateh Chand, defendant No. 4, filed a separate written statement in which he admitted generally the pedigree given in the plaint, with the exception of the existence of Maheshwar Dayal. He plead-

ed, *inter alia*, that no son qualified to inherit was ever born to Sri Krishen Das, and set up a Will of Sri Kishen Das in favour of *Musammat* Gomti Kunwar and a subsequent Will of *Musammat* Gomti Kunwar in his own favour. By a subsequent oral pleading he denied the validity of the adoption and the existence of the alleged custom. Defendants Nos. 5—7 in addition set up their claim as *bona fide* purchasers for value from ostensible owners.

Twenty-eight issues were framed in the Court below, out of which all the issues, except issues Nos. 3, 4, 8, 26 and 27 have been found in favour of the plaintiff. The grounds on which the plaintiff's claim has been dismissed are that the *factum* of the adoption of Jwala Datt has not been established, nor has it been proved that Harsukh Rai's widows had the authority to adopt. The plaintiff's contention that an award of the year 1870 either operated as *res judicata* or concluded the matter as a family arrangement has been overruled.

The learned Advocate for the plaintiff has challenged the findings of the learned Subordinate Judge on the issues decided against his client.

We propose to deal with the main question of fact, namely, that of the alleged adoption first and shall deal with the other subsequent questions later on.

[After discussing the evidence, the judgment continued:—]

Having considered the entire evidence, both oral and documentary, we are of opinion that the balance of evidence is distinctly in favour of the defendants and we think that the learned Subordinate Judge has come to the right conclusion in holding that the plaintiff has failed to establish that Jwala Datt had been adopted by the widows of Harsukh Rai.

In view of this finding it becomes unnecessary for us to go into the question of the authority to adopt or any other of the questions raised in the Court below.

There, however, remains for us to consider the argument of the learned Advocate for the plaintiff that in view of the admissions contained in Lala Fateh Chand's pleadings the plaintiff is entitled to a decree against him in respect of the properties in his possession. We have already pointed out that the plaint itself was very defective inasmuch as it did not make any express allegation that Jwala Datt had been adopted by the widows of Harsukh Rai or that his widows had any authority to adopt. The fact of adoption was mentioned only in the genealogical tree given in the plaint. The defendant, Lala Fateh Chand, generally admitted the correctness of the pedigree, with one exception. When the time for the oral pleadings came, the plaintiff's Vakil stated that Jwala Datt had been adopted by the widows of Harsukh Rai after his death and that there was a custom among Vaish Agarwals under which the adoption of a daughter's son was valid. Lala Fateh Chand's Vakil, although admitting the *factum* of adoption, denied the validity of it, basing its invalidity on the Hindu Law. The other defendants to the suit had expressly denied the adoption of Jwala Datt. The plaintiff took upon himself the burden of proving the alleged adoption and led evidence to that effect without any reservation. After both parties had given evidence and the Court had come to the conclusion that the plaintiff had failed to prove the case set up by him, it would not lie in the mouth of the plaintiff to turn round and ask for a decree against one of the defendants who had not expressly denied one of the facts in issue, though he had denied the validity of the adoption and the maintainability of the claim of the plaintiff altogether. If such a request were allowed, the result would be that in the same suit the Court would have to record one finding in favour of the plaintiff based on the admission of one of the defendants to the suit, and another finding on the same issue against him based on the evidence. In an analogous case, namely, that of *Janki Das* v. *Ahmad Husain Khan* (1), this Court remarked that it would be illogical to hold in one and the same decree that the full amount of consideration in a mortgage was paid as far as the mortgagor was concerned and that another sum was paid as far as the subsequent transferee was concerned, and

(1) 25 A. 159; A. W. N. (1902) 218.

that the proper thing to do would be to allow all the defendants to take advantage of the plaintiff's failure to establish the case set up by him. In addition to this we would like to point out that O. VIII, r. 5, of the Code of Civil Procedure, which regards allegations of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted, as taken to be admitted, gives a discretion to the Court to require any facts so admitted to be proved otherwise than by such admission. We think that in the present case, in view of the ambiguous assertion made in the plaint and the unsatisfactory way in which the pedigree was admitted and the validity of adoption denied by one of the defendants, the Court below was justified in calling upon the plaintiff to prove his case. The plaintiff having undertaken to prove it and having failed to do so cannot now fall back upon the partial admission of one of the defendants and ask for a separate decree against him. We are of opinion that when the plaintiff has failed to prove the alleged adoption of Jwala Dutt, without proving which he cannot possibly succeed, his whole suit must fail against all the defendants. The plaintiff has in no way been prejudiced and no question of estoppel can arise under the circumstances.

In our opinion the appeal is without force and is hereby dismissed with costs.

We direct that the respondents will be entitled to one set of costs for Counsel's fee as against the plaintiff-appellant, in addition to the principal and other charges legally taxable. Counsel's fee is allowed to be divided equally between respondents Nos. 1 and 2 (first set), respondent No. 3, Jai Bagwan (second set) and respondent No. 4, Lala Fateh Chand (third set).

Lala Fateh Chand has filed a set of cross-objections challenging some of the findings of the learned Subordinate Judge as well as urging that the amount of costs awarded to him should be increased by a sum of Rs. 216 10-8. As the decree was in his favour it was unnecessary for Lala Fateh Chand to file any separate objection. As to the question of costs, we are of opinion that in view of the unsatisfactory defence set up by him we should make no modification. The result is that the cross-objections are dismissed with costs.

Appeal dismissed.

Z. K.

PATNA HIGH COURT.

CIVIL REVISION NO. 80 OF 1923.

June 26, 1923.

Present :—Justice Sir Jwala Prasad, KT., and Mr. Justice Ross.

Srimati SAVITRI THAKURAIN —PLAINTIFF—PETITIONER

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXXIII, rr. 1, 9—Disqualifying of plaintiff —Ad interim maintenance—Accumulation—Sufficient means.

In a suit *in forma pauperis* by a widow for recovery of possession of property belonging to her late husband, where the Court-fees required was Rs. 3,000, she was granted an *ad interim* maintenance allowance of Rs. 200 a month. In pursuance of this order she received Rs 2,100 on account of arrears of the aforesaid maintenance and then the allowance of Rs. 200 month after month. On a certain date, when the widow had received in all Rs. 5,538 in this manner, an application was made to the Court that she should be disqualified under O. XXXIII, r. 9, of the Civil Procedure Code as she had now sufficient means to pay the Court-fees. There was nothing to show that on that date the widow had with her Rs. 3,000 to pay the Court-fees. The sums previously paid to her, she alleged, had been spent by her to pay off debts incurred on account of her maintenance. The widow was living with a relation of herself and eminent Counsel had appeared on her behalf in Court:

Held, (1) that the monthly allowance allowed to the widow was not a sufficient means to enable her to pay the Court-fees and, under the management, she could never at any one time have the requisite amount unless the arrears of her maintenance allowance accumulated to that extent; [p. 616, col. 1.]

(2) that the fact that eminent Counsel had appeared for her was in itself immaterial, in the absence of anything to show that she had incurred expense on account of them, nor was the fact that she was living with a relative material, in the absence of anything to show that he was financing her either in supporting her or in defraying the cost of the litigation; [p. 613, col. 1.]

(3) that the widow had the right to pay off debts incurred on account of her maintenance

and was not bound to accumulate her monthly allowance to make up the Court-fees in the absence of any such condition being imposed upon her; [p. 616, col. 1.]

(4) that, therefore, in the circumstances of the case, the means of the widow were not such so as to justify the withdrawal of the order allowing her to sue *in forma pauperis*. [p. 616, col. 2.]

Gadigi Muddappa v. *Gadigi Rudramma*, 61 Ind. Cas. 958; 13 L. W. 76 and *In re Atkins*, *Smith* v. *Atkin*, (1909) 1 Ch. 471; 78 L. J. Ch. 307; 99 L. T. 877, distinguished.

Appeal from an order of the Subordinate Judge, Monghyr, dated the 11th February 1923.

Messrs. *K. B. Dutt*, Messrs. *Hasan Imam* and *L. K. Jha*, for the Petitioner.

Mr. *Sultan Ahmad*, for the Crown.

Messrs. *F. A. Savi* and *S. N. Palit*, for the Opposite Party.

JUDGMENT.

Jwala Prasad, J.—This is an application against an order of the Subordinate Judge of Monghyr, dated the 11th February 1923 in Title Suit No. 103 of 1920, dispaupering the plaintiff under O. XXXIII, r. 9 (*b*), Code of Civil Procedure.

The plaintiff's husband, Ugra Mohan Thakur, died some time in 1914, leaving a large estate yielding an annual income of Rs. 1,30,000, besides houses, etc, worth eight or nine lakhs. The opposite party (defendant) are now in possession of the estate having obtained Letters of Administration of a Will said to have been executed by the deceased husband of the plaintiff petitioner. She now disputes the Will and has brought a suit in the Court of the Subordinate Judge of Monghyr for recovery of possession of the properties belonging to her late husband. She applied to be allowed to sue *in forma pauperis* and after contest by the opposite party and the Government she was adjudged a pauper on the 28th August 1920 and was allowed to sue as such. The order of the learned Subordinate Judge was upheld by this Court. The plaintiff applied in the Court below for an *ad interim* maintenance at the rate of Rs. 3,000 per month, and she based her claim for this amount upon a Will of her husband said to have been executed in 1908 which purports to give her Rs. 500 a month as maintenance and a house in Calcutta yielding about Rs. 500 a month which subsequently was sold for Rs. 1,07,000 and another house in Benares. The Will which was probated and on the basis of which the opposite party is in possession of the properties, however, allowed her a maintenance allowance of Rs. 100 a month only. Taking all these circumstances into consideration, the learned Subordinate Judge allowed her a maintenance allowance of Rs. 200 a month during the pendency of the litigation. On the 12th August 1921 in pursuance of this order she received a sum of Rs. 2,100 probably on account of her arrears of the aforesaid maintenance. Between the 20th January 1922 and the 25th April 1922 she received Rs. 1,238-11-6. From May 1922 to December 1922 she got Rs. 600. Thus up to the 25th April 1922 she had received in all Rs. 5,538. On the 1st February 1923 a petition was filed on behalf of Government under O. XXXIII, r. 9 (*b*), to dispauper the plaintiff upon the ground that by reason of her having received the aforesaid sum of Rs. 5,538 and of her being allowed to receive in future Rs. 200 per month as her maintenance allowance she had ceased to be a pauper and consequently she ought not to be allowed to continue the prosecution of her suit as a pauper. The application of the Secretary of State for India was taken up on the 11th February 1923. On that date the petitioner-plaintiff applied for time for filing her objection. This was refused by the learned Subordinate Judge on the ground that the application was not *bona fide*, and on that very day, the Court after hearing the parties passed its order allowing the petition of the Secretary of State and withdrawing its former order allowing her to sue as a pauper, and she was directed to pay the proper Court-fees by the 10th March 1923. The learned Subordinate Judge says that the amount of Court-fees was the first charge and that the plaintiff was bound to pay the same and not to spend the aforesaid sum of Rs. 5,538 which was paid to her, for payment of debt or any other purpose and that she really did not stand in need of the aforesaid sum to meet her maintenance charges inasmuch as she was living with

her cousin, Babu Ram Kishun Jha, a Vakil of Darbhanga who probably was supporting her and carrying on the litigation on her behalf. He also refers to the fact that she had appeared before him through eminent Counsel. In this Court also on her behalf eminent Counsel appeared but there is nothing to show under what arrangement learned Counsel appeared for her in the Court below and in this Court. No affidavit has been filed to show that she had incurred any expense on account of the aforesaid Counsel. Therefore, this consideration in itself is not sufficient to dispauper her. Similarly there is nothing to show that her cousin Ram Kishun Jha, is financing her, either in supporting her or in defraying the cost of the litigation. There is no statement of the said Vakil on the record. There is, therefore, nothing to show that the said gentleman is taking more interest in the lady than what he is naturally expected to take being a relation of hers. To have sympathy and to render assistance to a relation is different from incurring heavy expenses on behalf of that relation. This circumstance also is therefore, not sufficient to dispauper her. She had received the sum of Rs. 5,538 piecemeal and on different dates, long before the application of Government to dispauper her was filed. None of these payments, made at one time, approached Rs. 3,000 the sum necessary to pay the Court-fee upon the plaint so that she was not at any time in possession of the entire sum necessary to pay the Court-fees. It is said that she should have accumulated the said sums until they reached Rs. 3,000 and then paid the Court-fees and should not have spent the sums in paying her creditors on account of debts incurred for maintaining herself. Such a condition was not imposed upon her either on the date when the order allowing her *ad interim* maintenance allowance was passed or on the dates that the several payments were made by the opposite party and received by her. The said payments were made as her maintenance allowance with effect probably from the date of the death of her husband which happened in 1914. It was, therefore, understood that she had already incurred expenses in maintaining herself so that she was entitled to have the arrear allowance of the said maintenance. She in her affidavit in this Court says that the sums paid to her were spent on personal expenditure soon after they were received leaving her in the same straitened circumstances as before. This statement does not seem to be unnatural or in any way untrue considering the circumstances in which she was place on the death of her husband. Without going into the legal aspect of the question, to require her to have accumulated the aforesaid sum and to have paid the Court-fees, is to give charity by one hand and to withdraw it by the other. The learned Subordinate Judge thinks that he was justified in doing so by reason of an application made by the lady on the 21st August 1920. The learned Subordinate Judge says "From the order-sheet, dated 21st August 1920, it appears that she had filed a petition that she was willing to pay the Court-fees if Rs. 3,000 was paid to her and which she was willing to accept under protest." In that petition she says "that in the course of her cross-examination the learned Government Pleader in consultation with the Pleaders for defendants Nos. 1, 5 and 6, and your petitioner believes with the consent of such Pleaders, suggested to your petitioner as to whether or not she was prepared to pay Rs. 3,000 for Court-fee on getting the same from defendant No. 1 on account of the allowance mentioned in (spurious) will propounded by defendant No. 1.

"That your petitioner has been advised and she accordingly submits that if the defendant No. 1 pays your petitioner a sum of Rs. 3,000 on condition that the said sum will be deducted from any sum decreed payable to your petitioner in this suit on account of mesne profits, maintenance or otherwise she is prepared to receive the sum without in any way admitting expressly or impliedly the genuineness or validity of the said Will or that she is bound by any provision appearing in the said Will for her and is willing to pay Court-fee out of such sum as full Court-fee on her plaint.

"That as the said suggestion was made with the consent of the Pleaders of defend-

ant No. 1 your petitioner has reason to believe that the defendant No. 1 will be found willing to pay the said sum of Rs. 3,000 on the conditions hereinbefore mentioned.

"It is accordingly prayed that the Court will be pleased to direct the defendant No. 1 to state whether he is willing to pay a sum of Rs. 3,000 to your petitioner through her Pleaders for payment of Court-fee on the conditions hereinbefore stated within a reasonable time, and if he shows his willingness he may be directed to pay the sum at an early date."

The Court referred the petition to the Pleader of the opposite party by it's order of the 21st August to intimate to the Court if he was willing to pay the said sum of Rs. 3,000 on the condition mentioned in the petition, to the lady. On the 27th August 1920 the opposite party (defendant in the case) filed a petition stating that he was "unable to pay the sum of Rs. 3,000 for payment of Court-fees as he holds a decree for costs amounting to a very large amount against her." The terms of the aforesaid petition were mentioned to the lawyers representing the opposite party in this Court and they intimated that they were not willing to accept the terms proposed by the lady in the said petition.

It is obvious that there was not the faintest suggestion in the application made by the lady that the sum of Rs. 3,000 would be paid as Court-fee by her out of her *ad interim* maintenance allowance. She suggested the payment of the Court-fees out of the sum paid by the defendants on condition that the said sum would be deducted from any sum decreed payable to her in the event of her succeeding in the suit on account of mesne profits, maintenance or otherwise. No legitimate inference, therefore, can be drawn from the petition in question as to any obligation on her part to pay the Court-fee of Rs. 3,000 out of the sum of Rs 5,538 received by her as maintenance allowance on different dates.

Now, has she under the law, ceased to be a pauper? "Pauper" has been defined in r. 1 of O. XXXIII thus: "A person is a 'pauper' when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed when he is not entitled to property worth one hundred rupees other than his necessary wearing apparel and the subject-matter of the suit." On the 28th August 1920 the Court below after hard contest on the part of the defendant and Government held that she was a pauper, in other words, that she was "not possessed of sufficient means to enable her to pay the fee prescribed by law for the plaint," that is, Rs. 3,000 as Court-fee. Clause (*b*) of r. 9 empowers the Court to dispauper her and to withdraw the original order allowing her to sue as a pauper when, as the clause says, it appears that her means are such that she ought not to continue to sue as a pauper. The word "means" in this clause is to be interpreted with the help of the definition of pauper referred to above. To apply clause (*b*) of r, 9 to this case, therefore, the Court could dispauper her when her means were such as to enable her to pay the Court-fee of Rs. 3,000 upon the plaint. On the 1st February 1923 when the application of Government was made or on the 11th February 1923 when the Court dispaupered the plaintiff, there is nothing to show that she had with her Rs. 3,000 to pay the Court-fee, or that she had the means to pay the same. The sums previously paid to her were, as she says, not in her hands at the time as they were spent just after they had been received.

The learned Government-Advocate argues that she ought not to have paid off her debts incurred on account of her personal maintenance but ought to have saved out of the sums received by her Rs. 3,000 in order to pay the Court fees and that her means which were not sufficient at the time when the order of the 20th August 1920 was passed had considerably improved on account of her being allowed a maintenance allowance of Rs. 200 a month and that therefore her means in February were such that she ought not to be allowed to continue to sue as a pauper. In support of this contention the learned Government-Advocate quotes the case relied upon by the Court below *viz.*, *Gadigi*

Mudlappa v. *Gudigi Rudramma* (1). The learned Subordinate Judge says—"No doubt this ruling was not on an application made under O. XXXIII, r. 9, Civil Procedure Code, but the principle to my mind should be the same for an application under O. XXXIII, r. 9, Civil Procedure Code also." In that case, it appeared and in fact the plaintiff admitted that subsequent to the date of the application for leave to sue as a pauper, she had received a large sum of money from the persons against whom she intended to file the suit but that she had paid away that amount to a creditor. Mr. Justice Napier says "There was no dispute that, at the date of her application, she was a pauper. The point taken is that having been in possession of funds after her application, the plea would fail and that she could not revive it, by paying the money away. There is no authority on this point, but I think the contention is well-founded and that the Court had no jurisdiction to make the order, once it had ascertained that she had ceased to be a pauper after the date of the application." We have not got any further detail of the case, we do not know what sum was required to pay the Court-fee and what sum she came into possession of before her application for leave to sue as a pauper was disposed of. All that we know is that a large sum was received probably much larger than was needed for her maintenance and bare subsistence. We also do not know whether the sum received was for her maintenance or a gift or such as she was entitled to, making that receipt as an asset in her hands wherewith she could pay the Court-fee. It is not safe to apply the decision in that case when the facts are not sufficiently mentioned therein in order to find out the reasons which weighed with the learned Judge in arriving at his conclusion.

It may also be passingly mentioned that this was a decision of a Single Judge. I do not think that that case applies to the present case.

The next case is one which my learned brother got hold of and for which I am very much indebted to him. It is *In re Atkins, Smith* v. *Atkin* (2). In that case the lady who obtained leave to prosecute her claim in the action *in forma pauperis* was entitled as tenant for life to have an income amounting to £52 a year under the very settlement which was the foundation of the action. Eve J., held that the "lady, being entitled to this annuity, although subject to the qualified restraint which I have mentioned cannot establish that she is not worth £25." Mr. Luxmoore who appeared for the lady contended that she only had £52 5s. 5d. per annum payable quarterly and after providing for her maintenance it would not be possible to save £25 before the action would come on for trial. The learned Government-Advocate in this case says that such an argument would not be of avail to the plaintiff in withholding payment of the Court-fee payable upon the plaint and in asking to be allowed to continue to sue as a pauper. The argument of Mr. Luxmoore does not seem to have been expressly met in the case but it seems not to have been impliedly accepted inasmuch as the lady in that case was dispaupered. The decision of Eve, J., was under the Supreme Court Rules in England in force at the time when his decision was passed, under which the applicant had to show that she was not worth a sum exceeding £25 a year excluding wearing apparel and the subject-matter of such proceedings. The annuity allowed to the lady in that case was £52. 5s. 5d. that is, almost double the amount required to disallow her to continue her action as a pauper. The limit of £25 was subsequently raised to £50. That was the law of 1922. But in 1923 the Law of England seems to have undergone further modification. It now requires that the applicant's means should exceed £50. and also that his income is at least £2 a week, and in some special cases at the discretion of the Judge £4 a week. Now this modification is in favour of an applicant applying for leave to sue as a pauper. It means that besides possessing an income of £50 he must also have £2 a week or in some cases £4 a week. The latter addi-

(1) 61 Ind. Cas. 958; 13 L. W. 76.

(2) (1909) 1 Ch 471; 78 L. J. Ch. 307; 99 L. T. 877.

tional circumstance is probably with a view to secure maintenance charges, the minimum of which is prescribed to be £2 a week for a man in England and according to the circumstances of a particular case £4 a week. The argument of Mr. Luxmoore in the aforesaid case based upon the maintenance charges being not taken into consideration in disposing of the application for leave to sue as a pauper would perhaps have received better consideration if the present rule had been in force at the time when Eve, J., pronounced his judgment. The decision in that case, therefore, to my mind is not applicable to the present case. There is another reason and perhaps a stronger one why the case in England should not apply to the law in this counrty. No Court-fee is payable upon a bill or plaint in England, and only the cost of conducting the litigation, such as payment of fees to lawyers etc. has to be incurred and that alone is excused. That circumstance has been taken into consideration in the latter portion of the Exception to r. 1 of O. XXXIII, which says that where no such fee is prescribed, the pauper must show that he is not entitled to property worth one hundred rupees. In England he will have now to show that he has not property worth £50 plus a weekly income of two pounds or four pounds as the case may be. The present case is not covered by the latter part o the Exception to rule 1. It is equally not governed by the Law in England. Here the plaintiff was required to pay at one time a sum of Rs. 3,000 as Court-fee upon her plaint, and the Court had to see whether she had the means to do so. In my opinion the monthly allowance of Rs. 200 a month allowed to her is not a sufficient means to enable her to pay the said Court-fee. She can never at one time receive Rs. 3,000 unless the arrears of the allowance accumulated to that extent. She could not be expected to raise any loan on the strength of the monthly allowance which is only *ad interim* and not a sufficient security for Rs. 3,000, which would cover fifteen months' allowance, assuming that she starved herself all that time.

Therefore, I do not agree with the view taken by the Court below or with the argument of the learned Government Advocate in the case that the means of the lady in February 1923 was such as to withdraw the order already granted to her to sue as a pauper or not to allow her to continue her suit *in forma pauperis*. Mr. Palit has been heard on behalf of F. A. Savi who had applied to be made a party.

The application is, therefore, allowed with costs. The order of the Court below is set aside. Hearing fee three gold *mohurs*.

Ross, J.—I agree.

Application allowed.

N. H.

LAHORE HIGH COURT.

FULL BENCH.

CIVIL REFERENCE No. 27 OF 1921.

May 12, 1922.

Present:—Sir Shadi Lal, KT., Chief Justice, Mr. Justice Scott-Smith, Mr. Justice Broadway, Mr. Justice Abdul Raoof and Mr. Justice Martineau.

SUNDAR DAS—PETITIONER

versus

THE COLLECTOR OF GUJRAT—RESPONDENT.

Income Tax Act (VII of 1918), s. 3 (1)—"Received," meaning of—Money received outside British India and transmitted to British India, whether received in British India—Interpretation of Statutes—Fiscal Statute, principles applicable to.

The subject is not to be taxed without clear words to that effect, and in a case of doubt the Courts should always lean against the construction which imposes a burden on the subject. [p. 618, col. 1.]

If a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. [p. 618, col. 1.]

SUNDAR DAS v. COLLECTOR OF GUJRAT.

An equitable construction is not permissible in the case of a taxing Statute where the Court should simply adhere to the words of the Statute. [p. 618, col. 1.]

Partington v. *Attorney-General*, (1869) 4 H. L. 100; 38 L. J. Ex. 205; 21 L. T. 370, relied on.

The word "receive" implies two persons, the person who receives and the person from whom he receives. A person cannot receive a thing from himself. [p. 618, col. 1.]

Where a person after receiving money outside British India brings it into or transmits it to British India, the money thus transmitted cannot be held to be income received in British India within the meaning of section 3 (1) of the Income Tax Act of 1918. [p. 618, col. 2.]

Reference by the Financial Commissioner, Punjab.

Bakhshi *Tek Chand* and Lala *Mehr Chand*, for the Petitioner.

The Government Advocate, for the Respondent.

JUDGMENT.

Shadi Lal, C. J.—This is a reference under section 51 of the Indian Income Tax Act, VII of 1918, which empowers the Chief Revenue Authority, in the event of a question arising with reference to the interpretation of the provisions of the Act or of any rule thereunder, to "draw up a statement of the case and refer it with his own opinion thereon to the High Court." The Financial Commissioner of the Punjab, who is the Chief Revenue Authority contemplated by the section, has drawn up a statement of the case, but has not complied with the provision of the law requiring him to record his own opinion upon the question referred to the High Court. It is, however, unnecessary to delay the matter by remitting the case to him for his opinion, and we accordingly proceed to determine the question.

The statement of the case submitted to us shows that the assessee Rai Bahadur Sundar Das (who died during the pendency of the reference) was a contractor residing in the Punjab who had done extensive work for Government on the Frontier of Baluchistan.

It is common ground that on account of the work done by him as a contractor during the War he received large sums of money from Government but all the payments were made to him at Quetta in British Baluchistan which is exempted from the operation of the Income Tax Act except that part of the Act which imposes the tax upon salaries. It appears that in the financial year 1919-1920, the assessee invested about 23 lakhs of rupees in the Punjab, mainly in buying immoveable property, and the whole of the sum has been treated as the income of one year. We are not concerned with the question whether the aforesaid sum has been rightly held to be income, nor are we called upon to determine the matter whether that sum should be regarded as the income of one year or the accumulated income of more than one year. The only point upon which we are invited to pronounce our opinion is whether the alleged income comes within the purview of section 3, sub-section (1) of the Income Tax Act and is consequently liable to income-tax.

Now, the aforesaid sub-section defines taxable income as income which "accrues or arises or is received in British India, or is, under the provisions of this Act; deemed to accrue or arise or to be received in British India." It is not contended that the latter portion of this sub-section has any application to the case before us, and it is also admitted that the income in question accrued or arose not in the Punjab, but in British Baluchistan, which, as already stated, is exempted from the operation of the Act. The matter then is reduced to this. Was the income "received" in the Punjab? Now the statement of the case makes it absolutely clear that a very large sum of money was received by the assessee at Quetta and that a portion of it was afterwards invested in the Punjab. Upon the material supplied to us we are not in a position to say whether the sum invested in the Punjab was actually brought into, or transmitted to, the Punjab, or whether it was paid to the vendors of the immoveable property by cheques drawn upon a Bank in Baluchistan.

Assuming, however, that the assessee after receiving the money in Baluchistan brought it into, or transmitted it to, the Punjab, I do not think that the money thus brought or transmitted can be held to be income "received" in the Punjab. The assessee undoubtedly received it in

Baluchistan where he was not chargeable with the tax, and I fail to understand how he can receive the same thing again when he has not parted with it in the interval. Whether he brought the money with himself or transmitted it by a cheque or by any other method, it remained all the time under his control; and the process cannot be described as a second receipt of the money.

The Act contains no definition of the word "receive" or "received," but in Murray's Oxford Dictionary the expression "receive" is defined as "to take in one's hand or into one's possession (something held out or offered by another), to take delivery of (a thing) from another, either for oneself or for a third party."

In the Imperial Dictionary the same expression is defined as "to get or obtain, to take, as a thing offered, given, sent, committed, paid communicated or the like; to accept." It seems to me that the word "receive" implies two persons, namely, the person who receives and the person from whom he receives. A person cannot receive a thing from himself.

The rule of interpretation applying to fiscal enactments is thus stated by Lord Cairns in *Partington* v. *Attorney-General* (1):

"As I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however, apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any Statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing Statute where you can simply adhere to the words of the Statute."

It is a sound principle that the subject is not to be taxed without clear words to that effect; and that *in dubio* you are always to lean against the construction which imposes a burden on the subject.

(1) (1869) 4 H. L. 100; 38 L. J. Ex. 255; 21 L. T. 370.

Bearing these principles in mind and taking the expression "received" in its ordinary dictionary meaning, I am of opinion that the assessee, who had already received the money in Baluchistan, did not receive it again when he brought it into, or forwarded it to, the Punjab. I would, therefore, hold that he is not taxable on the alleged income mentioned in the reference.

Scott-Smith, J.—I entirely agree with the learned Chief Justice.

Broadway, J.—I agree. I think *Secretary to the Commissioner* v. *Ramanathan Chetti* (2) relied on by Mr. Jai Lal is distinguishable.

Abdul Raoof, J.—I also agree.

Martineau, J.—I agree.

Reference answered in the affirmative.

Z. K.

(2) 53 Ind. Cas. 976; 43 M. 75; (1919) M. W. N. 826; 10 L. W. 570; 37 M. L. J. 663; 26 M. L. T. 447 (F. B.).

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 40 OF 1922.

April 3, 1922.

Present:—Mr. Karhaiya Lal, J. C.

Thakur BIKRAM SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SURAJ BAKHSH SINGH—PLAINTIFF—RESPONDENT.

Oudh Laws Act (XVIII of 1876), s. 6—Pre-emption—Sale of interest under pre-emption decree whether liable to pre-emption.

Where the holder of a decree for pre-emption sells his interest in the decree, the sale is of an interest in immoveable property which though contingent at the date of sale becomes vested when the vendee deposits the pre-emption money into Court. Such a sale is, therefore, liable to pre-emption under section 6 of the Oudh Laws Act. [p. 619, col. 1.]

Second appeal against a decree of the Third Additional District Judge, Lucknow, dated the 21st November 1921, confirming that of the Subordinate Judge, Bara Banki, dated the 13th August 1920.

HARIDASI DEBI *v.* GOPESHWAR PYNE.

Mr. *Basudeo Lal*, for the Appellants.

Mr. *Zahur Ahmad*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for pre-emption under somewhat peculiar circumstances. On the 10th June 1897 Mahesh Singh, Subh Karan Singh and Fateh Singh sold a 5 pies 8 *kirants* share in the village Basti to Ram Bharose and Durga. Sant Bakhsh Singh filed a suit for pre-emption in respect of that sale and obtained a decree on the 11th September 1918. He was allowed four months to pay the decretal money. Before the expiry of the period fixed for payment Sant Bakhsh Singh sold his interest which he had acquired by the decree in the said property to Bhikham Singh and Kuar Bahadur Singh. On the 9th January 1919 Bhikham Singh and Kuar Bahadur Singh deposited the pre-emption money on behalf of Sant Bakhsh Singh and on the 15th February 1919 they got possession of the pre-empted property.

On the 7th January 1920 Suraj Bakhsh Singh sued for pre-emption in respect of the said share and got a decree, the propriety of which is questioned in this appeal. The contention of the learned Counsel who appears for the defendants-vendees is that no suit for pre-emption was maintainable because what the defendants-vendees had purchased was the right, title and interest of Sant Bakhsh Singh in the decree for pre-emption.

The Courts below repelled that contention.

Section 6 of the Oudh Laws Act (XVIII of 1876) defines the right of pre-emption as a right to acquire immoveable property in preference to other persons. On the date on which Sant Baksh Singh sold his interest in the property to Bhikham Singh and Kuar Bahadur Singh he was entitled only to a contingent right. That right became vested when Bhikham Singh and Kuar Bahadur Singh deposited the pre-emption-money on behalf of Sant Bakhsh Singh. The suit for pre-emption was filed after the interest of Sant Bakhsh Singh became absolute by the payment of the pre-emption money within the meaning of O. XX, r. 14 of the Code of Civil Procedure. The sale-deed was executed before the right had fully vested: but even a contingent interest of that kind is an interest in immoveable property and a suit for pre-emption is, therefore, maintainable.

On behalf of the defendants-appellants reliance is placed on the decision in *Lashkari Mal* v. *Ishar Singh* (1), but the transfer in that case was a transfer of the rights, conferred by the decree, which directed the decree-holder to pay the decretal money into Court and take possession of the land. Here what had been sold was an interest in immoveable property itself. It was then only a contingent interest but it became absolute when the pre-emption money was paid into Court and a suit for pre-emption is, therefore, maintainable.

The appeal fails and is dismissed with costs.

Appeal dismissed.

Z. K.

(1) 94 P. R. 1902; 134 P. L. R. 1902.

CALCUTTA HIGH COURT.

PRIVY COUNCIL APPLICATION NO. 35 OF 1920.

April 10, 1922.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Thomas Richardson, KT.

HARIDASI DEBI—APPELLANT

versus

GOPESHWAR PYNE AND OTHERS—RESPONDENTS.

Court-Fees Act (VII of 1870), s. 19, cl. (xx), Sch. II, Art. 1—Application for refund of money deposited in Court—Court-fee, payment of.

An application to the High Court, for the refund of money deposited by the applicant for the preparation of a paper-book in an appeal, should, under the provisions of Art. 1, Schedule II to the Court-Fees Act, bear a Court-fee of Rs. 2. Such an application does not come within the purview of section 19 (*xx*) of that Act, and is, therefore, not exempt from the payment of Court-fees.

GULSHER KHAN *v.* RAMSWARUP.

Babu *Prokash Chandra Pakrashi*, for the Petitioner.

JUDGMENT.

Sanderson, C. J.—This is an application made by the learned Vakil in respect of a petition presented by the appellant to England in an appeal to the Judicial Committee of the Privy Council. The petition is as follows: It is addressed to "The Hon'ble Sir Lancelot Sanderson, Kt., K. C., Chief Justice and his companion Justices of the said Hon'ble Court."

"1. That your petitioner put in Rs. 100 as a deposit towards costs of preparation of paper-book in the abovementioned appeal."

"2. That on 11th July 1921 the said appeal was dismissed for default for non-payment of the balance of the costs."

"3. That nobody appeared for the respondents in the said appeal."

The prayer was for "the refund of the said sum of Rs. 100 or any sum that is in deposit to the credit of petitioner after deducting the necessary costs incurred by the office in connection with the said appeal or to pass such other order as to your Lordships may seem fit and proper."

When this petition was presented the officer of the Court informed the Vakil that it required a Court-fee of two rupees. The learned Vakil objected to the payment of the two rupees and the matter has been referred to the Court for decision. The learned Vakil based his argument upon section 19 (*xx*) of the Court Fees Act of 1870, which he informs us has not been altered by the new Act dealing with Court-fees. That section provides that "Nothing contained in this Act shall render the following documents chargeable with any fee," and clause (*xx*) runs as follows:—"Application for payment of money due by Government to the applicant." The learned Vakil has argued that this petition is an application for payment of money due by Government to the applicant. The balance of Rs. 100 we are informed, is lying in the Bank to the credit of the Registrar of the Court. In my judgment this is not an application for payment of money due by Government to the applicant within the meaning of section 19, clause (*xx*). On the other hand in my judgment it is an application or petition which was presented to this Court, consequently it comes within the provisions of Schedule II of the Court Fees Act, Art. 1, "application or petition when presented to a High Court —two rupees." It is clearly a petition which was presented to the High Court and in my judgment is liable to a fee of two rupees. I am confirmed in my judgment by the information, which I have received, that this is in accordance with the established practice.

For these reasons the petition will be returned to the learned Vakil for the purpose of the payment of the proper fee, *viz.*, two rupees.

Richardson, J.—I entirely concur.

W. C. A. *Petition returned.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE NO. 75 OF 1922.

June 29, 1923.

Present:—Mr. Baker, Offg. J. C.

GULSHER KHAN—JUDGMENT-DEBTOR—APPELLANT

versus

RAMSWARUP—RESPONDENT.

C. P. Tenancy Act (I of 1920), s. 97, applicability of—Land and trees belonging to different persons.

The prohibition against the attachment of trees apart from the land on which they stand, contained in section 97 of the C. P. Tenancy Act, has no application where the trees and the land belong to different persons.

Sukhnandan v. *Manakchand*, 10 Ind. Cas. 473; 7 N. L. R. 63, referred to.

Appeal against a decree of the District Judge, Hoshangabad, dated the 22nd of December 1921, reversing that of the Second Subordinate Judge, Hoshangabad, dated the 17th of September 1921.

Mr. *J. Sen*, for the Appellant.

Messrs. *G. L. Subhedar*, and *K. K. Gandhe*, for the Respondent.

JUDGMENT.—The only question in this appeal is whether the attachment of trees standing in land belonging to another person is prohibited by section 97 of the Central Provinces Tenancy Act, which provides that "trees standing in any land shall not be attached in execution of a decree or order of a Civil Court unless the land itself is attached." The section is based on the ruling in *Sukhnandan* v. *Manakchand* (1), but that ruling specially excepts cases were trees belonging to one man stand on land of another. The note to section 97 in the Central Provinces Revenue Manual, Volume I, Edition 1921, states that section 95 safeguards existing rights and customs. It is quite clear that the prohibition of the attachment of trees apart from the land on which they stand has no application where the trees and the land belong to different persons. The view of the lower Appellate Court is, therefore, right and the appeal is dismissed with costs, Pleader's fee Rs. 10.

Z. K. *Appeal dismissed.*

(1) 10 Ind. Cas. 473; 7 N. L. R. 63.

MADRAS HIGH COURT.

FULL BENCH.

REFERRED CASE NO. 2 OF 1922.

January 29, 1923.

Present:—Sir Walter Salis Schwabe, KT., Chief Justice, Justice Sir Francis Oldfield, KT., and Mr. Justice Coutts-Trotter.

THE SECRETARY, BOARD OF REVENUE (INCOM-TAX), MADRAS—REFERRING OFFICER

versus

RIPON PRESS AND SUGAR MILLS CO. LIMITED—ASSESSEE.

Income Tax Act (VII of 1918), s. 3 (1)—Income accruing and received outside British India—Directors and share-holders controlling business from British India—Income whether liable to assessment.

A Company having its head office in Bellary in the Presidency of Madras carried on a factory in the Territories of the Nizam of Hyderabad, outside British India and the actual business operations of the Company were conducted there. The Directors and share-holders of the Company, who controlled the business, directed the policy examined the accounts and issued the dividend warrants, were in British India. Some money was received at Bellary for the purpose of office expenditure and some money also for the payment of dividend warrants, although the dividend warrants issued to share-holders were expressed to be payable outside British India. The Company was sought to be assessed to income-tax in Madras Presidency on its profits:

Held, that the profits of the Company did not accrue or arise, nor were they received, in British India within the meaning of section 3 (1) of the Income Tax Act of 1918 and the Company was not, therefore, liable to be assessed to income-tax on its profits. [p. 622, col. 1.]

In re Aurangabad Mills, Limited, 64 Ind. Cas. 9; 45 B. 1286; 23 Bom. L. R. 570; *Secretary to the Commissioner* v. *Ramanathan Chetti*, 53 Ind. Cas. 976; 43 M. 75; (1919) M. W. N. 826; 10 L. W. 570; 37 M. L. J. 663; 26 M. L. T. 447; (F. B.), *Sundar Das* v. *Emperor*, 77 Ind. Cas. 632; 3 L. 349; (1923) A. I. R. (L) 14, followed.

Per *Oldfield, J.*—The identity between the share-holders and the Company is immaterial, where the assessment sought to be imposed is of the income of the Company as distinguished from that of the share-holders in their individual capacity. Even the payment of dividends to the share-holders within British India would be nothing more than the distribution of income which had already accrued outside British India and was payable as of right in accordance with the arrangement by the Company to the share-holders only outside British territory. [p. 623, col. 1.]

Case stated under section 51 of Act VII of 1918 by the Secretary, Board of Revenue (Income-Tax) Madras, in I. P. A. No. 28 of 1920-21.

Mr. *C. Madhavan Nair*, Government Pleader, for the Government.

Mr. *C. Smbasiva Rao*, for the Assessee.

JUDGMENT.

Schwabe, C. J.—In this case the facts contained in the original reference and the further report, which is by no means clearly expressed, amount to this. The Company carries on a factory at Raichur in the territory of the Nizam of Hyperabad. At that factory the material is pressed. Against persons who bring the material to the factory, a charge is made, and the charge is received wholly in

Hyderabad. The Company's Head Office is in Bellary in this Presidency. There are Directors there and they control the business carried on at Raichur by directing its policy, fixing the rates to be charged for the work done there, examining its accounts and issuing dividend warrants in respect of the profits earned The only other thing that, it would appear, is done in British India, is the receipt of some money for the purpose of the office expenditure at Bellary and possibly, though it is not clear on the statement, the receipt of some money which is occasionally used for the payment of dividend warrants at Bellary, though, by the terms of the dividend warrants, they are payable only at the office of the treasury at Raichur.

The question referred to us is whether the Company can be assessed to income-tax on the whole of its profits for the year, it being claimed that Bellary is the place where the total amount of the profits is paid by the Company to its share-holders by the issuing of dividend warrants. The question turns on the interpretation of section 3 (1) of the Income Tax Act VII of 1918 which runs thus: "This Act shall apply to all income from whatever source it is derived if it accrues or arises or is received in British India" or is, under the provisions of this Act, deemed to accrue or arise or to be received in British India. Except for the small amount received as the Company's money by the Company in Bellary, in my judgment there is no income which accrues or arises or is received in British India and there is nothing in the Act to show that such profits earned outside British India are to be deemed to accrue or to arise or to be received in British India.

There is a direct authority on the point in *In re Aurangabad Mills, Limited* (1). In that case the facts were precisely the same as in this case except that the Bombay Directors of the business which had its factory in Aurangabad, seemed to have controlled the business in Aurangabad more than the Bellary Directors did in this case, and except for the fact that it was admitted in that case, though it is not clear in this case, that money was received in Bombay for the express purpose of paying some of the Bombay share-holders their dividends; and it was held in that case that the general profits of the Company were not liable to income-tax. I agree with that decision which governs this case, and I have nothing to add to the reasons given by Macleod, C. J., in that case. I think that this case really is also covered by the ruling of this Court in *Secretary to the Commissioner* v. *Ramnathan Chetti* (2) There is a recent case reported as *Sundar Dass* v. *Emperor* (3) where it was held that where a man carried on business outside the part of India to which the Income Tax Act applies, earned his profits there, and the had them remitted to him in India where he resided, that money was not received in India. It was pointed out that it had been received outside and had remained in the possession, actual or constructive, of the trader throughout and that it could not be considered to be received again when it was brought into British India whether brought by him or sent from abroad to him in British India. I point out this because that is a point which may be involved in the event of the question being referred to this Court whether small amounts, received by the Company as stated by me above in Bellary are themselves liable to taxation or not.

I, therefore, answer the question referred to us in the negative. The costs to be assessed by the Registrar are payable to the assessee.

Oldfield, J.—I agree. I only wish to point out that although the argument as to the receipt by some of the share-holders of dividends in Bombay was available to the Crown in *In re Aurangabad Mills, Limited* (1) it was not thought worthwhile to make any distinct reference to it in the judgment. I supplement what has been said by my Lord regarding it, because it is as well to point out that the terms of the reference of the Board indicate a fundamental misconception on one important point. Mention is made in that reference of the fact that "the majority of the share-holders (who after

(1) 64 Ind. Cas. 9; 45 B. 1286; 23 Bom. L. R. 570.

(2) 53 Ind. Cas. 976; 43 M. 75; (1919) M. W. N. 826; 10 L. W. 370; 37 M. L. J. 663; 26 M. L. T. 447 (F. B.)

(3) 77 Ind. Cas. 632; 3 L. 349; (1923) A. I. R. (L.) 14.

all form the Company) receive their dividends in British India." The identity between the share-holders and the Company is not material for the present purpose, since the assessment is not of the income as the income of the individual share-holders, but as the income of the Company, and we have nothing to do with the share-holders in their individual capacity. So far as the Company is concerned the only material matter is the receipt of the income and that income was received at Raichur. If some of it came to Bellary and was actually used to pay dividends that is no reason why we should assume that what was done in Bellary was anything more than the distribution of what was already the Company's income, and was payable as of right in accordance with the arrangement made by the Company to the share-holders only at Raichur outside British territory. It is not necessary for us, and it is not possible on the facts before us, to say whether payment in the cases referred to in the reference was made at Bellary by the officers of the Company to the payees, who took their money there instead of presenting their dividend warrants at Raichur, after receipt of the money by those officers at the latter place as the payees' agents, or to attempt an exact definition of the legal position. It is sufficient that such payments have nothing to do with the accrual of income to or its receipt by the Company as such. With these observations, I agree in the negative answer proposed.

Coutts-Trotter, J.—I agree. Where you have dividend warrants issued to share-holders expressed to be payable at the office of the treasury at Raichur, it is very strong evidence that the income regarded as the Company's income has been received and has accumulated in Raichur. I entirely agree with the decision cited to us in *Sundar Das* v. *Emperor* (3), that you cannot receive the same sum of money *qua* income twice over, once outside British India and once inside it. *In re Aurangabad Mills, Limited* (1) covers the point raised in argument, and I respectfully agree with that decision.

Reference answered in the negative.

V. N. V.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 529 OF 1923.

March 2, 1923.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Cuming.

W. REBEIRO—PETITIONER

versus

ELIAS E. M. JACOB—OPPOSITE PARTY.

Calcutta Rent Act (III of 1920), ss. 2 (f) (ii), 15 (3)—Policy of Act—"First letting," meaning of—Sub-lease.

The Calcutta Rent Act was intended for the protection of tenants generally, and not merely of lessees to the exclusion of sub-lessees. [p. 626, col. 2.]

The words "first let" in section 2 (*f*) (*ii*) of the Calcutta Rent Act, cannot be construed to mean the first letting between the tenant and the sub-tenant. [p. 626, col. 2.]

When an entire building is let out, a subsequent sub-letting of a part of it is not the "first letting" of such part within the meaning of section 2 (*f*) (*ii*) of the Calcutta Rent Act. The first-letting of the entire building is the first-letting contemplated by the section. [p. 626, col. 2.]

Chapsi Umersi v. *Keshavji Damji*, 60 Ind. Cas. 960; 45 B. 744 at p. 752; 23 Bom. L. R. 133, *Glossop* v. *Ashley*, (1922) 1 K. B. 1; 90 L. J. K. B. 1237; 125 L. T. 842; 85 J. P. 234; 19 L. G. R. 593; 65 S. J. 695; 37 T. L. R. 827, *Woodward* v. *Samuels*, (1920) W. N. 82; 89 L. J. K. B. 689; 122 L. T. 681; 84 J. P. 105, referred to.

Rule.

Babu *Bepin Chandra Mullick*, for the Petitioner.

Babu *Mokendro Nath Roy* and Mr. *Chippendale*, for the Opposite Party.

JUDGMENT.

Chatterjea, J.—This Rule arises out of proceedings taken by the opposite party under the Calcutta Rent Act for fixing the standard rent of certain premises.

It appears that the opposite party took a three years lease of the entire premises No. 40 Ripon Street at a rent of Rs. 150 in July 1919, and on the 4th August 1919 sublet it, with the exception of three rooms facing Ripon Street, at a monthly rent of Rs. 200 exclusive of taxes to the petitioner. Disputes having arisen between the parties, regarding the rent, the opposite party applied to the Rent Controller for fixing the standard rent of the premises held by the petitioner *i. e.*, of the building with the exception of the roadside rooms. The Rent Controller fixed the standard rent of the premises at Rs. 148 per month exclusive of taxes. The opposite party thereupon moved the President of the Improvement Tribunal for revision

of the order of the Rent Controller under section 18 of the Rent Act, and the President held that the sub-letting of the premises (excepting the roadside rooms) was the first letting of the premises after November 1918, and fixed the standard rent of the premises in question, as between the opposite party (the lessee) and the petitioner (the sub-lessee) at Rs. 200 exclusive of taxes.

Now under clause (*c*) of section 2 the expression "landlord" includes "a tenant who sublets any premises". The opposite party, therefore, is a landlord within the meaning of the Act. The expression "premises" includes a part of a building let separately. It is accordingly contended on behalf of the opposite party that as between the opposite party who must be treated as the landlord under the Act and the petitioner, the premises (*i. e.*, the part of the building separately let to the petitioner) was first let on the 4th August 1919. In construing the provisions of section 2 (*f*) (*ii*) the question arises whether it contemplates only *one first letting* or there may be more than one first-letting as portions of the premises are sub-let from time to time to different persons.

For instance a house consisting of two rooms is let out to *A* in January 1919. *A* then sublets one room to *B*, and the other to *C*, in February and March respectively. The question is whether the letting of the entire premises to *A* in January 1919 was the first letting of the rooms, or the sub-letting in February and March was the first letting with respect to the rooms. The contention of the opposite party is that having regard to the fact that the expression "landlord" includes a "tenant who sublets any premises" and "premises" includes a "part of the premises", the first letting with respect to *B* was in February and with respect to *C* in March respectively. On the other hand it is contended on behal of the petitioner that the words "the rent at which the premises were or may be first let" in section 2 (*f*) (*ii*), contemplate only one first letting of the premises, and, therefore, in the above illustration both the rooms must be taken to have been first let when the entire premises were let to *A* in January 1919. The question of the standard rent depends upon the determination of the above question.

The question whether there can be only one standard rent or a number of different standard rents was, considered in the case of *Chapsi Umersi* v. *Keshavji Damji* (1), where Sitalvad, J., observed: "The only object to my mind of including in the definition of 'landlord' a tenant, and in the definition of 'tenant' a sub-tenant, is to extend the benefits of the Rent Act to sub-tenants, but I do not think that it was intended that the standard rent was to be determined by different standards between the original landlord and the tenant, and between the tenant and the sub-tenant. Otherwise the tenant, while himself getting the advantage of the Rent Act, would be able to profiteer as between himself and the sub-tenant.....'Standard' means a rule or a model and can only be one. The whole object of the Rent Act is to prevent tenants being made to pay rent which the Legislature considers excessive or unreasonable.....Standard rent must, I think; mean the rent at which the premises were originally let. The standard rent is to be fixed in relation to premises and not in relation to persons, and can, therefore, be only one, and not varying as between different individuals." In the case of *King* v. *York* (2); the Court of Appeal in dealing with the provisions of the Increase of Rent and Mortgage Interest Act, 1915 said:—"The Act applied to houses, not to persons. The Act operated *in rem* not *in personam*. It stereotyped the rent of a house."

The learned President of the Improvement Tribunal differed from the view taken in the Bombay case, and pointed out that in sub-section (2) of section 13 of the Bombay Rent Act it is provided that "in the case of any such sub-letting as is referred to in clause (*a*) of sub-section (1) the Court shall have regard to the standard rent of the premises a part of which has been or is sublet", whereas there are no provisions corresponding to sub-section (2) of section

(1) 60 Ind. Cas. 960; 45 B. 744 at p. 752; 23 Bom. L. R. 133.

(2) (1919) W. N. 59; 88 L. J. K. B. 839; 35 T. L. R. 256.

13 of the Bombay Act in section 15 of the Calcutta Rent Act. That is so, but in the first place, the observations of Setalvad, J., were not based upon the provisions of sub-section (2) of section 13 of the Bombay Act, and secondly I think that the provisions of sub-section 3 (*a*) of section 15 of the Calcutta Rent Act *viz.*, that the Rent Controller may fix the standard rent at such amount as having *regard to the provisions of this Act*, and the circumstances of the case, he deems just, would include a consideration of the "standard rent of the premises a part of which has been sublet."

Then the learned President is of opinion that "the view taken by Setalvad, J., that the standard rent of a premises which has been let and sublet in succession should be based on the rent of the original letting is opposed to the view taken by the Court of Appeal in *Glossop* v. *Ashley* (3), where the rent of the last sub-letting, that is to say, the rent paid by the tenant in actual occupation was taken as the basis for the standard rent." There was however no question of *last letting* in that case. A Brewery Company were lessees of a public house at a rent of £ 130 on the 3rd August 1914. The Company had sublet the house to the defendant on a quartarly tenancy at a rent of £24 a year by an agreement containing a clause for the purchase of liquors by the defendant from the Company. In August 1916 the lease to the Brewery Company expired and was not renewed, and the defendant Company became tenant to the owners of the house who were the plaintiffs, at a rent subsequently fixed at £ 30 a year. On March 23rd 1920 the plaintiffs duly gave the defendant notice to quit on June 24th 1920. They also gave him notice that if he held over after that date his rent would be £ 130 a year. The defendant held over but refused to pay rent at a higher rate than £ 30 a year. The rateable value of the house was £ 24 16s. and no more. In an action by the plaintiffs for possession of the house it was held by the Court of Appeal that the defendant having been in occupation of the house on and ever since August 3rd 1914 the standard rent was £24, or at the most £ 24 16s and not £ 130. It will be seen that both the lease and the sub-lease were in existence on the crucial date (31d August 1914). Subsequently the sub-lessee became the tenant under the owners, as the lessee did not renew his lease on the expiry of the term, and the question was whether the rent paid by the original lessee or that paid by the sub-lessee on the 3rd August 1914 was the standard rent.

The Court of Appeal thought it undesirable to give to the enactment any general construction, but was of opinion that in that case the rent paid by the tenant in actual occupation on the 3rd August 1914 was the standard rent. It was argued that "the Statute is speaking not only of the original letting but of every subletting of the dwelling house, and so there may be any number of standard rents and the standard rent in question in any particular case is the rent payable by that tenant to that landlord between whom the dispute has arisen." On the other hand it was contended that "the plain intention of the Act is that there should be but one standard rent, namely, the rent payable on August 3rd 1914 by the tenant then in occupation to his immediate landlord." Bankes, L. J, observed "in my view there are difficulties in the way of either construction as applicable to every case", and that he was not prepared to hold that in every case the rent paid by the tenant in actual occupation on 3rd August 1914 was the standard rent. Scrutton, L. J., on the other hand seems to have been of opinion that the Legislature contemplated only one standard rent. Atkin, L. J., was also inclined to take that view, but he did not decide the question. The question, therefore, whether there was only one standard rent or there could be any number of standard rents was not decided, though two of the learned Judges were inclined to take the view that only one standard rent was contemplated. However that may be, there was no question of *last sub-letting* in that case, as both the lease and the sub-lease were in existence on August 3rd 1914, and the precise question before us did not arise in that case.

(3) (1922) 1 K. B. 1; 90 L. J. K. B. 1237; 125 L. T. 842; 85 J. P. 234; 19 L. G. R. 593; 65 S. J. 695; 37 T. L. R. 827.

REBEIRO *v.* JACOB.

In the case of *Woodward* v. *Samuels* (4) the respondent (Samuels) was the tenant of a house at a rent of £ 45 from a date prior to August 3rd 1914 until 1919 when he purchased it, and converted it into three flats. He made alterations in the house the costs whereof amounted to £ 35. He then let the flats separately at varying rents making in all £ 2-18s-6d., equivalent to an annual rent of £ 153, the landlord paying the taxes and rates. The appellant (Woodward) who in June 1919 became tenant of the first floor claimed that the 22s. which he was charged for his flat was in excess of the standard rent provided by the Act of 1915, and applied to the Court for apportionment of the rent of the house between the three flats for the purpose of fixing the standard rent of his flat. The County Court Judge held that as the appellant's flat was first let as a separate dwelling house in June 1919 the rent at which it was then let *viz.*, 22s. a week was the standard rent of it, and there was no case for apportionment. On appeal it was held that the case clearly fell within the provisions of section 2 sub-section (3) of 5 & 6 Geo. V, c. 97 (which expressly provides for apportionment of the rent), and the decision of the County Court Judge was reversed. The Court observed: "If a house was pulled down and re-built since August 1914, the standard rent would be the rent at which the new building was first let, but it was otherwise with the conversion of an existing building into flats. If on conversion, one of the flats was to be regarded as a distinct thing from the whole dwelling house, a landlord might, by reserving one room for himself, let the residue of the house at any rent he pleased".

The question is not free from difficulty. But the definition of the expressions "landlord" and "premises" might support the construction put forward on behalf of the opposite party only if it is held that the particular portion of the building sublet to the petitioner in August 1919 was not first let, when the entire building was let out to the opposite party in July 1919. It is difficult, however, to hold that a portion of a building is not let out when the entir building of which it is a component part is let out.

Then again the provisions of section 15, sub-section (3), go against the construction relied upon by the opposite party. If the sub-letting of a part is the first letting, the rent at which such part is sub-let after November 1918 is the standard rent under section 2 (*f*) (*ii*). If so, there would be no necessity of enacting in section 15 (3), that in a case where a tenant has sublet a part of any premises let to him, the Rent Controller "may fix the standard rent at such amount as having regard to the provisions of the Act and the circumstances of the case he deems just", because according to the contention of the opposite party, the rent at which such part was sublet would automatically become the standard rent under section 2 (*f*) (*ii*). The provision of section 15 (3) referred to above would come into operation if the part sublet is taken to have been first let when the entire premises were let out to the lessee.

The construction sought to be placed by the opposite party would defeat the object of the Act. There can be no doubt that the Rent Act was intended for the protection of tenants generally, and not merely of lessees to the exclusion of sub-lessees, and if the contention of the opposite party *viz.*, that the words "first let" in section 2 (*f*) (*ii*) should be construed to mean first letting between the tanant and the sub-tenant, be accepted, the object of the Act may be frustrated. An entire premises may be taken on lease by a tenant at a rent of Rs. 500 a month, and he may sub-let in four flats at a rent of Rs. 500 or for the matter of that, at any rent he pleases for each flat, each of which according to that contention would be a first letting so far as that particular flat is concerned. Having regard to the considerarion stated above and the observations in the Bombay case referred to above, I am unable to hold that when an entire building is let out, a subsequent sub-letting of a part of it is the *first letting* of such part.

Section 15, sub-section (3), provides for a case such as the present. That section as stated above, gives the power to the

(4) (1920) W. N. 82; 89 L. J. K. B. 689; 122 T. 681; 84 J. P. 105.

REBEIRO *v.* JACOB.

Rent Controller in certain cases, among others, in cases where a tenant has sub-let a part of any premises let to him, to fix the standard rent at such amount as having regard to the provisions of the Act and the circumstances of the case he deems just.

I am accordingly of opinion that the rent at which the portion of the house was sub-let to the petitioner is not the standard rent, but the standard rent for that portion is to be fixed according to the provisions of section 15, sub-section (3). That has been done by the Rent Controller and he has fixed it at Rs. 148. The learned President of the Improvement Tribunal has fixed it at Rs. 200, but he has fixed the rent at Rs. 200 on the ground that that was the rent payable under the first letting, and has not decided the question with reference to the provisions of section 15, sub-section (3).

The case must, therefore, go back to the learned President so that he may fix the standard rent having regard to the provisions of section 15, sub section (3). Costs, two gold *mohurs*, to abide the result.

Cuming, J.—This is an application for the revision of an order passed by the learned President of the Calcutta Improvement Trust Tribunal revising an order made by the Rent Controller.

The facts are these according to the petitioner. In July 1919 the opposite party Mr. Elias Jacob took a three years' lease of the entire premises No. 40 Ripon Street on a rental of Rs. 150 a month. On the 4th August 1919 Mr. Jacob let the same premises to the petitioner Mr. Rebeiro with the exception of three rooms in the ground floor for Rs. 200 a month exclusive of taxes. The case of the petitioner is that before November 1918 the rent of the entire premises was Rs. 100 and that that rent was not unduly low. He applied to the Rent Controller and the Rent Controller held that the standard rent of the premises let out to the petitioner should be Rs. 148 having regard to the fact that Rs. 132 would have the fair rent of the entire premises in November 1918 and the opposite party Mr. Jacob had spent some money in electric wiring. Mr. Jacob applied to the Presiden of the Tribunal for a revision of the order. The President of the Tribunal held that what was let out to Mr. Rebeiro was the house less the three shops and the premises let to the petitioner formed only a part of the entire premises. Therefore he held the letting must be considered as the letting of the particular premises leased to the petitioner and as such the case was a case of first letting and so the rent of Rs. 200 plus occupier's share of the taxes must be considered as the standard rent of the said portion of the entire premises.

The sub-tenant Mr. Rebeiro has moved this Court in revision and he contends that the principle followed by the learned President of the Tribunal in assessing the rent is wrong. His contention appears to be as follows. This letting to him was not a case of first letting and does not come under section 2 (*f*) (*ii*) of the Calcutta Rent Act. That this letting of the particular combination of rooms cannot be considered to be a first letting. These rooms had been let out before when the entire premises were let out.

The opposite party contend that this is the first letting of this particular combination of rooms. That this particular combination of rooms constitutes a premises under section 2 (*c*) and that this letting was, therefore, the first letting of these premises. The simple point for decision would seem to be this.

Supposing a dwelling house has already been let as a whole would the subsequent sub-letting of a portion of the house be a first letting so far as that portion of the house was concerned.

The answer must, I think, be in the negative, for to hold otherwise would be at once to defeat the whole purpose of the Act. The landlord could, by reserving a room for himself or letting it to a third party, let the house at any rent that he pleased and could so arrange by reserving a different room each time he let out the house that every letting of the house would be a first letting.

This was the point of view taken by the learned Judges in deciding the case of *Woodward* v. *Samuels* (4). No doubt the decision was under the English Act (5 & 6 Geo, V, C. 97, 1915) but it has not been shown me that as far as this particular point is concerned, there is any

difference between the Calcutta Act and the English.

No doubt in section 2 (e) "premises" means any building or part of a building and from this it is argued that this particular combination of rooms forms a different premises from the whole building of which it is a part.

This no doubt is correct. But when the whole building was let out this new particular combination of rooms was let out then as part of the whole and so this present letting cannot be considered as a first letting of the premises in question.

I, therefore, agree with the order which my learned brother proposes.

Z. K. *Petition allowed; Case remanded.*

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 836 AND 850 OF 1922.

November 22, 1923.

Present:—Mr. Justice Krishan and Mr. Justice Waller.

YEZZU MALLAYYA—DEFENDANT NO. 1 —APPELLANT

versus

TALLURI PUNNAMMA, MINOR, BY NEXT FRIEND KONKALLA PUNNAYYA —PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11, Expl. IV, O. XXXII, r. 4—Suit against minor—Guardian ad litem, *appointment of—Consent of guardian, form of*—Res judicata—*Plea not taken in previous suit whether can be taken in subsequent suit.*

Order XXXII, r. 4 of the Civil Procedure Code requires that no person shall be appointed guardian *ad litem* for a minor defendant wihout his consent. But there is nothing in the rule which requires that that consent should be expressed in writing; it may be inferred from the circumstances of the case. [p. 629, col. 2.]

Chhatter Singh v. *Tej Singh*, 59 Ind. Cas. 671; 43 A. 104; 18 A. L. J. 956; 2 U. P. L. R. (A.) 384, followed.

In a suit by a minor through his next friend to set aside a sale of the minor's property held in execution of a decree against the minor, the plea that the minor was not properly represented in the suit in which the decree was passed and that, therefore, the decree and the sale are null and void might and ought to be put forward as a ground of attack and if the plea is not taken, the decision in the suit would operate as *res judicata* in a subsequent suit by the minor to set aside the decree on the ground that the minor was not properly represented in the suit. [p. 630, col. 1]

Arunachalam Chetty v. *Meyyappa Chetty*, 21 M. 91; 8 M. L. J. 28; 7 Ind. Dec. (N. S.) 421 and *Naina Muhammad Rowther* v. *Abdul Rahman Rowther*, 72 Ind. Cas. 207; 46 M. 135; (1922) M. W. N. 845; 17 L. W. 188; 32 M. L. T. 82; (1923) A. I. R. (M.) 257, followed.

A guardian *ad litem* is not bound to defend a suit in which the defence will not succeed. [p. 629, col. 2.]

Second appeal against a decree of the District Court, Guntur, in Appeal Suit No. 157 of 1921, preferred against a decree of the Court of the Principal District Munsif, Guntur, in Original Suit No. 414 of 1919.

Mr. *B. Somayya* and *C. L. Raghava Rao*, for the Appellant.

Mr. *B. Satyanarayana*, for the Respondents.

JUDGMENT.—These are second appeals which arise in a suit brought on behalf of a minor by his next friend for setting aside the decree in Original Suit No. 187 of 1917 obtained against that minor with the present second defendant as his guardian for a certain sum of money due on a promissory-note, and also for the setting aside of a sale in execution of that decree, in which the third defendant became the purchaser of certain properties belonging to the minor. The learned District Judge has declared the decree to be invalid but he has upheld the sale in execution of that decree, and in consequence, the plaintiff has appealed in Second Appeal No. 850 of 1922 and the decree-holder in Original Suit No. 187 of 1917 has appealed in Second Appeal No. 836 of 1922. Both the second appeals have been heard together.

Now, the first question we have to consider is whether the decree in Original Suit No. 187 of 1917 should be treated as null and void and not binding against the minor. The only reason urged before us for holding so is that the consent of the second defendant, who was appointed as guardian *ad litem* of the minor, was not obtained before hand and that this appointment should be treated as a nullity and the suit should be looked

upon as having been decreed against the minor without his being properly represented on record. The learned District Judge has, no doubt, found in the minor's favour on this point, but after considering the point carefully we are unable to agree with him.

The second defendant was appointed in 1913 as the guardian of the person of the minor under the Guardians and Wards Act. The Suit No. 187 was brought in 1917, that is at a time when the second defendant was the certified guardian of the minor. Notice was issued to the second defendant before he was appointed guardian and the notice was in these terms:—

"Take notice hereby that Yezzu Malliah, the plaintiff in the above-mentioned suit (Original Suit No. 187 of 1917) has presented an application to this Court praying that a guardian *ad litem* for the minor may be appointed and that after receipt by you of the notice of application in the matter of the said minor, you or any friend of the minor be appointed as such before 14th March 1917 the date fixed; and that, in default, the Court shall appoint a separate person as guardian of the minor for purposes of the suit."

That notice was served on the defendant personally and it bears an endorsement in these terms:—

"On 27th February 1917 the Court peon having come to the village of Tadikonda and given me, the guardian of the defendant mentioned in the order a copy of the notice of application for appointment of a guardian for the minor, herewith attached, I have received the same. (Signed Konagalla Venkatasubbarayudu, that is, the second defendant)."

It is not disputed that this notice was served on the second defedant personally. On the date fixed for the appointment, of the guardian the second defendant no doubt, did not appear, and the learned District Munsif, evidently holding that the second defendant was willing to act as guardian, appointed him as guardian of the minor for the suit. He notes "Served. Absent. Appointed." Now, it is contended that unless there is an express consent on record by the person proposed as guardian that he would act as guardian, his appointment as guardian is illegal and the case should be treated as if no guardian has been appointed for the minor. We are unable to accept this argument. All that O. XXXII, r. 4 *(ii)* says is that no person without his consent shall be appointed guardian for the suit. No doubt the consent of the person is wanted but there is nothing in the rule which requires that that consent should be expressed in writing. The consent may be inferred from circumstantial evidence, and in this case, we think the circumstances are such that we are justified in holding that the second defendant did in fact consent to be the guardian of the minor for the suit. He was, as already pointed out, appointed guardian of the person of the minor under the Guardians and Wards Act, and, under clause *(ii)* of r. 4 of O. XXXIII he was the person who ought to be appointed as guardian for the suit, unless the Court considered, for reasons which have to be recorded, that it was for the minor's welfare that another person should be appointed. There is nothing here to show that there was any reason for thinking that another person should be appointed for the minor's welfare. That consent can be inferred from circumstances is clear from the ruling in *Chhatter Singh* v. *Tej Singh* (1), which we respectfully follow. In these circumstances we must reject the argument that the minor was not properly represented in the previous suit.

It is also suggested that, as the second defendant was the person who executed the promissory-note, he had an interest that was adverse to the minor; but, in the particular case he was not a party himself, he not having been sued but only the minor and there is no reason to suppose that the maternal uncle of the minor would not have put forward a proper defence for the minor if there was one. No guardian is bound to waste the minor's money in trying to defend a suit in which the defence will not succeed. The conclusion we have, therefore, come to is that the decree itself cannot be set aside.

(1) 59 Ind. Cas. 671; 43 A. 104; 18 A. L. J. 956; 2 U. P. L. R. (A.) 384.

JOKHU *v.* DEOKINANDAN PANDEY.

It is not proved on the minor's side that she has been in any way prejudiced by the course that the proceedings took or that there has been any fraud or gross negligence on the part of her guardian. This finding is sufficient to dispose of Second Appeal No. 836 but there is still another ground why the minor is bound by this decree and that is the ground of *res judicata*. The minor's present next friend had brought a suit, Original Suit No. 79 of 1920 to set aside the sale that was held in execution of this very decree and it would certainly have been a proper ground to take in that suit that the decree was itself null and void, so that the sale would also be null and void; but no such plea was put forward. The suit was dismissed against the minor both in the First Court and in appeal. We think the ground that is put forward at present, *viz.*, that the minor was not properly represented in the suit in which the decree was passed, was a ground that might and ought to have been put forward in the previous suit, and that not having been done, the decision in the previous suit constitutes the question *res judicata* under Explanation 4 of section 11 of the Civil Procedure Code. As authority for this proposition we may refer to the case in *Arunachalam Chetty* v. *Meyyappa Chetty* (2) and *Naina Muhammad Rowther* v. *Abdul Rahman Rowther* (3) On this second ground also the plaintiff's claim to set aside the decree fails.

We must, therefore, allow Second Appeal No. 836 of 1922, with costs throughout and set aside the decree of the lower Appellate Court in so far as it holds that the decree in Original Suit No. 187 of 1917 is invalid.

Second Appeal No. 850 of 1922 will fail in this view. We have already held that there was nothing illegal and invalid in the decree under which the sale took place, and therefore there is no ground for holding that the sale in pursuance of that decree was in any way affected by illegality or was void. We agree with the District Judge in his view that the plaintiff's claim is affected by *res judicata* as regards the sale also. Second Appeal No. 850 of 1922 must, therefore, be dismissed with costs.

V. N. V.
Z. K. *Appeal dismissed.*

(2) 21 M. 91; 8 M. L. J. 28; 7 Ind. Dec. (N. S.) 421.

(3) 72 Ind. Cas. 207; 46 M. 135; (1922) M. W. N. 845; 17 L. W. 188; 32 M. L. T. 82; (1923) A. I. R. (M.) 257.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1630 OF 1922.

January 19, 1923.

Present:—Mr. Justice Ryves.

JOKHU *Gadaria* AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

DEOKINANDAN PANDEY AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 167—Suit for ejectment as sub-tenant dismissed by Revenue Court—Subsequent suit on same allegations in Civil Court—Res judicata.

Where a suit for a person's ejectment as a sub-tenant is dismissed by a Revenue Court, a subsequent suit on the same allegations in a Civil Court is barred by *res judicata*.

Baljit v. *Mahipat*, 49 Ind. Cas. 118; 17 A. L. J. 60; 41 A. 203 and *Ram Das* v. *Dubri Kocri*, 77 Ind. Cas. 139; 20 A. L. J. 606; (1922) A. I. R. (A.) 336; 44 A. 724, followed.

Second appeal against a decree of the Subordinate Judge, Jaunpur, dated the 21st June 1922.

Mr. *Haribans Sahai*, for the Appellants.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs-appellants for the recovery of the possession of an occupancy holding on the allegation that their father had entrusted it to the ancestor of the defendants-respondents called Mata Badal as long ago as 1909 and that in spite of the repeated demands the defendants-respondents had failed to make over the holding to the plaintiffs. The claim was resisted on various pleas. The allegation in the plaint that the holding in question was entrusted to Mata Badal was categorically denied and it was further pleaded that the suit was not cognizable by a Civil Court and was barred by the principle of *res judicata* and by limitation. The

plea of *res judicata* was urged on the ground that the parties had already litigated the question in the Revenue Court where a decision adverse to the plaintiffs was given. It appears that the plaintiffs had first gone into the Revenue Court describing the defendants as their sub-tenants and asking for their ejectment. The defendants pleaded that some time prior to 1906 the plaintiff's father had left the village and the *Zemindar* had resumed the holding. In 1906 the *Zemindar* gave the holding in question to Mata Badal and the latter executed a *patta* in favour of the *Zemindar* on the 10th of September 1906 since when Mata Badal and after his death his descendants have been in possession. The plea for the defence was accepted in the Revenue Court and the claim of the plaintiffs was dismissed. The same plea is also repeated on behalf of the defence in the present suit. The lower Courts, however, have not gone into the merits of the case but have disposed of it on the legal plea that the suit is not maintainable in a Civil Court. They have relied on the case of *Baljit* v. *Mahipat* (1). It is not denied in appeal before me that the said case covers the present suit but it is contended that the earlier rulings are in favour of the plaintiffs-appellants. I find that there is a ruling subsequent to that reported in *Baljit* v. *Mahipat* (1) that of *Ram Das* v. *Dubri Koeri* (2) which affirms the principle laid down in the case of *Baljit* v. *Mahipat* (1) referred to above. I, therefore, consider that the judgment of the Court below is correct and dismiss the appeal under O. XLI, r. 11.

S. D. *Appeal dismissed.*

(1) 49 Ind. Cas. 118; 17 A. L. J. 60; 41 A. 203.
(2) 77 Ind. Cas. 139; 20 A. L. J. 606; (1922) A. I. R (A.) 336; 44 A. 724.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 74 OF 1922.

August 29, 1923.

Present:—Mr. Justice Spencer and Mr. Justice Devadoss.

T. K. P. PARAMASIVA THEVAR—DEFENDANT No. 6—APPELLANT

versus

PULUKARUPPA THEVAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch, I, Arts. 166, 181—Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 90—Application to set aside Court sale on ground of fraud and illegality—Limitation.

An application under the Code of Civil Procedure to set aside a sale in execution of a decree is governed by Art. 166 and not by Art. 181 of the Limitation Act whether the alleged ground is the commission of an irregulatity or fraud or an illegality and whether the application is really one under O. XXI, r. 90 or section 47 of the Civil Procedure Code.

Case-law considered.

Appeal against an order, dated the 6th January 1922, of the District Court, Tinnevelly, in Appeal Suit No. 371 of 1920, preferred against an order, dated the 30th September 1920, of the Court of the Subordinate Judge, Tuticorin, in Execution Petition No. 49 of 1920, in Original Suit No. 101 of 1916.

Messrs. *A. Krishnaswamy Aiyar* and *K. Balasubramania Iyer*, for the Appellant.

Messrs. *T. Rangachariar* and *P. V. Krishnaswamy Aiyar*, for the Respondents.

JUDGMENT.

Spencer, J.—This appeal is concerned with an application to set aside a Court sale of mortgaged property which took place on November 21st, 1919. It was filed by the sixth defendant on January 17th, 1920, more than 30 days after the date of the sale and was rejected by the Subordinate Judge as being out of time. The learned District Judge confirmed his order.

It is now contended that the omission to publish the sale in Rayagiri, which is the village where the land is situated, was not a mere irregularity but an illegality, that the petition though treated by the Subordinate Judge in his judgment as an application under O. XXI, r. 90 of the Code of Civil Procedure was properly (as it purported to be) one under section 47

and that the limitation period in such cases is three years under Art. 181 of the First Schedule of the Limitation Act.

Assuming that the publication of the sale notice in Sivagiri, the parent village to which the suit land belongs according to the plaint and the mortgage-deed, and the failure to publish it in Rayagiri was something more than a material irregularity in publishing the sale, we have to see whether a party to the suit who asks to have the sale set aside has 30 days under Art. 166 or three years under Art. 181 to come in with his application.

It is clear that Art. 181 is a residuary Article which can only be applied if no other Article dealing with applications under the Code of Civil Procedure is applicable.

Whether the ground for seeking to set aside the sale in this case is the commission of an irregularity or an illegality, and whether section 47 or O. XXI, r. 90 is the appropriate provision of law to be entered at the head of the petition, it is undoubtedly an application under the Code of Civil Procedure to set aside a sale in execution of a decree and thus falls within the definition in Art. 166.

There is so much authority for the view that Art. 166 applies to all such cases that it hardly needs demonstration that the residuary Art. 181 cannot be applied.

By "authority" I have in mind the cases in *Thekkedath Neelu Nelthiar* v. *Subramania Moothan* (1), *Konidena Kamayya* v. *Konidena Ramamma* (2), *Pasumarti Paydanna* v. *Ganti Lakshminarasamma* (3) (See the judgment of Sadasiva Aiyar, J.,) and *Muthiah Chettiar* v. *Bawa Sahib* (4), *Satish Chandra* v. *Nishi Chandra Dutta* (5) and *Babu Das Narayan Singh* v. *Mir Muhammad Yusuf* (6). Unfortunately so long as contrary decisions remain in the Law Reports withtout being overruled it is possible to found arguments upon them. It has, therefore, become necessary to examine the cases which lend support to the argument that Art. 181 is appropriate.

It is not uncommon to hear a sale described as a nullity, if there is an illegality affecting the jurisdiction of the Executing Court, and illegalities are commonly supposed to take applications to have sales set aside out of the scope of O. XXI, r. 90.

Ever since the Privy Council decision in *Malkarjun* v. *Narhari* (7) distinguished between a total absence of jurisdiction and an erroneous working out of a valid decree against an estate after its owner's liability is established, there should be no room for misconception. But unfortunately it is not uncommon to hear the expression "nullity" indiscriminately applied to sales by Court, as if by that magical word, the Statute of Limitations was abolished. If in the present instance the sale was a nullity, there was no need for the appellant to apply to have it set aside under section 47 or O. XXI, r. 90. He could simply ignore it so long as his possession was not disturbed.

Rayarappan Nambiar v. *Malikandi Aketh Mayan* (8) is one of the cases in which a sale was held to be a nullity. It is one of those rare instances where a person applies to be brought on the record as a defendant in execution. The decree-holder when executing the decree after the death of the mortgagor-judgment-debtor failed to bring the mortgagor's legal representatives on the record. So this representative having got himself placed on the record, applied to the Court to record satisfaction of the decree and incidentally to set aside the sale held behind his back.

The learned Judges may have felt themselves justified by the circumstances of the case in adopting the somewhat unusual procedure, but with due deference I am unable to agree with their opinion that the sale was a nullity. It is unnecessary to

(1) 53 Ind. Cas. 809; 11 L. W. 59; (1919) M. W. N. 897.
(2) 74 Ind. Cas. 458; 16 L. W. 934; (1922) M. W. N. 176; (1922) A. I. R. (M.) 95.
(3) 29 Ind. Cas. 314; 38 M. 1076; 28 M. L. J. 525.
(4) 26 Ind. Cas. 46; 27 M. L. J. 605; 1 L. W. 969.
(5) 54 Ind. Cas. 431; 46 C. 975.
(6) 61 Ind. Cas. 823; (1921) Pat. 181; 3 U. P. L. R. (Pat.) 33; 6 P. L. J. 319; 2 P. L. T. 401.
(7) 25 B. 337; 5 C. W. N. 10; 2 Bom. L. R. 27; 27 I. A. 216; 10 M. L. J. 368; 7 Sar. P. C. J. 3 (P. C.).
(8) 23 Ind. Cas. 251; 26 M. L. J. 267.

repeat the reasons for my opinion which I expressed at some length in Second Appeal No. 924 of 1921 [*Doraisami* v. *Chidambaram Pillai* (9)] that a sale does not necessarily become a nullity in consequence of a judgment-debtor being dead and his legal representatives not being on the record when it takes place.

The next case is *Seshagiri Rao* v. *Srinivasa Rao* (Seshagiri Aiyar and Moore, JJ.,) (10). The persons who applied to have the Court sale set aside were parties to the suit who had been exonerated, but they had no notice of the execution proceedings. The learned Judges recognised the fact that under the explanation to section 47 a defendant who has been exonerated would yet be a party to the suit. Yet they attempt to distinguish *Muthiah Chettiar* v. *Bawa Sahib* (4) where it was held that Art. 166 governed applications under section 47 to set aside sales on the ground that the application in that case was by a judgment-debtor. If the explanation to section 47 means anything, this is no distinction at all. There is no provision in the Code for persons who are not parties making an application with reference to a Court sale except O. XXI, r. 89 which requires persons interested to make a deposit before the confirmation of the sale that is within 30 days of its taking place, r. 90 which is available to persons entitled to rateable distribution besides persons having an interest in the property sold and r. 100 which requires persons dispossessed by a purchaser in execution of a decree to come to Court within 30 days of their dispossession. Strangers to the decree must under Art, 12 file a suit within one year of the confirmation of the sale; or if there has been fraud then under Art. 95 within three years of their becoming aware of it. I respectfully agree with the observation of Oldfield, J., in *Ganapathi Mudaliar* v. *Krishnamachari* (11) as to the soundness of the reasons given in *Seshagiri Rao* v. *Sreenivasa Rao* (10) for applying Art. 181 to the facts of that case.

The case of *Shivbai Babya Swami* v. *Yesu Chcoo Nayakin* (12), quoted by Moore, J., was one in which an *ex parte* decree had first to be set aside before the *ex parte* defendant could ask to set aside the sale. She might have obtained an *interim* injunction against the execution of the decree or she might have asked the Court to excuse the delay occupied in getting the *ex parte* order set aside. No definite reasons for holding Art. 166 inapplicable are given in the judgment, except that it would work harshly in the circumstances of that case. *Ram Kinkar* v. *Sthiti Ram* (13) was a case under section 18, Limitation Act, of fraudulent suppression of process, Mookerjee, J's reasons for applying Art. 181 are not explained.

Lastly there is the Full Bench case of *Thattantavita* v. *Puthalathan Kandi Kombi Aliassan* (14). This is an authority upon the scope of Art. 165, not of Art. 166, and its applicability to applications made by judgment-debtor under section 47. On the same analogy it is argued that Art. 166, should only be applied to applications made by persons who are not judgment-debtors. But the *ratio decidendi* of the Full Bench decision was a comparison of the language of section 230 of the Code of Civil Procedure of 1859 and that of Arts. 158 and 165 in the Limitation Acts of 1871 and 1908. The scope of Art. 166 must depend on quite different considerations *viz.*, the wide language of the Article itself and the change in the language between section 244 and section 47 of the Codes of 1882 and 1908 and between section 311 of the old Code and O. XXI, r. 90 of the new Code.

The Full Bench had before them a case in which a judgment-debtor complained that in executing a decree for possession more properly had been delivered to the decree-holder than what the decree authorised.

(9) 75 Ind. Cas. 46; 18 L. W. 577; 45 M. L. J. 413; 33 M. L. T. 25; (1923) M. W. N. 817; (1923) A. I. R. (M.) 130.

(10) 56 Ind. Cas. 260; 43 M. 313; 38 M. L. J. 62; (1920) M. W. N. 127.

(11) 70 Ind. Cas. 743; 43 M. L. J. 184 at pp. 187, 189; 16 L. W. 178; 31 M. L. T. 135; (1922) M. W. N. 514; (1922) A. I. R. (M.) 417.

(12) 48 Ind. Cas. 130; 43 B. 235; 20 Bom. L. R. 925.

(13) 46 Ind. Cas. 221; 27 C. L. J. 528.

(14) 53 Ind. Cas. 437; 42 M. 753; 37 M. L. J. 340; 10 L. W. 410; 26 M. L. T. 297; (1919) M. W. N. 732 (F. B.).

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Without doubting the correctness of the decision that such a complaint would be governed by Art. 181 of the Limitation Act, we may consistently hold that the application before us which is one by a judgment-debtor to set aside a sale is covered by Art. 166.

My learned brother agrees with me. The appeal is, therefore, dismissed with costs.

Devadoss, J.—This second appeal arises out of an application under section 47 of the Civil Procedure Code to set aside a sale held in execution of a decree on the ground of fraud and illegailty in publishing and conducting it. The Subordinate Judge of Tuticorin held that the fraud alleged was not proved, that the sale was vitiated by material irregularity as regards item No. 1, that the property was undersold in consequence, and that the application was barred by limitation. On appeal, the District Judge of Tinnevelly held that the sale was not a nullity and that the application was barred by limitation under Art. 166 of the Limitation Act.

The sixth defendant has preferred this appeal, and the sons of the decree-holder who was also auction-purchaser are respondents Nos. 1 and 2. Mr. T. Rangachariar who appears for the respondents raises a preliminary objection that no second appeal lies as the application was made under O. XXI, r. 90, Civil Procedure Code and only one appeal is provided by O. XLIII, r. 1 (*j*) against orders under O. XXI, r. 90. Mr. A. Krishnaswami Aiyar for the appellant contends that there was illegality in the conduct of the sale and the application was made under section 47, Civil Procedure Code and not under O. XXI, r. 90, inasmuch as there was no publication of the sale in the village in which the property is situate as required by law, and that such an omission is not merely an irregularity but is an illegality; and where illegality is brought about by fraud or otherwise, the application to set aside a sale falls under section 47, Civil Procedure Code, and a second appeal, therefore, lies. It is unnecessary to decide this point in the view that I take of the question of limitation involved in the case.

The sale was on 21st November 1919 and the application to set it aside was made on 17th January 1920. Article 166 of the Limitation Act gives a period of 30 days to set aside a sale in execution of a decree. The contention of the appellant is that Art. 181 which allows a period of three years applies to the case and the application is, therefore, in time. It is urged that the words "under the same Code" in Art. 166 should be taken to apply only to applications specifically provided for by the Civil Procedure Code and not to applications under the general section 47. The Article is in these terms:—"Under the same Court to set aside a sale in execution of a decree—30 days—the date of the sale." The wording of the Article includes all applications made under the Code to set aside a sale, and unless there are very strong grounds for holding that it was meant to apply only to applications specifically provided for by the Code under rules 89, 90 or 91, there is no warrant for departing from the plain meaning of the words of the Article. It is a well-known principle of construction that where there is a specific Article of limitation applicable to a suit or application, the residuary Article should not be applied unless the application or suit cannot be brought within the clear wording of the specific Article. The appellant relies on the following cases in support of his contention. In *Rayarappan Nambiar* v. *Mallkandi Aketh Mayan* (8) a mortgagee brought a suit on his mortgage and impleaded the puisne mortgagee as a defendant. The puisne mortgagee died after the decree, and the plaintiff brought the mortgaged property to sale without bringing the legal representatives of the puisne mortgagee on record, and without giving them notice, and bought it himself. The legal representatives of the puisne mortgagee applied to set aside the sale on payment to the plaintiff-auction purchaser the amount due under the decree. The High Court held that the application was not barred by limitation as the sale was a nullity so far as the appellants were concerned and the application was clearly not barred. The application to set aside the sale could not have been entertained and the redemption of the prior mortgage could not have been ordered till the appellants were placed on record

as the legal representatives of the puisne mortgagee and application under rule 89 cannot be entertained as long as an application under rule 90 is pending. Rule 89 (2) specifically lays down "where a person applies under rule 90 to set aside the sale of his immoveable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule." The puisne mortgagee was entitled to redeem the prior mortgage and as his legal representatives were not on record when the sale took place, they applied for relief as soon as they came to know of the sale of the mortgaged property and, therefore, Art. 166 was held not to apply to a case of that kind. Even if Art. 166 should have been held applicable to that case, the judgment could be supported on the ground that the appellants had no knowledge of the sale and they could not have come in therefore within the 30 days provided for by the Article. In *Seshagiri Rao* v. *Srinivasa Rao* (10) the plaintiff brought a suit for maintenance against twelve defendants. Defendants Nos. 9 to 12 belonged to a divided branch of the family and their shares were exonarated, and a decree was passed against defendants Nos. 1 to 8 with a charge on certain items belonging to them. The plaintiff executed the decree and certain items of property were brought to sale in execution as if they belonged to defendants Nos. 1 to 8 and were purchased by a person not a party to the decree. One year and seven months after, the plaintiffs who were defendants Nos. 9 to 12 filed a suit to set aside the sale so far as their shares were concerned. The District Munsif dismissed the suit as being barred by section 47, Civil Procedure Code. On second appeal the High Court remanded the suit to the District Munsif for disposal as a proceeding under section 47. The District Munsif and the District Judge held that the application was barred by limitation. The High Court held that Art. 181 was applicable to the case and that the application was not barred. The learned Judges, (Seshagiri Aiyar and Moore, JJ.,) observed at page 315*: "If an execution sale is a nullity (*i.e.*, is made without jurisdiction or is void *ab initio*) Art. 166 has in our view no application, and the residuary Art. 181 should be applied. We are justified in our conclusion by the decision in *Ramavenkatasubbier* v. *Subramania Chettiar*, Second Appeal No. 389 of 1914 (unreported)." With very great respect I am unable to follw the reasoning of the learned Judges. The appellants were parties according to the explanation to section 47, which was expressly enacted to set at rest the conflict of view that prevailed with regard to the parties to a suit but were not parties to the decree and they were bound to pursue the remedy as provided for by the Code. The judgment can, however, be supported on the ground that the appellants were not parties to the execution proceedings and they applied to set aside the sale as soon as they became aware of the sale and the period of limitation had to be calculated from the time when they came to know of the sale. In the present case, the appellant was a party to the decree and the finding is that notice of sale was served upon him. The facts in *Seshagiri Rao* v. *Srinivasa Rao* (10) being different from those of the present case, that decision has no application to the latter. In *Ram Kinkar* v. *Sitlu Ram* (13) it was held by the Calcutta High Court that omission to issue notice to the judgment-debtor was an illegality and that was a sufficient ground for setting aside the sale and that Art. 181 applied to the application in that case.

It is difficult to follow the reasoning, that if there is illegality in publishing or in conducting the sale, Art. 181 applies and if there is fraud or irregularity Art. 166 applies. Order XXI, r. 90 enables a decree-holder or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, to apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it. If a party is prevented by fraud from knowing of the sale, such fraud will prevent limitation running against him, or where he is kept out of the knowledge of the illegality by means of fraud, he may contend reasonably that by means of fraud he was prevented from knowing or having the means of knowledge of the illegality and, therefore, limitation should count against him only

*Page of 43 M.—[*Ed.*]

from the time when he discovered the illegality. Section 18 of the Limitation Act could apply to such a case. Therefore there is no reason why when there is a specific Article such as Art. 166 governing certain applications the aid of the residuary Article should be invoked to help a party who could justify his application as being within time by virtue of section 18 of the Limitation Act. It is urged that the reasoning adopted in a decision reported as *Thattantavita* v. *Puthalathan Kandi Kombi Aliassan* (14) with regard of Art. 165 should be applied to Art. 166. In *Thattantavita* v. *Puthalathan Kandi Kombili Aliassan* (14) it was held by a Full Bench that where a judgment-debtor was dispossessed of immoveable preperty the Article applicable to an application by him for restoration of possession was Art. 181. The learned Judges in the course of the judgment relied on the fact that O. XXI, r. 100 applied only to a stranger to the decree seeking for restoration of possession and not to a judgment-debtor seeking a simllar remedy. They expressly overruld the decision *Retnam Ayyar* v. *Krishna Doss Vital Doss* (15) which decided that Art. 166 was the proper Article to be applied to an application by a judgment-debtor who was dispossessed of immoveable property for restoration of possession. The decision in *Thattantavita* v. *Puthalathan Kandi Kombi Aliassan* (14) being the decision of a Full Bench, no purpose would be gained by expressing doubts as to its soundness. But I may be permitted to observe that the result of the decision is that a stranger to the decree and execution proceedings if dispossessed of immoveable property has to apply within 30 days under O. XXI, r. 100, whereas a judgment-debtor has three years under Art. 181 of the Limitation Act to make a similar application by claiming the benefit of section 47, Civil Procedure Code. Whether the Legislature intended such a result is neither necessary nor profitable to inquire. In *Shivbai Babya Swami* v. *Yesu Cheoo Neyakin* (12) the facts were: In 1906 an *ex parte* decree was passed against the defendant in execution of which the defendant's house was sold and purchased by the plaintiff-decree-holder in 1910. The *ex parte* decree was subsequently set aside. But at the re-trial a decree was again passed in plaintiff's favour in 1914. In the meanwhile the defendant applied to have the sale of the house set aside. With regard to limitation Hayward, J., observed: "It was also suggested that the application ought to be regarded as time-barred under Art. 166 of the Schedule to the Limitation Act: But that Article appears to be hardly applicable to the facts of this particular case. The cause of action accrued upon setting aside the *ex parte* decree in 1914 and taking that as the date from which limitation ran, the application would clearly be within time under the provisions of Art. 181 of the Schedule to the Limitation Act." In that case the right to apply to have the sale set aside arose only on the *ex parte* decree being set aside. The Court could very well have held that Art. 166 applied and that the delay should in the circumstances be excused under section 5 of the Limitation Act, and, if there was fraud, under section 18 of the Limitation Act. If Art. 181 of the Limitation Act is the proper Article applicable to such a case, the question arises, from what date should limitation be held to run against the applicant granting he has three years. Under Art. 164 time begins to run from the date of the decree or where the summons was not duly served, when the applicant has knowledge of the decree. If no summons was served and the defendant came to know of the passing of the decree more than three years after it was passed, his remedy to have the decree set aside is not barred till he comes to know of the passing of the decree. The learned Judges did not say from what date time would begin to run against a person who seeks to set aside a sale on the ground that he was not aware of the passing of the decree. With due respect, I think the proper course in such a case is to excuse the delay as the defendant was kept out of the knowledge of the passing of the decree or had no means of knowing of the passing of the decree and, therefore, he could not have made an application to have the sale set aside within 30

(15) 21 M. 494; 8 M. L. J. 75; 7 Ind. Dec. (N. S.) 706.

days of the sale and, therefore, the delay in making the application should be excused. None of the cases to which I have already referred have any direct bearing upon the present case.

In *Muthiah Chattiar* v. *Bawa Sahib* (4) it was held that the application to set aside a sale under section 47, Civil Procedure Code, was governed by Art. 166 of the Limitation Act. With reference to the question of limitation, Oldfield, J., observes at page 607* "It is not disputed that his petition was presented too late, if it was one under r. 90. If, however, it was under section 47 it is urged that Art. 181 Schedule I of the Limitation Act applied and he was in time, the special Art. 166 covering only applications under rr. 89 and 90. This restriction of Art. 166 corresponds with nothing in its wording, which is absolutely general; and the attempt to impose it has been supported by reference to the fact that the Article was substituted for Arts. 166 and 172 in the prior Act of 1877, which related only to applications under sections 310 A and 311 of the Code then in force. It is stated that this is borne out by the statement of reasons and objects connected with the present Act. But it has not been shown how reference to such a statement is a legitimate or necessary aid to the interpretation of a provision, the language of which is clear. The first respondent's application, though it may have been made under section 47, was one to set aside a sale, and under Art. 166 it must be held to have been out of time." With the reasoning of the learned Judge I fully concur. In *Thekkedath Neelu Nelthiar* v. *Subramania Moothan* (1) it was held that Art. 166 was the proper Article applicable to an application to set aside a sale. The learned Judges observe at page 62†: "It is then contended that, as the petitioners were parties to the litigation, the Article of Schedule 1 of the Limitation Act to be applied is No. 181, not No. 166. This is contended with reference to the recent decision of the Full Bench now reported as *Thattantavita* v. *Puthalathan Kandi Kombi Aliassan* (14).] But that decision dealt with a claim to apply Art. 165; and we do not think that its application and that of Art. 166 stand on the same footing or can be dealt with on similar considerations. We have not been shown reasons for restricting the very comprehensive wording of the latter to exclude the present case." Another Bench of this Court held the same view in a case reported as *Konidena Kamayya* v. *Konidena Ramamma* (2). In *Ganapathi Mudaliar* v. *Krishnamachari* (11) it was held that Art. 166 of the Limitation Act was the proper Article to apply to the application to set aside the execution sale whatever its nature, whether it fell under section 47, Civil Procedure Code or under O. XXI, r. 90. The learned Judges observe at page 189*: "The wording of Art. 166 is unrestricted and we do not consider that we are at liberty to impose restrictions, which nothing in it suggests. It, no doubt, covers only applications under the Code; but that is immaterial, as in the present case, the controversy is between the parties and an application instead of a suit, is authorized by section 47. We, therefore, hold that Art. 166 of Act IX of 1908 is applicable." The same view has been held in *Satish Chandra* v. *Nishi Chandra Dutta* (5). There also the learned Judges refused to uphold the contention that Art. 166 should be restricted to cases falling under O. XXI, rr. 89 and 90. They observe at page 977†: "It is argued for the appellant that Art. 181 of the Limitation Act applies and not Art. 166. There appears to be no good reason for limiting the scope of Art. 166 to applications under O. XXI, rr. 89, 90 and 91 of the Civil Procedure Code. The Article is perfectly general in its terms and refers to an application 'under the Code to set aside a sale in execution of a decree.'" The same view was held by the Patna High Court [*Vide Babu Das Narayan Singh* v. *Mir Muhammad Yusuf* (6)]. Following these decisions I hold that this application is barred by limitation under Art. 165 of the Limitation Act. The appeal, therefore, fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*

* Page of 27 M. L. J.—[*Ed.*]
† Page of 11 L. W.—[*Ed.*]

* Page of 43 M. L. J.—[*Ed.*]
† Page of 46 C.—[*Ed.*]

CHITTO *v.* GANGA SAHAI.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1461 OF 1921.

March 21, 1923.

Present:—Mr. Justice Rafique.

Musammat CHITTO—PLANTIFF—
—APPELLANT

versus

GANGA SAHAI AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Agra Tenancy Act (II of 1901), s. 95 (a)—Suit cognizable by Revenue Court—Decision by Revenue Court—Suit in Civil Court—Res judicata—Suit for declaration that plaintiff is sole occupancy holding, whether cognizable by Revenue Court.

A suit for a declaration that the plaintiff is the sole occupancy tenant of a holding is maintainable, under section 95 (*a*) of the Agra Tenancy Act, in the Revenue Court alone.

Plaintiff sued in the Revence Court for a declaration against her landlord and certain other persons that she was the sole occupancy tenant of a certain holding. The suit was dismissed. She then brought a suit in the Civil Court for substantially the same relief:

Held, that the suit in the Civil Court was barred by the principles of *res judicata*.

If after a decision by a Revenue Court of a suit cognizable by such Court, the losing party comes to the Civil Court for a relief which would have the effect of setting aside the decree of the Revenue Court, the civil suit would not be maintainable and would stand barred by the principles of *res judicata*.

Mollo v. *Ramlal*, 58 Ind. Cas. 772; 18 A. L. J. 1030; 43 A. 191; *Ram Das* v. *Dubri Kocri*, 77 Ind. Cas. 139; 20 A. L. J. 606; 44 A. 724; (1922) A. I. R. (A.) 336, *Baljit* v. *Mahipat*, 49 Ind. Cas. 118; 17 A. L. J. 60; 41 A. 203; *Kishore Singh* v. *Bahadur Singh*, 48 Ind. Cas. 470; 16 A. L. J. 933; 41 A. 97, followed.

Second appeal against a decree of the First Additional Subordinate Judge, Aligarh, dated the 27th June 1921.

Mr. *Peary Lal Banerji*, for the Appellant.

Mr. *Sailanath Mukerji*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit brought by her for a declaration that she was the sole occupancy tenant of the holding mentioned in the plaint. She stated in her plaint that the occupancy holding originally belonged to her husband Baldeo Singh who died some time ago without any issue, leaving her surviving as the sole heir. After the death of her husband she applied for mutation of names and also asked the Revenne Court to include with her name the name of her sister-in-law *Musammat* Kesar, the widow of a deceased brother of Baldeo Singh. She extended this indulgence to *Musammat* Kesar by way of consolation. At the last Settlement Ganga Sahai, son of Bhupal Singh, and Fateh Singh in collusion with *Musamma* Kesar and without the knowledge of the plaintiff got their names entered as joint occupancy tenants of the said holding with the plaintiff. She came to know of the fraud practised upon her some time in March 1919. She applied to the Revenue Court for the correction of the revenue papers asking for the names of Ganga Sahai and Fateh Singh to be expunged. The Revenue Court rejected her prayer and hence she has come into Civil Court for the declaration of her right as the sole occupancy tenant of the holding in question. The claim was resisted by the denial of the allegations in the plaint. It was urged that the suit was not maintainable in a Civil Court and that it was barred by section 11 of the Code of Civil Procedure. Both the Courts below have dismissed the claim of the plaintiff on the ground that her present claim is barred by the principles of *res judicata*. The contention for the plaintiff-appellant in her second appeal to this Court is that the lower Courts were in error in holding that her present suit is barred under section 11 of the Code of Civil Procedure.

In order to decide the question raised in the appeal it is necessary to refer to some of the facts which are disclosed from the evidence on the record. It appears that the last Settlement in the Bulandshaher District, where the property in suit is situate, was made some time in 1916. On the 16th November 1916 the plaintiff together with *Musammat* Kesar appeard before the Settlement Officer and stated that the names of Ganga Sahai and Fateh Singh should also be recorded as joint tenants o the holdings. The General Agent of the *zemindar* was also present at the time and he filed a written statement accepting the allegation of the two ladies namely, the plaintiff and *Musammat* Kesar, that Ganga Sahai and Fateh Singh were joint with the ladies in the occupancy holding. On the statement of the parties concerned the Settlement Officer made an order directing the entry of the names of Ganga Sahai

and Fateh Singh in respect of the holding. This state of things continued until the 28th March 1919 when a plaint was filed in the Revenue Court by the present plaintiff under section 95 (*a*) of Act II of 1901 against the *zemindar* of the village. *Musammat* Kesar was also impleaded as a defendant. It was stated in the plaint that the plaintiff *Musammat* Chitto and *Musammat* Kesar were the occupancy tenants of the holding and as *Musammat* Kesar had not joined in the plaint she was made a *pro forma* defendant. Ganga Sahai and Fateh Singh, it was stated, with the collusion of the *zemindar* and the Patwari had got their names recorded in the revenue papers as joint tenants which was untrue and against the interest of the plaintiff. She asked for the following reliefs namely, (1) it may be declared that the plaintiff (*Musammat* Chitto) and *Musammat* Kesar defendant No. 4, were the sole occupancy tenants of the holding, (2) that the entry of the names of Fateh Singh and Ganga Sahai was *farzi* and that they were not the occupancy tenants of the holding. The learned Assistant Collecter in whose Court the plaint was filed tried the case on the evidence that was tendered by the parties. The contesting defendants denied the allegations of collusion and fraud made in the plaint as also the plaintiff's allegation that they had no right or interest in the occupancy holding. On the 3rd August 1920 after a thorough inquiry the learned Assistant Collector dismissed the claim of *Musammat* Chitto. No appeal was preferred from the decree of the Assistant Collector. On the 15th September 1920 the suit out of which this appeal has arisen was filed for the relief mentioned above. From a comparison of the two plaints of *Musammat* Chitto in the Revenue Court and the Court of the Munsif it would appear that her allegations are not quite consistent. In the present suit she denies the right even of *Musammat* Kesar to have any interest in the occupancy holding while in the Revenue Court she admitted her to be her joint tenant. However, apart from any inconsistencies in her allegations in the two plaints the question for decision is whether the civil suit of *Musammat* Chitto is maintainable in view of the provisions of section 11 of the Code of Civil Procedure. The contention for her is that her suit in the Revenue Court purporting to be under section 95 of the Rent Act was not really a suit under that section. She was claiming to have the names of Fateh Singh and Ganga Sahai expunged from the Revenue Records. Such a suit is not contemplated by section 95 of the Rent Act. The proceedings, therefore, in the Revenue Court were irrelevant and do not operate as *res judicata* against her present claim. In view of the reliefs sought by the plaintiff in the Revenue Court which have already been recited above her contention has no force. She distinctly asked for a declaration that she and *Musammat* Kesar were the sole occupancy tenants of the holding. She asked this relief against the *zemindar* whom she had charged with collusion with Fateh Singh and Ganga Sahai. In other words she wanted to have her status as an occupancy tenant declared by the Revenue Court.

Such a suit is maintainable under section 95 of the Rent Act in the Revenue Court alone. The balance of authority of this Court is that if after a decision of a suit of such nature by a Revenue Court the losing party comes to the Civil Court for a relief which would have the effect of setting aside the decree of the Revenue Court the civil suit would not be maintainable and would stand barred by the principles of *res judicata*. A few cases of this Court on the point may be mentioned here, *vide*, *Mollo* v. *Ramlal* (1), *Ram Das* v. *Dubri Koeri* (2), *Baljit* v. *Mahipat* (3), *Kishore Singh* v. *Bahadur Singh* (4). In the face of these authorities it is not possible for the plaintiff to contend that her present suit is not barred by the principles of *res judicata*. In my opinion the decree of the Court below is correct. The appeal fails and is dismissed with costs including fees in this Court on the higher scale.

Z. K. *Appeal dismissed.*

(1) 58 Ind. Cas. 772; 18 A. L. J. 1030; 43 A. 191.
(2) 77 Ind. Cas. 139; 20 A. L. J. 606; 44 A. 724; (1922) A. I. R. (A.) 336.
(3) 49 Ind. Cas. 118; 17 A. L. J. 60; 41 A. 203.
(4) 48 Ind. Cas. 470; 16 A. L. J. 933; 41 A. 97.

GANPATRAO *v.* LAXMICHAND.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 89 OF 1920.

March 12, 1923.

Present:—Sir Henry Drake-Brockman, KT., J. C., Mr. Hallifax, A. J. C., and Mr. Batten, A. J. C.

GANPATRAO AND OTHERS—DEFENDANTS—APPELLANTS

versus

LAXMICHAND—PLAINTIFF—RESPONDENT.

Hindu Law—Joint family—Antecedent debt, what is—Reasonable enquiry—Necessity—Purchase of ancestral property of near relative—Immoral debts—Connection between loan and immoral act, proof of—Contract Act (IX of 1872), s. 16—Unconscionable bargain, what is.

Per *Drake-Brockman, J. C.*, and *Batten, A. J. C.*, (*Hallifax, A. J. C., dissenting*):—A debt borrowed by a Hindu father on the security of the joint family property does not constitute an antecedent debt so as to bind his sons by a subsequent mortgage effected for the discharge of that debt, and it is open to the sons, when a suit is brought to enforce the latter mortgage, to plead that the earlier one was not justified by legal necessity. [p. 643, col. 1.]

Mathura Misra v. *Raj Kumar Misra*, 62 Ind. Cas. 132; 6 P. L. J. 526; 2 P. L. T. 407; (1921) Pat. 245 (F. B.), *Chet Ram* v. *Ram Singh*, 67 Ind. Cas. 569; 44 A. 368; 3 P. L. T. 363; 31 M. L. T. 50; 43 M. L. J. 98; 16 L. W. 89; (1922) M. W. N. 455; 4 U. P. L. R. (P. C.) 64; (1922) A. I. R. (P. C.) 247; 3 P. L. R. 1922; 24 Bom. L. R. 1231; 27 C. W. N. 150; 49 I. A. 228; 21 A. L. J. 114; 37 C. L. J. 79 (P. C.), referred to.

Sahu Ram Chandra v. *Bhup Singh*, 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.), interpreted.

Per *Hallifax, A. J. C.*—What is in fact an antecedent or pre-existing debt due by a Hindu, for the satisfaction of which he would be entitled to alienate his sons' shares in the joint family property along with his own, if he had not mortgaged that property as security for the debt at the time he incurred it, does not change its character as an antecedent-debt due by the father for which he is entitled to alienate his sons' shares, merely by reason of his having executed a void mortgage of those shares along with the valid mortgage of his own when he first incurred the debt. [p. 649, col. 2; p. 650, col. 1.]

If, however, the first mortgage was executed only as a blind with the knowledge that it was invalid and with the intention of executing another, after the debt had had time to ripen into a deceptive appearance of being an antecedent-debt, it would not be antecedent at all at the time of the execution of the second mortgage. [p. 650, col. 1.]

Arumugham Chetty v. *Muthu Koundan*, 52 Ind. Cas. 525; 42 M. 711; 9 L. W. 565; (1919) M. W. N. 409; 37 M. L. J. 166; 26 M. L. T. 96 (F. B.), relied on.

The doctrine of reasonable satisfaction after due enquiry as to the propriety of an alienation of joint family property by the manager of a joint Hindu family applies as much to the case of an antecedent-debt as to family necessity or pressure on the estate. [p. 651, col 1.]

Per *Drake-Brockman, J. C.*—The duty of the father or other manager of a joint Hindu family is to manage the property of the family for the benefit of the family. He is not entitled to encumber the propeity for the purpose of acquiring ancestral property belonging to a near relative. [p. 644, col. 1.]

In order to exonerate himself from liability to pay his deceased father's debts on the ground of immorality, a Hindu son must establish a connection between each particular debt and some act of immorality of the father for which the debt was borrowed. [p. 648, col. 1]

Dilli Singh v. *Bina*, 44 Ind. Cas. 506; 14 N. L. R. 41 at p. 50; *Babu Singh* v. *Bihari Lal*, 30 A. 156; 5 A. L. J. 175; A. W. N. (1908) 61; *Bhagat Mal* v. *Abdul Karim*, 34 Ind. Cas. 23; 1 P. L. J 86; 2 P. L. W. 430; 20 C. W. N. 797, relied on.

A bargain is unconscionable within the meaning of section 16 of the Contract Act, when it is such that no man in his senses and not under delusion would make on the one hand and no honest and fair man would accept on the other. [p. 648, col. 2.]

Deorao v. *Ambadas*, 43 Ind. Cas. 952; 14 N. L. R. 21, followed.

Appeal against the decision of the District Judge, Hoshangabad, dated the 16th June 1920, in Civil Suit No. 1 of 1919.

Mr. *K. K. Gandhe*, for the Appellants.

Mr. *Gupta*, for the Respondent.

JUDGMENT.

Drake-Brockman, J. C. (*September 15, 1921*).—In the suit out of which this appeal arises the plaintiff, who is the respondent in this Court, sued to recover Rs. 14,500 for principal and Rs. 16,839-4 for interest and compound interest to the date of suing and, in default, for foreclosure of the property mortgaged in Exhibit P-1. That document was executed on the 28th March 1912 by one Narain Rao, who died before the suit was filed, and his eldest son Ganpat Rao. Narain Rao executed the deed not only for himself but also for his four minor sons who with Ganpat Rao are the defendants in the suit and the appellants to this Court.

GANPATRAO v. LAXMICHAND.

Exhibit P-1 shows the total consideration of Rs. 14,500 to be made up as follows :—

(1) Rs. 7,605 ..Old debts due to the mortgagee.

(2) Rs. 3,977 8 ..Due to other creditors whom the mortgagee undertook to pay.

(3) Rs. 2,917-8 ..Cash advance.

The details of the five items making up the first head are as follows :—

(a) Rs. 3,493-4 ..Due under a mortgage (Exhibit P-2) executed by Narain Rao alone on the 30th April 1907.

(b) Rs. 1,123-14 ..Due under a mortgage (Exhibit P-3) executed by Narain Rao for himself and his sons Bhim Rao and Ram Rao and by Ganpat Rao on the 21st September 1907.

(c) Rs. 3,123-6 ..Due under a mortgage (Exhibit P-16) executed by Narain Rao alone on the 29th May 1908.

(d) Rs. 803-8 ..Due on a mortgage (Exhibit P-4) executed by Narain Rao and Ganpat Rao on the 24th November 1910.

(e) Rs. 1,440-0 ..Due to the plaintiff because he had surrendered a lease (Exhibit P-5) of *sir* land granted to him by the executants of Exhibit P-1 in return for a cash advance.

The total of these items is Rs. 9,984 out of which the mortgagee remitted Rs. 2,179 and accepted a separate conveyance of a house belonging to the executants in lieu of Rs. 200, the net figure thus reached being Rs. 7,605.

The second head comprises the following items :—

(a) Rs. 850 ..Due to one Manakchand under a mortgage (Exhibit P-6) dated the 10th September 1911,

(b) Rs. 1,250..Due to one Sarupchand on three bonds.

(c) Rs. 500 ..Due to Rai Sahib Sunderlal.

(d) Rs. 1,250..Due to Waman Rao and Jairamji Banias under an agreement (Exhibit P-11) dated the 8th April 1911.

(e) Rs. 127-8..Due to Arjun Kirar under a decree dated the 29th February 1912.

The third main item was admittedly paid in cash to Narain Rao and Ganpat Rao before the officer by whom Exhibit P-1 was registered.

Exhibit P-1 includes a stipulation to pay interest at one per cent. per mensem yearly until satisfaction, any interest not punctually paid to be treated as principal and itself to carry interest at the aforesaid rate. The mortgagors undertook to pay in full within four years and in default to suffer foreclosure of the mortgaged property.

The plaint alleges that the entire mortgage-debt was incurred for the benefit and necessary purposes of the family and is thus binding on the defendants.

Ganpat Rao filed a written statement raising a number of pleas with some of which we are not now concerned. He admitted the items shown in Exhibit P-1 as due under Exhibits P-4, P-6 and P-11 and those shown as due to Sarupchand, Rai Sahib Sunderlal and Waman Rao as well as the sum paid in cash before the registering officer. He also admitted that Rs. 127-8 was due to Arjun Kirar under a decree, but pleaded that the plaintiff never paid the decree-holder who took out execution and recovered the money from the judgment-debtor. The balances shown in Exhibit P-1 as due under Exhibits P-3 and P-16 were denied. In respect of Exhibits P-2 and P-3 detailed allegations were put forward which will be dealt with later on. The objection to the amount shown as due under Exhibit P-16 was based solely on the ground that the agreement therein to pay interest at 2 per cent. per mensem was obtained by undue influence which the plaintiff was in a position to exercise as a creditor of the family and a professional money-

lender. With regard to the lease, in return for surrendering which the executants of Exhibit P-1 acknowledged Rs. 1,440 to be due, it was pleaded that the plaintiff had been in possession of the land for 30 years and that he had in that time realised all he could justly claim.

The minor defendants put in a separate written statement alleging that Narain Rao had no need to borrow at the date of Exhibit P-1; that the mortgage-debt did not constitute an antecedent-debt; and that it was not incurred for any purpose which would suffice to make it binding upon them. They alleged generally that Narain Rao was a man of immoral habits who used to waste a good deal of money in gambling, but this allegation was not definitely connected with any specific portions of the ostensible consideration for Exhibit P-1.

The following are the issues with which we are concerned in connection with these defences.—

"(2) Was the consideration as shown in the mortgage-deed in suit not paid to the mortgagors and, if so, what portion of the consideration was not paid to the mortgagors?

(3) Was any portion of the debt secured by the deed in suit an antecedent-debt or was any portion of it, and if so what portion, incurred by the mortgagors for legal necessity?

(4) Was any portion of the debt in question incurred by Narain Rao, father of the defendants, for immoral or gambling purposes and, if so, what portion?

(5) Was the speculative or gambling portion of the debt, if any, incurred by Narain Rao at the instance of the plaintiff?

(6) Were accounts of the old debts included in the deed in suit not explained to the executants and were any sums not due to the plaintiff included in the consideration and, if so, what was the total of such sums?

(7) What portion of the debt sued for is binding on the several defendants?

(8) To what relief is the plaintiff entitled against the defendants jointly or severally.

The District Judge, who tried the suit, found that all the items of the consideration set out in Exhibit P-1 were duly established, the defendants having failed to prove any of their allegations in this connection. He also held that all the items under heads (1) and (2) above given constituted antecedent debt and as such were binding on the minor defendants as well as on Ganpat Rao. The sum of Rs. 2,917 paid before the Registering Officer was held not to be antecedent-debt and not to have been taken for the benefit of the joint family: this portion of the consideration was, therefore, declared binding on the shares of Narain Rao and Ganpat Rao only. The fourth issue was answered in the negative for want of specific evidence indicating any connection between certain habits of Narain Rao and any of the items in suit. The fifth issue was also decided in the negative and on the sixth the plaintiff's evidence was held to establish that Exhibit P-1 was executed after the accounts had been explained to the executants.

In the result all the defendants were held liable for Rs. 11,582-8 out of the principal with corresponding interest as claimed up to the 10th December 1920 till which date the time for payment was allowed. For the rest of the principal and corresponding interest Ganpat Rao alone was held responsible. The minor defendants' shares of the mortgaged property was put at two thirds.

In the memorandum of appeal the binding nature of the principal sum of Rs. 11,592-8 for which all the defendants have been held responsible, is denied. At the hearing, however, this contention was not pressed in respect of the following items:—

(1) Rs. 470 out of the total consideration (Rs. 1,270) for Exhibit P-16.

(2) Rs. 1,250 due to Sarupchand.

(3) Rs. 500 due to Rai Sahib Sunderlal.

(4) Rs. 1250 due to Waman Rao and Jairamji.

The total of these four items is Rs. 3,470.

The appeal was heard on the 17th March last at which time a Bench of three Judge

of this Court was about to consider the judgment of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (1). Three separate judgments were delivered on the 5th August, the conclusions reached being that a debt borrowed by a Hindu father on the security of the joint family property does not constitute an antecedent-debt so as to bind his sons by a subsequent mortgage effected for the discharge of that debt and that it is open to the sons when a suit is brought to enforce the later mortgage to plead that the earlier one was not justified by legal necessity. We are, in my opinion, bound by these conclusions and I proceed to consider the grounds of appeal on the basis of them.

The first item to be considered is that secured by Exhibit P-2 dated the 30th April 1907. The defendants' story of this transaction is set out in the second and third paragraphs of Ganpat Rao's written statement. Narain Rao's step-brother Gambhir Rao owned a 10-annas 8-pies share in *Mouza* Sawari and the entire village of Umri, but this property was about to be sold by the Collector in execution of a decree. At the instigation of the plaintiff Narain Rao determined to buy the attached property himself and by private negotiations with the Collector arranged to purchase it for Rs. 20,000, of which he raised Rs. 10,000, himself by selling his ancestral share of 2-annas 8-pies in *Mouza* Bagoda, the plaintiff undertaking to deposit the balance. Exhibit P-2, by which Narain Rao mortgaged his ancestral share of 5-annas 4-pies in *Mouza* Sawari, was in reality a merely nominal transaction executed because the plaintiff had given the undertaking aforesaid. The document itself described the money as required to enable Narain Rao to deposit the purchase-money. It was followed on the 21st September 1907 by Exhibit P-3 which is for a total consideration of Rs. 12,950, of which Rs 10,000, represents the sum about to be deposited with the Collector by the plaintiff and Rs. 2,950 a cash advance actually paid to Narain Rao on the 28th September 1907 when the document was registered. This second transaction too was described in the written statement as without consideration, though the plaintiff admittedly deposited Rs. 10,000, as promised in March 1909. The defendants' view of the plaintiff's conduct in the matter is best described in the words of the written statement which runs as follows:—

"When the accounts were adjusted the plaintiff wrongly charged interest for the period from the 21st September 1907 to March 1909. The transaction of purchasing the village shares of Gambhir Rao (10-annas 8-pies of *Mouza* Sawari and 16-annas of Umri) was speculative and gambling transaction and was entered into at the plaintiff's instigation who wanted to acquire all the family property including the property to be purchased. The property thus purchased for Rs. 20,000, was subsequently sold by the defendant's father along with the ancestral family property (a 5-anna 4-pies share of *Mouza* Sawari) for Rs. 19,500. The defendant also urges that the amounts received by the plaintiff from the sale of *Mouzas* Sawari, Umri and occupancy land of *Mouza* Sawari house (?) were more than sufficient to meet the just amount of debt then due on that date including the *havala* amounts admitted by the defendant Ganpat Rao."

The plaintiff denied the allegations thus made against him. According to his written reply Narain Rao in purchasing Gambhir Rao's property acted on the suggestion of the Collector. The plaintiff advanced Rs. 10,000 and kept the money in deposit for payment to Gambhir Rao's creditors as the Collector might require. Interest was fairly claimable seeing that the plaintiff having ear-marked the money in this way could not use it for his own purpose.

As already stated the District Judge found that consideration was actually paid for Exhibits P-2 and P-3 as mentioned therein and the correctness of this finding is not contested in appeal. With regard to Exhibit P-2 it is urged that there is no evidence to establish legal necessity for the purchase of Gambhir Rao's property or of actual benefit to the family from

(1) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.).

the transaction. For the respondent on the other hand it is contended that it was beneficial to keep in the family the immoveable property which Gambhir Rao was about to lose and that according to the defendants' own allegations Narain Rao's estate was worth Rs. 2 lakhs with an annual income of Rs. 6,000 so that he was in a position to acquire his step-brother's estate. In reply it is urged for the appellants that the defendants also admitted Narain Rao's debts to have almost reached Rs. 13,000 in the year 1905 and that what was purchased from Gambhir Rao was sold in May 1911 along with the rest (a 5-annas 4 pies share) of *Moza* Sawari for no more than was paid to Gambhir Rao.

No authority has been cited to us on behalf of the respondent for the proposition that the father as manager for the joint family property is entitled to encumber it for the purpose of acquiring ancestral estate belonging to a near relative. The entiment which prompts such an acquisition is laudable enough, but I am unable to think that its gratification justifies any alienation of immoveable property. The duty of the father or other manager is to manage the property of the joint family to which he himself belongs for the benefit of that family. The danger to Gambhir Rao's estate is not shown to have been attended with any corresponding danger to that of Narain Rao and the respondent has not attempted to show that Narain Rao's family gained anything beyond temporary satisfaction of family pride by acquiring what Gambhir Rao was compelled to part with. The final result of the transaction entered into with the object of acquiring Gambhir Rao's property was that Narain Rao lost his share (2-annas 8-pies) of Bagoda, the entire villages of Sawar and Umri and some absolute occupancy land in Sawari, receiving from the plaintiff Rs. 2,000 only and being left with liabilities aggregating on the date of Exhibit P-1, Rs. 4,617-2-0 under Exhibits P-2 and P-3. There was thus a heavy loss of immoveable property in space of four years, and this was in no sense necessary and has not been shown to be even reasonable and proper. There seems indeed to be good ground for suspecting that the plaintiff put Narain Rao forward as purchaser of Gambhir Rao's property because he knew that a purchase by Gambhir Rao's step-brother would be regarded with more favour by the Deputy Commissioner than one by a Marwari money-lender and that he thus prepared the way for eventually becoming the owner himself. In my opinion the share of the minor defendants should not be held liable for any part of the balance due under Exhibit P-2 which is included in the consideration for Exhibit P-1.

Turning to Exhibit P-3, the pleadings in respect of which have already been given, I have to notice in the first place that the defendant Ganpat Rao though a minor at the time was a party to this document and that it was executed by Narain Rao on behalf of Bhim Rao and Ram Rao also. Why the defendant Kashi Rao, who appears to be older than Ram Rao, was not included has not been explained. The defendant Bala was admittedly still unborn in 1907, the plaint signed on the 13th January 1919 showing him then as ten years old: as, however, he was born on the date of Exhibit P-1 (20th March 1912) it is open to him to question the character of the consideration for that transaction and we have not been asked by the plaintiff-respondent to exempt his share from liability on the strength of his non existence in the year in which Exhibits P-2 and P-3 were executed. As to Rs. 10,000 out of Rs. 12,950, the total consideration of Exhibit P-3, I have already set out the facts which are conclusive, Rs. 2,950 was paid in the presence of the Registering Officer and is described as for making payment towards debt. What this debt was is not stated in the deed or shown by the evidence recorded in the present suit. According to the argument addressed to us for the plaintiff-respondent in connection with the scheme for acquiring Gambhir Rao's property Narain Rao had himself a valuable estate in 1907 and the defence included a similar allegation. The plaintiff, therefore, should have exercised considerable care before making a cash advance for the payment of alleged debts. Moreover, in such a case it is usual for the mortgagee to get the several creditors

and their respective claims expressly mentioned in the document. In these circumstances I conclude that the balance due under Exhibit P-3 with corresponding interest should not be treated as binding upon the shares of the minor appellants.

The next item contested in the appeal arises out of Exhibit P-16, the total consideration for which was Rs. 1,270. For Rs. 470 the appellants accept liability. Rs. 800 are shown by the document to have been received by Narain Rao, the sole executant, in cash on the date (29th May 1908) on which it was executed. The deed, which mortgages three entire villages (Dhara, Umri and Sawari), half Kampur and an 8-pies share in Baroda to secure re-payment within four months of Rs. 1,270 with interest at 2 per cent. per mensem, does not show why the cash advanced was required, and in this connection it has to be remembered that only eight months previously Narain Rao had obtained Rs. 2,950 in cash from the plaintiff under Exhibit P-3. For the plaintiff-respondent it is conceded that if the law as to the nature of an "antecedent-debt" is as laid down by the Full Bench none of the defendants can be held bound by so much of the principal of Exhibit P-1 as consists of Rs. 800 secured by Exhibit P-16 and interest under that document.

There is similarly no opposition on the part of the respondent to the appellants' contention based upon the nature of Exhibit P-4 which was executed by Narain Rao and Ganpat Rao on the 24th November 1910. By this document most of the same property as was mortgaged by Exhibit P-16 was again encumbered to secure re-payment within two years of Rs. 600 advanced in cash with interest at 2 per cent. per mensem. The document recites that this money was taken to pay off debts due to Donaji, Rai Sahib Sunderlal and other creditors. Donaji, who died in 1919, was the son of Mallu, the legitimate son of Raghunath the paternal grandfather of Narain Rao and Ganbhir Rao. He was thus Narain Rao's first cousin. The plaintiff put forward one Nathulal (P. W. No. 6) an attesting witness, to prove and explain this transaction. In examination-in-chief this witness said:—

"Narain Rao when borrowing this money said that he wanted this for agricultural purposes but he did not specify the purpose."

In cross-examination, however, he said:—

"I do not remember why the debt of Rs. 600 secured by mortgage-bond (Exhibit P-4) was borrowed by Narain Rao. All that Narain Rao said (was) that he wanted the money for paying off the debt of some of the creditors. I do not remember if the plaintiff asked Narain Rao to give the names of the creditors. No account was made in my presence. I do not recollect how I happened to be present at the time when this bond (page 4) was written. When I reached the place the bond was being written."

Amirchand (P. W. No. 22) who has been in the plaintiff's service for over 30 years said nothing about Exhibit P-4 and in this Court the plaintiff-respondent's Counsel admitted his inability to show how much was due to Donaji Rai Sahib Sunderlal and each of the unnamed creditors respectively. In these circumstances the appeal must succeed as to the item of Rs. 803-8-0 with corresponding interest so far as the share of the minor appellants in the mortgaged property is concerned. The appellant, Ganpat Rao, was a major at the date of Exhibit P-4 and having signed the document himself is bound thereby.

The next item for consideration is that of Rs. 1,440 represented in Exhibit P-5 as due under the lease (Exhibit P-5) executed by Narain Rao and Ganpat Rao on the 29th May 1911 in the plaintiff's favour. By the latter document Rs. 1,200 was taken in cash on the security of a *sir* field, area 51·61 acres, in *Mouza* Baroda, the plaintiff being authorised to hold the field for 30 years in satisfaction of the advance and then to return it to Narain Rao who was to be liable throughout for the rental assessed upon the land. Exhibit P-5 contains no indication of the purpose for which the money was required and the plaintiff adduced no evidence to explain this transaction. The scribe, Jwala Prasad (P. W. No. 7), could say nothing as to the purpose for which the

money was taken. For the plaintiff-respondent it is urged that this lease was cancelled for the purposes of Exhibit P-1, the debt being treated as an ordinary unsecured debt, and so should now be regarded as "antecedent". The defence regarding this lease included an allegation that the plaintiff enjoyed the profits of the land for a year, but none-the-less added Rs. 240 to the principal by way of interest and this was not denied by the plaintiff. I am not prepared to accept the respondent's contention that the nature of the advance made under Exhibit P-5 was changed by the arrangement in Exhibit P-1 for the cancellation of the lease. The so-called lease was really a usufructuary mortgage, the plaintiff being required to realise his debt in full from the usufruct: See *Manikchand v. Vishnoo Govind* (2). And in any view of the legal character of the transaction it is impossible to say what amount the executant would have been able to raise if no security in the shape of joint family property had been furnished. I think, therefore, that the minor appellants' share of the property mortgaged by Exhibit P-1 should not be bound by this sum of Rs. 1,440 with its corresponding interest,

It remains to consider the nature of two out of the five items in Exhibit P-1 which made up the second main portion (Rs. 3,977-8-0) of the consideration for that Exhibit. Of these the first is a sum of Rs. 850 described in Exhibit P-1 as due to Seth Manakchand under a registered mortgage-deed dated the 10th September 1911. This mortgage is Exhibit P-6 which was executed by Narain Rao alone. The principal amount secured is Rs. 750 advanced in cash which Narain Rao undertook to re-pay with interest at 2 per cent. per mensem within twelve months. The property mortgaged comprises an 8-pies share in *Mouza* Bagoda together with six *malik makbuza* plots. The document recites that Rs. 750 was required to comply with an order passed by Rao Bahadur Anantlal, Extra Assistant Commissioner, which entitled the executant to cancel certain leases given to Lachhmi Narain Khandelwal of Multai and Nema Bania of Senurjana. It is plain that the money was raised on the security of the joint family property and consequently cannot constitute an antecedent-debt. It is urged for the plaintiff-respondent that the sums due to Lachhmi Narain and Nema were ascertained by the Debt Conciliation Board over which Rao Bahadur Anantlal presided in 1904. The proceedings of this Board were referred to in paragraph 3 of the written statement for the minor appellants which was filed by their Pleader on the 26th July 1919. The witnesses who deposed to this transaction are Raghunath (P. W. No. 9), an attesting witness, and Subhakaran (P. W. No 17), the son-in-law of the mortgagee Manakchand. The latter proves that Rs. 750 was paid by the plaintiff to Manakchand on the 1st April 1912, but neither throws any light upon the nature of the previous transaction with Lachhmi Narain and Nema, nor has a copy of the order passed by the Debt Conciliation Board been filed. Manakchand died in 1913. Lachhmi Narain was examined as P. W. No. 16 and deposed as follows:—

"I had taken a lease of Deu Gond's field in *Mouza* Ghana. Narain Rao *malguzar* of Ghana sued me for cancellation of the deed and he had to pay me Rs. 600. The sum of Rs. 600 was paid as follows:—Rs. 450 to me and Rs. 150 to Nema Bania of Sendurjana. For making this payment of Rs. 600 Narain Rao borrowed them from Manakchand Sher Singh of Badnur. This payment was made about eight years ago. Nema Bania of Sendurjana is dead. He was my partner in the lease of Deu....The payment was made in the Court of Mr. Anantlal, Extra Assistant Commissioner."

It seems clear from this explanation that Narain Rao spent Rs. 600 out of the advance secured by Exhibit P-6 for recovering certain land in one of his villages, and to this extent I think that the mortgage effected by that document was binding upon the joint family. There is, however, no evidence regarding the balance (Rs. 150) of the advance which according to Exhibit P-6 would have been

(a) 12 C. P. L. R. 96.

taken as represented by the cost of the transa tion, but could not reasonably have reached so large a figure. I would, therefore, allow as binding upon the minor appellants' share in the property mortgaged by Exhibit P-1 Rs. 680 only out of the item of Rs. 850 to which will be added corresponding interest.

For an explanation of the last item, namely, Rs. 127-8-0 due to Arjun Kirar on account of the decree passed by the Munsif of Betul in Suit No. 300 on the 29th February 1912, reference is necessary to Exhibit P-19. No copy of the judgment or decree obtained by Arjun Kirar has been filed and it is impossible to ascertain from the record the nature of the decree in question. It appears, however, from Exhibit P-19 that Arjun Kirar executed the decree before the plaintiff could pay off the amount as he undertook to do in Exhibit P-1. The plaintiff, therefore, paid Rs. 127-8 incash to Narain Rao and Ganpat Rao on the 22nd April 1921, Exhibit P-19 being their receipt for the money. This payment was admitted by the plaintiff's Pleader in an unverified endorsement upon the plaintiff's written reply to the written statement filed for the minor defendants. These beirg the facts, I am unable to think that the minor appellants' share should be made liable for this money. It is clear that Narain Rao and Ganpat Rao were able to meet Arjun Kirar's decretal claim without assistance from the plaintiff and there is nothing to show why having so met it they omitted to have the amount credited to the mortgage account instead of taking it away in cash. This item, therefore, with corresponding interest will be deducted from the sum recoverable from the minor appellants' share.

It is unecessary to consider ground No. 2 of the appeal as I have already held that no part of the balance due under Exhibit P-3 should be treated as binding upon the share of any of the appellants. The point raised is covered by the sixth issue and is dealt with in the latter part of paragrahp 11 of the lower Court's judgment. Were it necessary to decide the point, I would be unable to differ from the District Judge's view. The sum of Rs. 10,000, which Narain was obliged to borrow from the plaintiff in order to make up the price of Gambhir Rao's estate, was ear-marked for the purpose and the plaintiff cannot be held responsible for the delay which occurred in making the money over to the Collector. It appears from the evidence of the plaintiff-respondent's servant Copal Rao (P. W. No. 18) that Gambhir Rao had to pay off certain mortgages before he could give a clear title and that the purchase-money was withheld till the title had been cleared. This course benefited Narain Rao and I think that the plaintiff was entitled to his interest from the time that the money was set aside for Narain Rao's use.

The third ground of appeal is concerned with the fourth and fifth issues which the appellants contend to have been wrongly decided in the lower Court's 9th and 10th paragraphs. In this connection, however, we have been referred for the appellants, to the evidence of four witnesses only, namely, Banuji (D. W. No. 2), Raghunath Rao (D. W. No. 3), Yado Rao (D. W. No. 4) and Banna (D. W. No. 8). The first named deals in provisions at Bagoda and deposed that Narain Rao obtained from him provisions worth Rs. 1:3 in the course of the three years from 1902 to 1904 for dancing girls. Raghunath Rao, a son of Narain Rao's cousin, was in his service for three years 20 yaers ago. He deposed as follows:—

"Narain Rao was of a licentious character and was extravagant in his expenses. He did not listen to good advice. For these reasons I gave up his service."

Yado Rao, after describing Narain Rao as a licentious man who would not listen to the good advice of others, gave the following details in cross-examination:—

"He had four or five prostitutes in his keeping at a time. These were Dilawarjan and Banna. Dilawarjan was a Muhammadan. In our caste a person is not outcasted if he keeps a Muhammadan woman as his mistress. Narain Rao had married four wives and his brother Gambhir Rao married three wives. His father Jairam had two vives and two prostitutes in his keeping. Narain Rao followed the example of his father. Ganpat Rao, son of Narain Rao, has also three wives in his house. In

our caste to have three or four wives is not considered a bad thing."

Banna, the last witness, is evidently one of the dancing girls mentioned by Yado Rao. She said:—

"I used to dance and sing at Narain Rao's house on occasions of marriage and on other occasions four or five times every year. I used to go to his house for eight or nine years. I cannot say what I was paid on each occasion, but I used to get about Rs. 400 a year. He had also had intercourse with me, but I was not separately paid for it. The sum of Rs. 400 a year was inclusive of all my fees."

I am unable to find upon this evidence that Narain Rao's relations with loose women account in any way for his need of money. Moreover, the witnesses entirely failed to establish any connection between a particular loan and expenditure upon such women. That a Hindu son must establish such a connection in order to exonerate himself from liability to pay his deceased father's debt was laid down by me in *Dilli Singh* v. *Bina* (3). To the authorities cited in that case may be added *Babu Singh* v. *Bihari Lal* (4) which was cited by the lower Court, and *Bhagat Mal* v. *Abdul Karim* (5).

The last ground of appeal impeaches the entire transaction embodied in Exhibit P-1 on the ground that it is voidable by reason of undue influence exercised by the plaintiff. It is also urged that the burden of proof was on the plaintiff to show that the contract was not induced by undue influence, he being at the time in a position to dominate Narain Rao's will. The question thus raised was not embodied in any of the lower Court's issues. The plea on which the contention is now based is to be found in paragraph 4 of the appellant Ganpat Rao's written statement, the relevant part of which runs as follows:—

"The plaintiff is a professional moneylender as well as a previous creditor of the family. He took advantage of his position against the defendant and his father who are ordinary agriculturists. No accounts were explained and the mortgage-deed was obtained by the plaintiff for sums not actually due. The plaintiff enjoyed the profits of the land taken by him on *theka* for 30 years in lieu of Rs. 1,200 and after a year again charged interest and added Rs. 240 by way of interest on this sum."

The lease thus referred to is Exhibit P-5 with which I have already dealt. The allegation that no accounts were explained to Narain Rao formed the basis of the lower Court's sixth issue on which the District Judge found on the strength of the statement made by Motilal (P. W. No 1) and Amarchand (P W. No. 22) that the accounts were understood by Narain Rao and Ganpat Rao before they executed Exhibit P-1. It has also been found, and the finding is accepted here, that the ostensible consideration really passed. Moreover, the appellants do not suggest that any evidence has been shut out by reason of the form taken by the sixth issue.

Section 16 (3), Indian Contract Act, is in the following terms.

"Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it, or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other."

In *Deorao* v. *Ambadas* (6) it was held by me that a bargain is unconscionable when it is such as no man in his senses and not under delusion would make on the one hand and no honest and fair man would accept on the other. The terms of Exhibit P-1 cannot be said in any way to satisfy the terms of that definition and the burden of proof was consequently upon the defendant Ganpat Rao, not upon the plaintiff. For the minor appellants no plea of undue influence was advanced. This ground of appeal accordingly fails.

The result of the appeal is that the amount for which the minor appellants' two-

(3) 44 Ind. Cas. 506; 14 N. L. R. 41 at p. 50.

(4) 30 A. 156; 5 A. L. J. 175; A. W. N. (1908) 61.

(5) 34 Ind. Cas. 23; 1 P. L. J. 86; 2 P. L. W. 430; 20 C. W. N. 797.

(6) 43 Ind. Cas. 952; 14 N. L. R. 21.

thirds share in the mortgaged property can be held liable will be reduced by the following principal sums:—

	Rs.	a.	p.		Page.
(1)	3,493	4	0	arising out of Exhibit 2.	
(2)	1,123	14	0	,, ,, ,,	3.
(3)	1,967	7	8	,, ,, ,,	16.
(4)	803	8	0	,, ,, ,,	4.
(5)	1,440	0	0	,, ,, ,,	5.
(6)	680	0	0	,, ,, ,,	6.
(7)	127	8	0	due under Arjun Kirar's decree.	
Total	9,635	9	8		

From this total should be deducted Rs. 2,101-14-10, or 5/21sts $\frac{(2,379)}{(9,984)}$ of the sum of Rs. 2,379 which, as already stated, was excluded from the first main head of the consideration for Exhibit P-1. The figure thus becomes Rs. 7,533-10-10. Deducting this from Rs. 11,582-8-0, the balance of principal for which all the defendants' shares remains liable is Rs. 4,048-13-2. To this will be added interest, simple and compound as allowed by the lower Court. The date for payment should be altered from the 16th December 1920 to the 16th December 1921 and simple interest from the institution of the suit to the new date will be allowed.

So far as the defendant, Ganpat Rao, is concerned the appeal fails entirely.

All the defendants having made common cause in this Court success and failure may be regarded as equally divided. I, therefore, consider that costs in this Court be borne as incurred. In the Court below the plaintiff's costs should be charged upon the one-third share of the mortgaged property treated by the lower Court as the share of Narain Rao and Ganpat Rao, and Ganpat Rao should bear his own costs. No separate costs for the minor defendants were allowed by the lower Court.

Hallifax, A. J. C.—(*January* 19, 1922.)—Out of my great respect for the opinion of the learned Judicial Commissioner I regret that I am unable to accept the view he has adopted in regard to the vexed question of the proper interpretation of the judgment of their Lordships of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (1). In regard to some of the items of the mortgage in this suit that question appears to me not to arise. Where it does, my reluctance to differ from my learned brother is decreased by the fact that he has not stated any opinion himself but has accepted as binding that expressed in *Dhudabai* v. *Narain* (7) by the other two Judges of a Full Bench of which I was a member. In the first place as that ruling has not been published we are not bound to follow it. But further, if it had been published, it is only the judgment of Kotwal, A. J. C. that could have been considered binding on this point. Dhoble, A. J. C. expressed an opinion on it, coinciding with that of our brother Kotwal, but his final decision of the case was based on entirely different considerations and was directly contrary to what it would have been if it had rested solely on his view of the effect of the judgment in *Sahu Ram Chandra's case* (1). What he said on this point was, therefore, entirely *obiter*.

For myself, I refrained from discussing the point in that case, agreeing with my learned brother Dhoble in regarding such a discussion as unnecessary for the decision of the case. My opinion, however, is that the meaning and effect of the Privy Council ruling, so far at least as the Central Provinces, Bombay and Madras are concerned, was correctly interpreted by a Full Bench of the Madras High Court in *Arumugham Chetty* v. *Muthu Kourdan* (8). The view there taken of the effect of the ruling, in which I respectfully concur, is this. What is in fact an antecedent or pre-existing debt duely a Hindu for the satisfaction of which he would be entitled to alienate his sons' shares in the joint family property along with his own if he had not mortgaged that property as security

(7) 66 Ind. Cas 239; 5 N. L. J. 73; (1922) A. I. R. (N.) 28.
(8) 52 Ind. Cas. 525; 42 M. 711; 9 L. W. 565; (1919) M. W. N. 409; 37 M. L. J. 166; 26 M. L. T. 96 (F. B.).

for the debt at the time he incurred it, does not change its character as an antecedent debt due by the father for which he is entitled to alienate his sons' shares, merely by reason of his having executed a void mortgage of those shares along with the valid mortgage of his own when he first incurred the debt. If the first mortgage were executed only as a blind with the knowledge that it was invalid and with the intention of executing another after the debt had had time to ripen into a deceptive appearance of being an antecedent debt, it would not be antecedent at all at the time of the execution of the second mortgage. In those circumstances it makes no difference whether a mortgage is executed at the time of the loan or not. If money were borrowed, even without security, on an understanding that a mortgage would be executed for it later, as soon as a sufficient period had elapsed to make it appear to be a pre existing debt, it would still be contemporaneous debt in fact at the end of that period, whether the period were two days or a month or ten years. The borrowing and the hypothecation would be merely two parts of the same transaction. Between the payment of the consideration there is ordinarily some interval of time, even if it is not more than a few seconds or a day or two and making it as much as ten years would not of itself make the one mortgage into two separate transactions. A first mortgage at the time of the payment of the consideration may be evidence that the borrowing is not "dissociated in fact from the security or fancied security afforded by the family property" in the later mortgage, but it does not of itself associate the borrowing with that security nor is it conclusive evidence of that association. That association might equally well exist if the money were originally advanced without security but on a promise to execute a mortgage for it as soon as the debt had acquired a false appearance of having no connection originally with the mortgage, however long the interval allowed for this fraudulent purpose might be.

In this view I hold that the minor's shares in the property are liable to the mortgage in respect of the first four items of the consideration discussed in the judgment of my learned brother. The fifth item of Rs. 1,440 cannot be called a debt at all. The document filed as Exhibit P-5 is in terms and effect a pure lease and I am quite unable to see how it can be regarded as a usufructuary mortgage. There was no loan and no subsisting debt. The lessor remained liable to pay the annual rent, or rather the annual contribution to the revenue of the village proportionate to the area of *sir* land, but that condition is not uncommon in agricultural leases and certainly does not of itself turn what would otherwise be a lease into usufructuary mortgage. The transaction embodied in the mortgage in suit was, therefore, a payment of Rs. 1,440 to the lessee for the cancellation of the lease, which had been in existence for one year only and still had twenty-nine years to run. The payment of Rs. 1,200 by the mortgagee for a lease for thirty years seems to me sufficient proof that the payment of at least Rs. 1,160 for a lease for twenty-nine years was a prudent bargain, and the cancellation of a lease for *sir* land must certainly be considered one of those matters that are within the discretion of the manager of a joint Hindu agricultural family. I am further of opinion that when it is found that the taking of a lease, to which the transaction is equivalent, was desirable in the interests of the family and that the value of it was not less than Rs. 1,160, it must be assumed that the manager did not act unreasonably in the circumstances, of which we have no exact knowledge, in agreeing to pay Rs. 1,440 which is 24 per cent, more. To hold otherwise would be to deprive him of all discretion in the matter.

I turn next to the two items of what the learned District Judge has called Group B. The second of them, Rs. 127-8-0, was a contemporaneous advance, which was intended originally to be used in payment of Arjun Kirar's decree, but it was not so used as the decree was paid off otherwise. It is then practically admitted that there was no necessity at all for borrowing this sum and nothing that can make the mortgage in respect of it binding on the minor appellant's shares in the property. The sum of Rs. 850 was

borrowed and used for the payment of a mortgage-debt to one Seth Manak Chand. I agree entirely in thinking that the mortgage to Manak Chand was itself binding on the sons' shares to the extent of Rs. 600 out of its consideration of Rs. 750. But it is to be remembered that the previous mortgage in this instance was in favour of a third party and not of the plaintiff. All the plaintiff did was to ascertain that there was such a debt outstanding and to pay it, and it seems to me that under those circumstances he is protected by the doctrine of reasonable enquiry. In the case of *Dhudabai* v. *Narain* (7), already mentioned, the whole of the consideration of the mortgage was for the payment of a previous mortgage executed by the father in favour of a third party, and the following passage in my judgment in that case will apply equally here:—

"Even if we accept the view that the decision in *Sahu Ramchandra's case* (1) means that what is undoubtedly in fact an antecedent debt of the father ceases to be an antecedent debt binding on the sons merely because he secured it by a mortgage of his sons' shares along with his own, it seems to be the mortgagees in this case would be amply protected by the doctrine of reasonably satisfactory enquiry into the necessity for the alienation. This doctrine of reasonable satisfaction, after due enquiry as to the propriety of an alienation of joint family property by the manager of the family must apply just as much to an antecedent father's debt as to family necessities or pressure on the estate. The mortgagees could scarcely be expected to know anything about such a delicate point of law as that raised in the case, about which there is even now so much discussion, many years before it was enunciated by their Lordships of the Privy Council, whatever the true interpretation of their Lordships' enunciation may be, and at that time any person who ascertained that a Hindu father had been owing money for some years and had gone to the length of mortgaging the whole of his family property for it, would have been quite justified in assuming, as all the Courts in India did, that this antecedent debt of his was one for which he could alienate their shares with his own in the joint property, whether the mortgage bound their shares in the property or not.....If they were satisfied that an unsecured father's debt existed it would not be for them to institute enquiries and make sure that the debt had not been incurred for immoral purposes before advancing money on the security of the family property for its re-payment. Similarly if the previous debt was secured on the family property it would not be necessary for them to enquire whether the money had originally been borrowed for family necessity or the debt had been in existence as a father's debt before the mortgage was executed. They would be perfectly justified in assuming that it was so, for, to translate the familiar maxim of law, the chances are that what has been done has been done honestly and properly."

For these reasons I hold that the mortgage is binding on the minor appellents' shares for the whole of this item of Rs. 850. I have already said that I hold it to be binding in respect of all the items in dispute here except that of Rs. 127-8. For the rest I concur entirely in the findings that the plaintiff is entitled to interest on the amount of Rs. 10,000 held in deposit for payment to the Collector, that no part of the mortgage-debt is tainted with immorality and that the contract is in no way vitiated by any undue influence having been exercised by the plaintiff. Finally I cannot see why the remission of Rs. 2,179 and the payment of Rs. 200 should not be appropriated wholly to the part of the debt that is found to have been due by the actual mortgagors alone and not by the minor members of the family. I am much inclined to think that it ought to be set off against the amount of Rs. 2,917-8 advanced in cash at the time of the mortgage, but at the least the whole of that portion of Rs. 9,984 which is found to be a debt payable by the minors should be made binding on their shares, no deduction being made from that portion on account of the remission or payment made at the time of the execution of the mortgage. The remission was certainly never meant to benefit them apart from the two mortgagors.

In regard to costs in both Courts I consider they ought to follow the event strictly. The decree should, therefore, declare the price of redemption of the whole property

to be Rs. 14,500, plus compound interest at 12 per cent. per annum up to the date of suit, plus simple interest on the sum of these two amounts at 1 per cent. per mensum from the date of suit up to the date eventually fixed for payment, plus the whole of the plaintiff's costs in both Courts. The price of redemption of the two-thirds of the property will be Rs. 11,582-8, plus interest on it as on the Rs. 14 500, plus a sum bearing the proportion to the plaintiff's total costs in the lower Court that Rs. 11.582 does to Rs. 14,500, minus a sum bearing the proportion to the defendants' total costs in the lower Court that Rs. 2,917 does to Rs. 14,500, plus the plaintiff's costs in this Court.

OPINION.

Batten, J. C.—This appeal has come before me under section 10 (*b*) (*ii*) of the Central Provinces Courts Act, 1917, as there was a difference of opinion between the two Judges composing the Bench that heard the appeal. The nature of the suit is set out in the judgment of Drake-Brockman, J. C., and the difference of opinion is as to the extent to which the minor appellants are bound by the mortgage. There have been no arguments before me as to the points on which both Judges are agreed, and I see no reason to differ from their joint conclusions.

The main point of difference is on the question as to the effect of the judgment of their Lordships of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (1) on the meaning to be attached to the term "antecedent debts". The point of view adopted by Drake-Brockman, J. C., is that a debt borrowed by a Hindu father on the security of the joint family property does not constitute an antecedent debt so as to bind his sons by a subsequent mortgage effected for the discharge of that debt and that it is open to the sons when a suit is brought to enforce the later mortgage to plead that the earlier one was not justified by legal necessity. Hallifax, A. J. C., on the other hand has adopted the interpretation of the Privy Council judgment of a Full Bench of the Madras High Court in *Arumugham Chetty* v. *Muthu Koundan* (8). I accept the opinion of Hallifax, A. J. C., who was a member of the Bench, that this question was not decided by the Full Bench in *Dhudabai* v. *Narain* (7).

The interpretation adopted by Drake-Brockman, J. C., has been extremely well stated in *Mathura Misra* v. *Raj Kumar Misra* (9) by Miller, C. J., though the view of the Full Bench was in accordance with that of the Full Bench of the Madras High Court already referred to. Since this case was argued before me the judgment of their Lordships of the Privy Council in *Chet Ram* v. *Ram Singh* (10) has become available. After reading that judgment I have no doubt that the interpretation of *Sahu Ram Chandra's case* (1) given by Miller, C J. and adopted by Drake-Brockman, J C., is the correct one. It is argued for the respondent that in *Sahu Ram Chandra's case* (1) the father was still alive, whereas in this case the father Narain Rao died before the suit was filed, and as their Lordships distinguished between a case where the father was still alive and a case where he was dead, their ruling has no application to the present case. It is argued that the appellants are bound to pay off their father's debt because of their pious obligation to do so. But their Lordships observe: "Responsibility to meet their father's debt is one thing, and the validity of a mortgage over the joint estate is quite another thing." This is a suit to enforce a mortgage, not merely a suit to recover a debt, and I am, therefore, unable to distinguish this case on the ground that the father is dead. I may observe that some of the previous mortgages were executed by Ganpat Rao as well as by Narain Rao, but no arguments have been addressed to the Court in respect of this circumstance. The result is that I agree with Drake-Brockman, J. C., as regards Items Nos. (1), (2), (3) and (4) in the list towards the end

(9) 62 Ind. Cas. 132; 6 P. L. J. 526; 2 P. L. T. 407; (1921) Pat. 245 (F. B.).

(10) 67 Ind. Cas. 569; 44 A. 368; 3 P. L. T. 363; 31 M. L. T. 50; 43 M. L. J. 98; 16 L. W. 89; (1922) M. W. N. 455; 4 U. P. L. R. (P. C.) 64; (1922) A. I. R. (P. C.) 247; 3 P. L. R. 1922; 24 Bom. L. R. 1231; 27 C. W. N. 150; 49 I. A. 228; 21 A. L. J. 114; 37 C. L. J. 79 (P. C.).

of his judgment. There is no difference of opinion as regards Item No. (7).

There appears to be a mistake in the learned Judicial Commissioner's list in respect of Item No. (6). He held that out of the item of Rs. 850 claimed in respect of the mortgage Exhibit P-6, Rs. 680 were binding on the minor appellants' share in the property, and in this view Hallifax, A. J. C., concurred. Item No. (6) in the list of amounts for which Drake-Brockman, J. C. held the minors' shares not to be liable should be Rs. 170 and not Rs. 680. As regards the Rs. 170 there is a difference of opinion. The learned Judicial Commissioner held that there was no evidence that Rs. 150, out of the mortgage amount of Rs. 750, were advanced for a purpose binding on the minors' share. Hallifax, A. J. C., held that the plaintiff was, in respect of a previous mortgage to a third party, protected by the doctrine of reasonable enquiry. With this view I agree, and I would accordingly strike out Item No. (6) from the above mentioned list.

The next item on which there is a difference of opinion, is Item No. (5) in the above mentioned list, namely Rs. 1,440 arising out of Exhibit P-5. This document is found by the learned Judicial Commissioner to constitute a usufructuary mortgage and not a lease. Hallifax, A. J. C., holds the document to be a lease, and considers that the payment of Rs. 1,440 for its cancellation was a prudent transaction, binding on the minors. In this view I concur, with the result that the Rs. 1,440 should be held binding on the minor appellants' two-thirds share of the estate.

There also is a difference of opinion as to the apportionment of the remission of Rs. 2,179 and the payment of Rs. 200, excluded from the first main head of the consideration for the mortgage in suit. I am unable to follow the figures of the learned Judicial Commissioner, but the effect of them is that the minor appellants' two-thirds share gets the benefit of some of the remission. Hallifax A. J. C., on the other hand, is of the opinion that the whole of that portion of the Rs. 9,984 which is found to be a debt payable by the minors should be made binding on their shares, no deduction being made from that portion on account of the remission or payment made at the time of the execution of the mortgage. If I understand his argument aright, it is that the remission having been granted on a portion of the debt including amounts larger than the remission, which the sons are not liable to pay, it must be regarded as a payment by the father of a debt for which the sons have not been found liable and none of the remission or payment should be apportioned to the debt for which the sons are liable. With this view I agree.

As to costs I agree with Hallifax, A. J. C., that the costs in both Courts should follow the event strictly. There will be no separate costs in respect of the reference to me.

FINAL JUDGMENT.

Baker, Offg. J. C., and Hallifax, A. J. C.—(*March* 12, 1923).—In accordance with the decision of the learned Judge to whom this case was referred the decree of the lower Court will be modified so as to declare the price of redemption to be as follows:—For the whole property it will be Rs. 14,500, plus compound interest at 12 per cent. per annum up to the date of suit, plus simple interest on the sum of these two amounts at 1 per cent. per mensem from the date of suit to the date hereinafter fixed for payment, plus the whole of the plaintiff's costs in both Courts. For a two-thirds share in the property it will be Rs. 6,445, plus interest on it as on the Rs. 14,500, plus a sum bearing the proportion to the plaintiff's total costs in both Courts that Rs. 6,445 does to Rs. 14,500, minus a sum bearing the proportion to the defendants' total costs in both Courts that Rs. 8,055 does to Rs. 14,500. The date up to which redemption is allowed will be the 28th of August 1923.

Appeal allowed in part.

Z. K.

BOMBAY HIGH COURT.

FULL BENCH.

CIVIL REFERENCE NO. 19 OF 1922.

April 4, 1923.

Present:—Sir Norman Macleod, Kt., Chief Justice, Mr. Justice Marten and Mr. Justice Crump.

ALFRED WILKINSON—PETITIONER

versus

GRACE EMILY WILKINSON AND ANOTHER—RESPONDETS.

Divorce Act (IV of 1869), ss. 2, 7, 22—Indian Councils Act (24 & 25 Vic. c. 67), s. 22—Power to divorce non-domiciled person—Jurisdiction of Indian Courts—Judicial separation.

Per *Macleod, C. J.* and *Marten, J.*—(*Crump, J., dissenting*).—Sections 2 and 7 of the Divorce Act do not confer on the Courts in India jurisdiction to grant decrees of divorce between persons who are not domiciled in India. [p. 659, cols. 1 & 2; p. 670, col. 2.]

Per *Marten, J.*—The reference in section 7 of the Divorce Act to the principles on which the English Court gives relief includes the principle on which the foundation of jurisdiction is based. [p. 668, col. 2.]

Per *Marten* and *Crump, JJ.*—The Divorce Act is not *ultra vires* the powers of legislation of the Indian Imperial Legislature, *vide* section 22 of the Indian Councils Act. [p. 679, col. 1; p. 685, col. 2.]

Per *Crump, J.*—The word "reside" in section 2 of the Divorce Act is used in its plain meaning of residence and not of domicile. [p. 683, col. 2.]

Courts in India have by virtue of sections 2 and 7 of the Divorce Act jurisdiction to grant divorces between persons resident but not domiciled in India provided the other conditions laid down in section 2 are fulfilled. [p. 686, col. 1.]

Section 7 of the Divorce Act is a residuary section intended to provide for any matters which by inadvertence or otherwise are not expressly dealt with in the Act. The expression "rules and principles" which occurs in the section points rather to the rules and principles on which the Court deals with matrimonial causes in requiring a certain degree of evidence and other cognate matters, than to rules on which jurisdiction is founded. [p. 687, col. 1.]

Per *Curiam*.—The jurisdiction to grant decrees of judicial separation rests on residence and the Courts in India have jurisdiction under the Divorce Act to grant decrees of judicial separation in cases in which the parties reside, although they are not domiciled, in India. [p. 658, col. 1; p. 666, col. 1.]

The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions. [p. 657, col. 2.]

Civil reference made by the District Judge, Poona, under section 17 of the Indian Divorce Act, 1869, in Suit No. 12 of 1921.

Mr. *Campbell*, (with him Messrs. *H. V. Divatia* and *S. E. Bamji*), for the Petitioner.

Mr. *Binning*, (with him Mr. *D. C. Virkar*), for Respondent No. 1.

Mr. *M. M. Karkhari*, for Respondent No. 2.

JUDGMENT.

Macleod, C.J.—This is a reference under section 17 of the Indian Divorce Act IV of 1869 to the High Court of Bombay for the confirmation of a decree for dissolution of marriage in a suit filed in the Court of the District Judge of Poona by the petitioner Alfred Wilkinson against his wife Norah Wilkinson as the respondent and a Captain D'Arcy as co-respondent.

The petitioner alleged that he was married to the respondent on August 8, 1914, at Poona. That he resided in Poona till 1917 and in Bombay until 1920 when he went to England with his wife and two children. That he returned on March 18, 1921, and resided at Poona. From May 1 he was employed in Bombay while his wife remained at Poona and they last resided together at Poona. In Poona the respondent became familiar with the co-respondent and on various occasions committed adultery with him. On August 22, the respondent came to Bombay to the petitioner and on the 23rd left him to go away with the co-respondent who left her that night at the Apollo Hotel. On September 1 the respondent wrote to him that she was going away altogether. The petition was filed on September 7. The

respondent denied that she had committed adultery on various occasions at Poona. She alleged that on August 23 the petitioner turned her out of the house when the co-respondent gave her a helping hand and found a room for her at the Apollo Hotel where she stayed till her father arrived and took her back to Poona. The co-respondent in his written statement adopted the same defence as the respondent. When the case came on for trial, the following issues were raised:—

1. Whether plaintiff proves adultery between respondents Nos. 1 and 2?

2. If plaintiff proves adultery, has he condoned it by his subsequent conduct?

Although no issues were raised with regard to the domicil of the petitioner or the jurisdiction of the Court to deal with the petition, it appears that the question of jurisdiction was argued on the basis that the parties were domiciled in England. The learned Judge said:

"The jurisdiction depends on the Indian Divorce Act, 1869, and so long as that Act is in force, this Court cannot decline jurisdiction. Moreover the Courts in India are not subject to the Probate Division of the High Court of Justice in England. As apparently divorces granted in India between parties of non-Indian domiciles are not recognised in England now, the present position of the law is anomalous but that is a matter for the Legislature and not for the Courts in India."

In this Court the petitioner has put in an affidavit, alleging that before the date of the institution of the petition he had given up his English domicil, but such a statement was too clearly prompted by the occasion, and for the purposes of this reference we must take it that the petitioner was not domiciled in India.

By section 2 of the Act nothing thereinafter contained shall authorise any Court to grant any relief under the Act, except in cases where the petitioner professes the Christian religion and resides in India at the time of presenting the petition, or to make decree of dissolution of marriage except in the following cases:—(*a*) where the marriage shall have been solemnized in India, or (*b*) where the adultery, rape or unnatural crime complained of shall have been committed in India, or (*c*) where the husband has, since the solemnization of the marriage, exchanged his profession of Christianity for the profession of some other form of religion.

By section 7, subject to the provisions contained in the Act, the High Courts and District Courts shall, in all suits and proceedings thereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief.

By section 10 any husband may present a petition for dissolution of his marriage on the ground of his wife's adultery and any wife may petition for dissolution of her marriage on any of the grounds mentioned in the section.

Section 22 enables a husband or a wife to obtain a decree for judicial separation on any of the grounds therein mentioned.

It has been contended before us that the District Court of Poona had no jurisdiction to pass the decree under reference for two reasons: (1) because the Indian Councils Act, 1861, could not be deemed to warrant the making of laws by the Indian Government to interfere with the status of subjects of the Crown not domiciled in India, (2) because even if the Indian Councils Act did warrant the making of such laws, the Indian Divorce Act itself did not give such jurisdiction to the Indian Courts. It cannot be disputed that ever since Act IV of 1869 was passed, the Indian Courts have assumed to themselves jurisdiction to divorce non-domiciled parties. It has never been questioned that decrees of divorce in such cases were valid in India and it has been taken for granted that they were also valid in England. *Thornton* v. *Thornton* (1), *Warter* v. *Warter* (2) and *Norton* v. *Norton* (3). The decision of the President of the Probate, Divorce and

(1) (1886) 11 P. D. 176; 55 L. J. P. 40; 54 L. T. 774; 34 W. R. 509.

(2) (1890) 15 P. D. 152; 59 L. J. P. 87; 63 L. T. 250; 54 J. P. 631.

(3) (1908) 1 Ch. 471; 77 L. J. Ch. 312; 99 L. T. 257.

Admiralty Division in *Keyes* v. *Keyes* (4) has necessitated a re consideration of the nature and extent of the powers of the Indian Courts under Act IV of 1869. In that case the petitioner Reginald Keyes had obtained a decree for the dissolution of his marriage from the Chief Court of the Punjab in 1918. Apprehending that the validity of that decree might not be recognised in England, he filed a petition for divorce in England. It was not defended, but considering the importance of the case, the Secretary of State obtained leave to intervene, in consequence of which the King's Proctor also appeared. The Attorney-General said that the question was whether having regard to the clear words of section 7 of Act IV of 1869 the word "resides" in section 2 was to be read as meaning merely resident or with the more pregnant meaning of domiciled. The jurisdiction of the English Courts rested not on residence but on domicil. He referred to *Armytage* v. *Armytage* (5) in which Mr. Justice Gorell Barnes said (page 185):—

"The jurisdiction to dissolve marriages was conferred upon this Court by the Matrimonial Causes Act, 1857, and, although that Act does not expressly make domicile a test of jurisdiction, that test is applied by the Court to the exercise of jurisdiction in cases of dissolution of marriage. It is derived from the principles of private international law, an adherence to which is necessary, as Lord Penzance said in *Wilson* v. *Wilson* (6), in order to 'preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another.'"

Sir Erle Richards for the Secretary of State pointed out that the doctrine that divorce jurisdiction must be based on domicil did not obtain in 1861 when the Indian Councils Act was passed. He relied on the user of the last fifty years and on the fact that the Indian Divorce Act was within the authority given by the Imperial Parliament and was binding everywhere within the British Empire.

The President in giving judgment said that the substantial question to be decided was whether the Governor-General of India in Council was authorised by the Indian Councils Act, 1861, to establish Courts having jurisdiction in India with power to decree the dissolution of the marriage of persons domiciled elsewhere, and whether the authority, if any, thereby given was so exercised in the enactment of the Indian Divorce Act, 1869. It was pointed out that so far from its having been recognised in 1861 that divorce jurisdiction need not be based on domicil, the law of nations with regard to the power of communities to deal with the status of marriage between strangers resident among them had long been declared by jurists to be that afterwards laid down in *Le Mesurier* v. *Le Mesurier* (7). In *Warrender* v. *Warrender* (8) Lord Brougham had said with the assent of Lord Lyndhurst that the parties to the marriage contract must be deemed to enter into it with reference to their own domicile and laws and that jurisdiction must depend on domicile. These pronouncements seemed to be material in the inquiry whether upon the true construction of the Imperial Statute of 1861 power was thereby conferred upon the Governor-General of India in Council to legislate for British subjects merely resident in India so as to affect their status as to marriage in the country of their domicile. Accordingly the learned President decided that section 22 of the Indian Councils Act could not be deemed to warrant the making of laws by the Indian Government to interfere with the status of subjects of the Crown not domiciled in India. As between two possible constructions, that which was conformable to international law as declared in English Tribunals was to be

(4) (1921) P. 204; 90 L. J. P. 242; 124 L. T. 797; 65 S. J. 435; 37 T. L. R. 499.
(5) (1898) P. 178; 67 L. J. P. 90; 78 L. T. 689; 14 T. L. R. 480.
(6) (1872) 2 P. & D. 435 at p. 442; 41 L. J. Mat. 74; 27 L. T. 351; 20 W. R. 891.
(7) (1895) A. C. 517; 64 L. J. P. C. 97; 72 L. T. 873; 11 R. 527.
(8) (1835) 2 Cl. & F. 488; 9 Bligh (N. S.) 89; 37 R. R. 188; 6 E. R. 1239.

preferred to that which would involve infringement of the rights of other communities.

With the very greatest respect it might to said that for the purpose of the decision in *Keyes* v. *Keyes* (4) it was only necessary to discuss the question whether extra-territorial effect could be given to the decree of the Chief Court of the Punjab, but in the present case it must be taken as granted that if we confirm the decree of the District Judge it will have no validity in England, so we have to decide whether we have jurisdiction to confirm a decree which will only be valid in India, and on that question the judgment in *Keyes* v. *Keyes* (4) has to be carefully considered. There are three courses open to us.

We may follow the decision in *Keyes* v. *Keyes* (4) that the Indian Legislature has no power to give the Courts jurisdiction to grant decrees for dissolution of marriage to non-domiciled parties; or

we may hold that the Indian Legislature has the power and has not exercised it; or

we may hold that the Indian Legislature has the power and has exercised it.

I am not prepared to differ from the decision in *Keyes* v. *Keyes* (4), for the argument that jurisdiction in matrimonial causes was based on a so-called matrimonial domicile when the Indian Councils Act was possed in 1861 can hardly be said to be grounded on fact. *Niboyet* v. *Niboyet* (9) which forms its chief support was decided in 1878, and as was pointed out in *LeMesurier* v. *LeMesurier* (7) it could not be said that at any time the doctrine was completely established so that we could safely say that the Indian Councils Act was passed on the understanding that it was a part of international law. I do not deny that there is considerable force in the argument that there is nothing in the Indian Councils Act itself to impel us to construe it in the restricted manner for which Mr. Binning has contended. In *Empress* v. *Burah* (10) their Lordships said (page 193) :—

"The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited—it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions."

It may be said, therefore, that unless we can read into the Indian Councils Act an express provision prohibiting the Indian Legislature from giving the Indian Courts of Justice powers to divorce non-domiciled parties, an Act of the Indian Legislature giving such powers would not be *ultra vires*.

Apart, however, from the undesirability of a conflict of judicial opinion between the Indian and English Courts on the question of the construction of an Imperial Statute, the discussion may be said to be purely academical, if my view is correct that the Indian Divorce Act does not confer jurisdiction on the Courts to dissolve the marriages of non-domiciled parties, since the Legislature would not be likely in the future to suggest the amendment of the Act so as to enable the Courts to

(9) (1879) 4 P. D. 1; 48 L. J. P. 1; 39 L. T. 486; 27 W. R. 203.

(10) 5 I. A. 178; 4 C. 172; 3 C. L. R. 197; 3 Sar. P. C. J. 834; 3 Suth. P. C. J. 556; 2 Ind. Jur. 618; 2 Shome L. R 63; 2 Ind. Dec. (N. S.) 110; (1878) 3 A. C. 889 (P. C.).

grant decrees for divorce which would only be valid in India.

The argument that the Legislature intentionally made residence the test of jurisdiction and not domicile, must also include the proposition that the Legislature omitted or declined to recognize that in matrimonial cases which involved dealing with the status of the parties the Courts follow the principles of international law unless they are expressly excluded by the Municipal Law. In *Jogendra Nath Banerjee* v. *Elizabeth Banerjee* (11) Jerkins, J., said that residence and not domicil had been made the test of jurisdiction, but apart from the fact that in that case there was no question with regard to the domicil of the parties, I doubt very much whether the argument is sound that because the Court can only give relief to a petitioner who is resident in India the question of domicil may be disregarded altogether. Relief not involving the status of the parties may be granted under the Act if the condition of residence is satisfied but that is in accordance with the principles and rules of the Ecclesiastical Courts which by section 22 of 20 & 21 Vic. c. 85 were to be acted upon by the Matrimonial Court in all suits and proceedings other than proceedings for the dissolution of marriage. The question whether the Court of Divorce in England had jurisdiction to entertain a suit for judicial separation where the husband was domiciled in Australia and the act of cruelty alleged was said to have been committed in Italy was very fully considered in *Armytage* v. *Armytage* (5). The petitioner maintained that the test of domicile was not applicable as in a suit for dissolution of marriage and that the Ecclesiastical Courts would have given her relief when she and her husband were both resident in England in the circumstances proved. The respondent contended that no relief would have been given because the parties were not domiciled in England and no act of cruelty had been proved within the jurisdiction. Gorell Barnes, J., said in conclusion at page 197:

"It may, I think, be safely laid down that the Ecclesiastical Courts would formerly, and this Court will now, interfere to protect a wife against the cruelty of her husband, both being within the jurisdiction, when the necessities of the case require such intervention."

The argument that the Indian Divorce Act has made residence and not domicil the test of jurisdiction may best be refuted by referring to the following passage in the judgment of the Privy Council in *Le Mesurier* v. *Le Mesurier* (7) when dealing with the decision in *Niboyet* v. *Niboyet* (9) (page 531.)

"The main reason assigned for their decision by the learned Judges of the majority was, that, before the Act of 1857 became law, the petitioner would have been entitled to sue her husband in the Bishop's Court, although he was not domiciled in England, and to ask either for restitution of conjugal rights, or for a divorce a *mensa et thoro*, and in either case for proper alimony; and consequently that, after the Act of 1857 was passed, jurisdiction in divorce might be exercised in the same circumstances. There appears to their Lordships to be an obvious fallacy in that reasoning. It is not doubtful that there may be residence without domicile, sufficient to sustain a suit for restitution of conjugal rights, for separation, or for aliment; but it does not follow that such residence must also give jurisdiction to dissolve the marriage. Their Lordships cannot construe section 27 of the Act of 1857 as giving the English Court divorce jurisdiction in all cases where any other matrimonial suit would previously have been entertained in the Bishop's Court".

It must follow that the Indian Courts have not a more extended jurisdiction than the English Courts. Undoubtedly a country by its Municipal Law may lay down its own tests for creating jurisdiction within its own boundaries even in cases where the status of the parties is involved. Their Lordships in *Le Mesurier* v. *Le Masurier* (7), when dealing with the question of matrimonial domicil, said (page 537):—

(11) 3 C. W. N. 250.

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"It is a circumstance not undeserving of notice that the learned Judges, whether English or Scottish, who have expressed judicial opinions in favour of a matrimonial domicil, have abstained from reference to those treatises on international law which are generally regarded as authoritative, in the absence of any Municipal Law."

And that it would be competent for Municipal Law to create jurisdiction valid within its own boundaries is clear from the following passage in the judgment at page 527 :—

"In order to sustain the competency of the present suit it is necessary for the appellant to show that the jurisdiction assumed by the District Judge of Motara was derived, either from some recognised principle of the general law of nations, or from some domestic rule of the Roman-Dutch Law. If either of these points were established, the jurisdiction of the District Court would be placed beyond question; but the effect of its decree divorcing the spouses would not in each case be the same. When the jurisdiction of the Court is exercised according to the rules of international law, as in the case where the parties have their domicil within its *forum*, its decree dissolving their marriage ought to be respected by the Tribunals of every civilized country."

But with regard to the dissolution of marriage the provisions of the Indian Divorce Act are with a few variations identical with those of 21 & 22 Vic. c. 85. Under section 27 of that Act any husband may petition for dissolution of his marriage, etc., but it may be taken now as settled that the Court in considering such a petition will follow the principles of international law whatever doubts may have been felt on the question until the decision in *Le Mesurier* v. *Le Mesurier* (7). As the Legislature has not directly given to the Indian Courts the power to dissolve marriages between non-domiciled parties, I do not think it is open to us to hold that we have the power by implication, even if I thought that the argument that residence has been made the test of jurisdiction was a sound one. I am prepared to go further and hold that section 7 of the Indian Divorce Act set out above directly excludes the idea that the Act gives jurisdiction to decree divorce in the case of non-domiciled parties. Professor Dicey in the second edition of his Conflict of Laws, considered that such a construction of sections 2 and 7 would be forced on two considerations. Residence was designedly made the basis of divorce jurisdiction in India, regardless of domicil, and the Indian Courts exercised jurisdiction on that basis. The second consideration merely begs the question, the first is also open to that defect, unless it could be said that it was intended to recognise the doctrine of matrimonial domicil. Considering that nearly all Englishmen in India were non-domiciled and that it may have been intended by the Act to provide them with a *forum* for deciding their matrimonial disputes, it is quite possible that the Legislature thought that they were giving effect to such an intention, and were not enacting divorce legislation for the domiciled community only. But granting that was the intention, and admitting that for fifty years it was considered that effect had been given to that intention by the Act the fact remains that we have to construe the Act as it stands now free from all such matters of prejudice. To my mind the same considerations on which it was held that the Indian Courts cannot grant divorces to non domiciled parties which will be treated as valid in England must operate on the validity of such divorce in India. I can see no difference in terms between the provisions of the Indian Divorce Act and the Matrimonial Causes Act, certainly no difference which gives the Indian Courts a wider jurisdiction. After the decision in *Keyes* v. *Keyes* (4) Statute 11 & 12 Geo. V, c. 18 was passed, whereby any decree granted under the Act of the Indian Legislature known as the Indian Divorce Act, 1869, and confirmed or made absolute under the provisions of that Act for the dissoultion of a marriage the parties to which were at the time of the commencement of the proceedings domiciled in the United Kingdom, and any order made by the Courts in relation to any such decree

shall, if the proceedings were commenced before the passing of the Act, be as valid and be deemed always to have been as valid in all respects as though the parties to the marriage had been domiciled in India. But the power to grant divorces in such cases in the future was withheld.

In my opinion, therefore, the District Court of Poona had no jurisdiction to pass a decree for dissolution of marriage in this case.

But it is also necessary to consider the question of fact, whether it was proved that the respondent had committed adultery with the co-respondent. Disregarding the allegation that adultery had been committed at Poona, there can be no doubt that a certain relationship existed between the respondent and the co-respondent before the former came to Bombay on the 22nd August. It also seems clear that she was not turned out of the house by the petitioner but left of her own accord with Captain D'Arcy. But I do not think the evidence discloses facts which must lead the Court to the inevitable presumption that adultery was committed that night.

Undoubtedly Captain D'Arcy accompanied Mrs. Wilkinson to the Apollo Hotel, but there is no evidence that he occupied the same room or even stopped the night in the Hotel. He was living at that time with Mr. Gove in Byculla. Mrs. Wilkinson said "Captain D'Arcy and the Manager took me to the door of the room, said 'Good night' and went away. The Manager was an Englishman. Captain D'Arcy behaved all along as a friend." None of the Hotel staff were called as witnesses and it seems to have been suggested to the Court that the Manager was dead, although as a matter of fact he had been summoned to appear on the 7th June and had written to the Judge to say that the Rs. 10 sent for expenses were insufficient. He has now filed an affidavit corroborating the petitioner's statement that Captain D'Arcy did not go into Mrs. Wilkinson's room and did not stop the night at the Hotel. The Judge must have been told that the Manager was dead and that is stated as a fact in the judgment. This casts little credit on the conduct of the petitioner's case. The statement of the petitioner regarding his observations when he went to the room next day and the fact that Captain D'Arcy was found to be in possession of the key of room are not sufficient in my opinion to found a presumption that the respondent and the co-respondent spent the night together in that room. There is no evidence, therefore, on which the Court is entitled to presume that adultery was committed in Bombay.

But undoubtedly the respondent after her return to Poona wrote a letter to the petitioner on the 1st September which affords a strange contrast to the affectionate letter she wrote to him on the 25th August. She began, "I wish to inform you for good and all that I shall never live with you again as your wife and the sooner we are separated or divorced the better for us both" and continued "my life with you is misery to myself and must necessarily be so to you, when you know I cannot even like you and I can only see one thing to do, *viz.*, 'Divorce me' which eventually must come." It has been argued that the latter sentence could only mean one of two things, either that the respondent had already afforded the petitioner grounds for divorce or intended to do so. But it does not necessarily follow that the respondent had been guilty of adultery or intended to commit adultery; she may well have thought that the mere fact of her going off with the co-respondent would be sufficient evidence. On the 2nd September the respondent left Poona with her children and went to stop at the Hamilton Hotel at Lonavla. The co-respondent joined her there on the 6th. The respondent's mother came on the 7th and left again with the children. The respondent and co-respondent left on the 8th. As the petition was filed on the 7th nothing was said therein about the visit to Lonavla as though the petitioner had heard from his father-in-law that his wife had left Poona he did not know where she had gone. No amendment to the petition was asked for. No particulars of the alleged acts of adultery were asked for or furnished, and there is nothing on

the record to show how evidence as to an alleged act of adultery committed after the petition was filed and nowhere referred to in the proceedings was admitted. The case was very badly conducted throughout and it does not appear whether the respondent had any notice that adultery at Lonavla was alleged until towards the close of the petitioner's evidence. The co-respondent was at Columbo and was unable to be present at the first hearing on the 7th June. and though on the 9th June the hearing was adjourned till the 28th June to procure the evidence of the Manager of the Hotel at Lonavla, the co-respondent has said he could not leave Columbo owing to his duties as Starter of the Ceylon Turf Club. The Manager of the Hotel said that Mrs. Wilkinson arrived on the 2nd September with two children. On the 6th of September Captain D'Arcy arrived about 11 A. M. At first he was assigned No. 2 bed-room, but wanting a large one he was moved to No. 4, the bath-room door of which faced the front door of room No. 5 which was occupied by Mrs. Wilkinson. An old lady came to see Mrs. Wilkinson on the 5th and again on the 7th when she took the children away. Mrs. Wilkinson and Captain D'Arcy left on the 8th. There was a lady visitor in the room next to Mrs. Wilkinson.

In her examination the respondent said she went to Lonavla on the 2nd September because she was afraid of her father and husband. She said nothing about the co-respondent's visit. In cross-examination she said: "I did not inform Captain D'Arcy that I was going to Lonavla. I wrote to him from Lonavla to come there: He came on the 6th and left the same night for Poona at 10 P. M., and returned to the Hotel at mid-night on the 7th and left in the morning of the 8th with me. The learned Judge was of opinion that these facts which were not disputed taken in conjunction with the respondent's letter of the 1st Sebtember were conclusive evidence of adultery. Now if the case had been undefended it might have been urged that the respondent must have intended, at any rate, to create evidence from which the Court would be entitled to presume that adultery had been committed. But I doubt very much whether a Judge in England would direct a Jury that on evidence, such as we have in this case, the presumption was inevitable. The case of *Grant* v. *Grant* (12) to which the learned Judge refers is an authority for saying that the mere fact that two people of opposite sexes are together under the same roof is not sufficient. From the reports of divorce cases, as far as I know, it has always been considered that there must be some evidence that they occupied the same room. Undoubtedly adultery may have been committed in this case, but it is just as possible that the respondent, though she must have known she was compromising herself and may even have intended the worst to be believed, had no desire to enter into sexual relationship with the co-respondent, until she could marry him. Thereafter when she had time to consider the situation she does not seem to have been prepared to be relegated to the status of a divorced wife, and so lose the right to the custody of her children, without a contest, with the result that in her written statement while denying that adultery was committed she asked for a judicial separation.

In these circumstances my opinion is that the petitioner has failed to prove facts from which the Court would be justified in holding that adultery was committed at Lonavla.

As my learned brothers are of a contrary opinion there will be a decree for judicial separation, the questions relating to alimony and the custody of the children to be determined by the District Judge. The costs of respondent No. 1 must be paid in the first instance by the petitioner but he will be entitled to recover those costs and his own from respondent No. 2.

Marten, J.—This is a husband's petition for divorce on the ground of his wife's adultery with the co-respondent. The wife in her answer has prayed for a judicial separation on the ground of her husband's cruelty. The learned Trial Judge found in favour of the husband on all points, and the decree for dissolution of the marriage which he has passed is now before us

(12) (1839) 2 Curt. 16 at p. 571 163 E.R. 322.

WILKINSON v. WILKINSON.

for confirmation under section 17 of the Indian Divorce Act, 1869.

The two main points before us are (1) whether the wife committed adultery with the co-respondent, and (2) if so, whether the Court has jurisdiction to grant a divorce, as opposed to a judicial separation, should it be the fact that the matrimonial domicil was English. The defences of cruelty and condonation were not persisted in before us, and it is clear that they were rightly decided in favour of the husband.

On the first main point, the detailed judgment of the learned Trial Judge relieves me from the necessity of dealing with the facts elaborately. It will be seen that the main events in 1921 are confined to three stages, *viz.* (1) the events at Poona from the 13th to the 21st August; (2) the events at Bombay on the 23rd and 24th August; and (3) the events at Lonavla from the 2nd to the 8th September. There is an important correspondence, and in particular a letter, Exhibit 46, written on the 1st September from the wife to the husband, intimating her intention to separate and suggesting a divorce.

With regard to the first stage, it is common ground that there was a serious quarrel between the husband and wife at Poona with reference to the co-respondent. The wife was then staying in her parent's house, where the co-respondent was a boarder. Incriminating letters are alleged to have been found, which have since been destroyed. Further, it is alleged that the wife admitted misconduct, and that the co-respondent admitted he loved the wife. This latter incident was at a later date than the wife's letter, Exhibit 41 of the 19th August, in which she asks to be forgiven the past, and would try and begin a new life. The letter may, therefore, refer only to her running into debt. Be that as it may, it is clear that the husband got rooms for his wife and children at Bombay, and took her away from Poona on the 22nd August, and she admits that she then promised not to have anything more to do with the co-respondent.

The second stage, *viz.*, the events at Bombay, are to my mind extremely important. It is common ground that on the 23rd August about 2-30 P.M. the wife left these rooms in a taxi with all her luggage and in company with the co-respondent, and that it was not till the next day that her whereabouts were discovered, when she was taken back to Poona by her father, who had in the meanwhile been telegraphed for by the husband. Now here I quite agree with the learned Trial Judge when he says in paragraph 14 of his judgment that "the important question is, which of the two conflicting versions is to be believed. Did the wife go away of her free will, or was she turned out by her husband?" After weighing carefully the evidence on this point, I am satisfied that the learned Judge came to the correct conclusion, *viz.*, that the wife went away of her own free will, and that she did so despite all efforts to stop her, and because, as Mrs. Parish says, she was going where her affections were.

It is common ground that the wife spent the rest of the day upto midnight in the company of the co-respondent, though not necessarily exclusively so. She first went with him to the bungalow of Mr. Gove where apparently the co-respondent was then living in a "chummery." In the evening they went to a theatre. About midnight she was escorted back to the Apollo Hotel where the co-respondent had obtained a room for her. It is not suggested that the co-respondent had a room at that Hotel. But it is significant that next day, the 24th, the wife admitted that he was in possession of the key of her room. Some of her clothes were apparently at the Hotel, and some at Mr. Gove's bungalow.

On the 24th August the wife was traced to Mr. Gove's bungalow by her father and husband, and when they found her there with the co-respondent late in the afternoon, they proceeded to assault the co-respondent and to take the wife away. They accordingly returned to Poona, and the evidence is that her father effected a re-conciliation between the wife and her husband, and that both decided to make a new start. The wife's letter, Exhibit 45, of the 27th August, and the husband's letters, Exhibits 51, 52,

and 53 of 27th, 31st August and 1st September are quite consistent with that.

But then on the 1st September the wife wrote the important letter Exhibit 46. In it she says "I wish to inform you for 'Good and all' that I shall never live with you again as your wife and the sooner we are separated or divorced the better for us both. I dislike you more than I can possibly describe...I can only see one thing to do, *viz.*, 'divorce me,' which eventually must come..Do not think for one minute I have only just decided, because it is not true and I made up my mind long long ago. If in the future you interfere in any way whatever in my doings 'Beware' as things will not be so peaceful on the next occasion. You have your recourse *viz*, the law. Do not correspond in future with me or ask to see me, but only through my Solicitors..I also wish to impress on you that I am perfectly in my right senses, as you have inferred at different times 'I could not be'. And this is my final decision" That letter she sent by registered post to her husband, and she sent a copy to her Solicitors.

The next day, *viz*. the 2nd September; the wife left her parent's house secretly with the two children and went to Hamilton's Hotel Lonavla. There she wrote to the co-respondent to join her, and he came on the 6th and left with her on the 8th September. The parties there occupied adjoining rooms, *viz*., rooms Nos. 4 and 5. It is in evidence that the room No. 2 which was originally alloted to the co-respondent was further off, and that he was shifted to room No. 4 at his own request. On the 7th September the husband signed his petition. The learned Judge is, I think, in error in stating in paragraph 24 that the husband had previously been to Lonavla and seen the visitors' book. As I read his evidence at paragraph 10 he did not know where his wife was until the morning after Mrs. Mikhan had brought the children away from Lonavla. That would be the 8th September, for the Hotel-keeper says the childeren were taken away on the 7th. His petition for the custody of the children was presented on the 8th September. An *interim* order was made on the 9th September, which was subsequently varied on the 20th October 1921.

On those main facts and on the remaining details in the case. I have come to the conclusion (1) that the wife had formed a guilty affection for the co-respondent and he for her; (2) that there were ample opportunities for gratifying their improper affections; and (3) that the true inference on the evidence is that the parties committed adultery.

One main objection raised before us on behalf of the wife was that adultery at Lonavla was not pleaded, and that accordingly the Lonavla incidents should be disregarded. Effective criticisms may no doubt be passed on the pleadings, and to some extent on the course of the trial. But if the figures of the taxed bill of costs mentioned at the end of the judgment are looked at, they will, I think, afford some clue as to the professional standard that might reasonably be expected. This is not a case on the Original Side, where the presiding Judge has the advantage of the assistance of Advocates and Attorneys. Be that as it may, paragraph 7 of the petition pleaded adultery in wide and vague terms, *viz*., that while the husband was employed in Bombay, his wife became familiar with the co-respondent, "and on various occasions committed adultery with him."

Further at the trial the wife and the co-respondent appeared by separate Pleaders, and no objection was raised to the evidence as to the events at Lonavla. On the contrary the husband's witnesses were cross-examined on these and other incidents. Further it would appear from the affidavit of the co-respondent dated the 1st March 1923 and presented to us, that there was an adjournment of the suit from the 9th June to 28th June in order to enable the husband to call the Manager of the Hotel at Lonavla. This is borne out by the dates given in the Court below for the respective depositions of witnesses Nos. 7 and 8 for the husband, and by the reference in paragraph 25 of the judgment to the non appearance of the co-respondent although a long adjournment was given.

In my opinion, therefore, it is not now open to the wife and the co-respondent

to object to this evidence. If any such objection had been raised at the trial, no doubt the Judge would have granted leave to amend or to file a supplementary petition, seeing that the original petition was only sworn on the 7th September, and the wife and the co-respondent did not leave Lonavla till the 8th September. But presumably the parties at the trial thought this unnecessary, having regard to the wide pleading and the equally wide nature of Issue No. 1. Nor do I attach any importance to the suggestion by Counsel for the co-respondent that although his Pleader may have told him that there was an adjournment to the 28th June, he did not tell him that it was for the purpose of calling further evidence as to the Lonavla incidents.

Before us, Counsel for the co-respondent applied to have his evidence taken now. But in my opinion the learned Trial Judge gave him all reasonable opportunities for entering the witness-box, and it is now too late. His excuse that he was detained by his duties as Starter at the Colombo Races, I do not accept. At most he need only have missed one day's racing, *viz.*, the 1st July, He does not say that he even asked the local officials for the requisite leave. If he had, surely it would have been granted. His conduct, even if viewed in the most favourable light, had gravely compromised the honour of a married woman, to say nothing of his own. A gentleman would, therefore, at all costs return to protect her honour and his own, provided at any rate he could truthfully say that no misconduct had occurred.

Nor do I accept the suggestion of Counsel for the wife that she merely sent for the co-respondent at Lonavla in order that he might intervene between her and her father, and effect a reconciliation. As the father had only assaulted the co-respondent a fortnight before, it is not likely that he would regard the co-respondent as a welcome negotiator. If she wanted to negotiate, she could have done that through her mother, for it is not suggested that she was afraid of her. On the contrary she wrote a letter to her mother at Poona and it is in evidence that her mother or her aunt Mrs. Howard came to Lonavla on the 5th and 7th September and took away the two children on the latter date. She has deposed that she was anxious to deny any admission of misconduct to her Solicitors in Bombay. But how could any prudent woman send for the very man in respect of whom such serious scandals had arisen, and allow him to occupy an adjacent room at a country hotel for the alleged object of discussing this admission of misconduct. In considering her conduct, it must be remembered that we are dealing with a married woman of seven years standing and a mother of two children and who had finally decided to leave her husband and had suggested a divorce. In my opinion, therefore, the proper inference to draw from all the facts of the case is that the parties committed adultery at Lonavla.

Then as regards the Bombay incidents, it is said that certain letters written by the wife's father were admitted in evidence on Counsel's statement that the father would be called as a witness for the husband, and that they have been improperly referred to by the learned Judge. For the purposes of my judgment I eliminate those letters; I have not even read them, and they have in no way influenced me. The father's opinion of the co-respondent is sufficiently indicated by the admitted fact that he assaulted him in Bombay at Mr. Gove's bungalow.

Next, it was said that the husband's Counsel misled the Court by stating that the Hotel-keeper at Bombay was dead, and consequently could not be called. As to that it would appear that some confusion has arisen between the Assistant Manager who died on the 7th of January 1922, and the Manager who is still alive. Further, the Manager states in his affidavit of 27th February 1923 that this Assistant Manager was not engaged by the Hotel till October 1921. Be that as it may, I do not think it essential that the Manager should now give evidence before us. The wife has admitted that the co-respondent accompanied her to her room, so that contradicts the Manager's statement that the correspondent only stepped into his office and left

the hotel as soon as the luggage was removed from his office. It is not essential for the husband's case to prove that the parties committed adultery after midnight that night in that particular room, when there were other opportunities both earlier in the day and also on the next day. So one need not go into the husband's story as to what he found in his wife's room in the Hotel, nor decide on the other hand whether the Manager is accurate in stating that the husband only made inquiries in the office. But in passing I may notice that the wife towards the end of her evidence described the Manager as an Englis man. This description would more likely apply to the deceased Assistant Manager Mr. Ormand, than to the Manager Mr. Adelhardi Rosverg who gives his nationality as Danish.

It was also objected that at the Solicitors' office the wife did not admit misconduct. But the husband does not say she did so on that occasion. What he says is she was taxed there with isconduct b t did not admit it. The fact that all the three parties went off together to the Solicitors may at first seem strange, whether they were innocent or guilty. But one desire of the husband may have been to gain ti e, and so prevent his wife taking the fatal step. This is borne out by the fact that he asked third parties, such as Mrs. Parish to intervene and stop his wife running away. Even at Bombay, it will be noted, that it was the wife who had a telephonic message se t to the co-respondent on the 23rd August. This was the very man over which the trouble had arisen a short while before at Poona, and personally I do not accept her explanation that he was summoned in order to deny the allegations of misconduct at Poona. If so, why should she pack up her luggage and go away with him in a taxi to an undisclosed destination.

On a consideration then of all the circ mstances I am of opinion that on the first main point the learned Trial Judge rightly decided that the wife had committed adultery with the co-respondent.

I now turn to the second main point in the case, *viz.*, the question of jurisdiction. The want of jurisdiction was not pleaded, nor was any issue raised upon it. On the contrary the wife made a cross-claim for a judicial separation. But at the trial the point was raised, though I regret that it was not dealt with in the way which its great importance deserves. In the first place, no proper evidence was taken as to domicil. Before us both the husband and wife have put in affidavits on that point, and the husband applied for a remand to produce further evidence. It was admitted, however, that his domicil of origin was English, he having been born in England of English parents and having lived there till he came out to India as an assistant in the chemists' firm of Thomson and Tayler. Counsel also stated that on that remand, if granted, he could not put the case higher than is contained in the husband's affidavit.

It was not seriously suggested that the husband had abandoned his domicil of origin prior to his return to India in 1921. The very fact that in 1920 he gave up his business appointment in India and apparently tried to make a living in England is almost sufficient to negative that, despite his alleged purchase of return tickets. Moreover in his evidence he states that he only returned to India, because his wife insisted on his returning. It also appears from the learned Judge's judgment of July 26th on the application for custody of the children that the husband proposed, on the termination of the present proceedings, to send his children to his sister in England. In my opinion, therefore, the husband's affidavit falls far short of what is required to effect an abandonment of his domicil of origin and an acquisition of an Indian domicil of choice. I am satisfied that the husband never intended to make his permanent home in India. Consequently the case must be decided on the basis that the husband and, therefore, the matrimonial domicil, was English.

This then raises a most important question, *viz.*, whether this Court has jurisdiction to dissolve a marriage, as opposed to granting a judicial separation, in cases where the parties are not domiciled in India. That depends on two points, *viz.*, (1) whether the Indian Divorce Act, 1869

purports to confer that power upon the Indian Courts, and (2) if so, whether that Act was within the Legislative powers conferred upon the Indian Legislature by the Indian Councils Act, 1861 (24 & 25 Vic. c. 67.).

I will deal with these points in the above order, which is the order in which they were presented in argument to Sir Henry Duke in *Keyes* v. *Keyes* (4). The learned Trial Judge does not, however, appear to have considered the second point. He seems to have thought that the jurisdiction was clear and depended on the Indian Divorce Act, 1869, and that so long as that Act was in force, the Courts could not decline jurisdiction. But that was not the *ratio decidendi* in *Keyes* v. *Keyes* (4). What the learned President held there was that the Indian Divorce Act, 1869, was *ultra vires* the Indian Legislature as not being within the powers conferred on that Legislature by the Indian Councils Act, 1861. But he gave no express decision as to the true construction of the Indian Divorce Act, 1869.

Taking, then, the first point, the argument against the jurisdiction of this Court under the Indian Divorce Act, 1869, may be put in two alternative ways. The first is that, having regard to section 7 the word "reside" in section 2 should be construed as equivalent to "domiciled," seeing that, according to the principles now accepted in England, domicil alone can confer jurisdiction in divorce. That was the argument presented to the learned President by the Attorney-General in *Keyes* v. *Keyes* (4). For reasons which I will state later, I do not accept that argument. It is sufficient to state here that if it were accepted, it would prevent this Court from exercising its jurisdiction to grant decrees for judicial separation on the ground of cruelty or other adequate reason, in cases where the parties are resident, though not domiciled, within the jurisdiction. This jurisdiction over residents, with reference to judicial separation as opposed to decrees for dissolution of the marriage itself, is now well-recognised by the English Courts as a principle of private international law (see *Le Mesurier* v. *Le Mesurier* (7) and *Armytage* v. *Armytage* (5) and a similar jurisdiction has been exercised by this Court or its predecessor the Supreme Court for a hundred years. See Supreme Court Charter 1823, clause 42.

The alternative argument is that assuming the word "reside" in section 2 means what it says, *viz.*, reside and not domiciled, even then the dominating words of clause 7 and the general principles of private international law compel this Court to give a limited construction to the Indian Divorce Act, despite its wide wording, in just the same way as the English Courts have eventually limited the even wider wording of the Matrimonial Causes Act, 1857.

To appreciate this argument, one must, I think, make some enquiry into the history of divorce legislation in England, and as far as practicable put oneself in the position of the English and Indian Legislators, who framed the Matrimonial Causes Act 1857, the Indian Council's Act, 1861, the Indian High Courts Act, 1861, and the Indian Divorce Act, 1869. It is vital to remember that up to 1857 there was no jurisdiction in England for any Court to dissolve a marriage. A special Act of Parliament alone could effect that. In 1857 a new Court called the Court for Divorce and Matrimonial Causes was founded by the Matrimonial Causes Act, 1857. And in 1873 this new Court became part of the Probate, Divorce and Admiralty Division of the High Court as established by the Judicature Act, 1873 (see section 16). But up to 1857 the Ecclesiastical Courts alone had any jurisdiction in matters matrimonial, and they could only grant a divorce *a mensa et thoro*, which is the equivalent of the modern decree for judicial separation. Further, the Ecclesiastical Courts rested their jurisdiction on the residence of the parites, and not on their domicil. Thus in *Niboyet* v. *Niboyet* (9) James, L. J, said as follows (pages 4 & 5):—

"Can there be any doubt that before the English Act of Parliament transferring the jurisdiction in matrimonial causes, from the church and her Courts to the sovereign and her Court, the injured wife could have cited the adulterous husband before the bishop, and have asked either

for a restitution of conjugal rights or for a divorce *a mensa et thoro*, and in either case for proper alimony? The jurisiction of the Court Christian was a jurisdiction over Christians, who, in theory, by virtue of their baptism, became members of the one Catholic and Apostolic Church. The Church and its jurisdiction had nothing to do with the original nationality or acquired domicile of the parties, using the word domicile in the sense of the secular domicile, *viz.*, the domicile affecting the secular rights, obligations, and status of the party. Residence, as distinct from casual presence on a visit or *in itinere*, no doubt was an important element; but that residence had no connection with, and little analogy to, that which we now understand when we endeavour to solve, what has been found so often very difficult of solution, the question of a person's domicile. If a Frenchman came to reside in an English parish his soul was one of the souls the care of which was the duty of the parish priest, and he would be liable for any ecclesiastical offence to be dealt with by the ordinary *pro salute animæ*.. And although the laws of the state sometimes interfered by way of coercion, regulation, or prohibition, with the Courts Christian, the latter acted *proprio vigore*, and they administered their own law, not the law of the state, and they administered it in their own name and not in the name of the sovereign. The language of the Act creating the existing Court strikingly illustrates this, when it enacts that all jurisdiction vested in or exercised by any Ecclesiastical Court or person in England, etc., shall belong to and be vested in Her Majesty. It was not previously vested in her, although she had appellate jurisdiction as Supreme Ecclesiastical Judge"

Accordingly when the English Legislature by the Act of 1857 founded the new Court, two separate jurisdictions were conferred on it, *viz.*, the old ecclesiastical jurisdiction of divorce *a mensa et thoro* or judicial separation as it was thenceforward to be called, and the new statutory jurisdiction of divorce *a vinculo*. But the 1857 Act gave this new jurisdiction in the widest terms. Section 27 runs:—

"It shall be lawful for any husband to present a petition to the said Court, praying that his marriage may be dissolved, on the ground that his wife has since the celebration thereof been guilty of adultery.."

As regards this new jurisdiction the only express limitation to be found in the Act is the preamble which states that.

"It is expedient to amend the law relating to divorce, and to constitute a Court with exclusive jurisdiction in matters matrimonial in England, and with authority in certain cases to decree the dissolution of a marriage."

As regards the old jurisdiction, section 22 runs:—

"In all suits and proceedings, other than proceedings to dissolve any marriage, the said Court skall proceed and act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be comformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act."

In effect, therefore, the Legislature was not prepared to lay down any very clear guiding principles on the question of jurisdiction, but left it to the Courts to say how the Act should be construed and applied in practice. As to this, there were at least three possible but different views, *viz.*, (1) to make domicile the test both for divorces and judicial separations, or (2) to make residence the test for both, or (3) to make domicile the test for divorce, and residence the test for judicial separations. But it took the English Courts some forty or fifty years to decide which of these views was the correct one. The first view was that adopted in 1878 by Lord Esher in *Niboyet* v. *Niboyet* (9). The second view was that adopted by the majority of the Judges in *Niboyet* v. *Niboyet* (9), *viz.*, Lords Justices James and Cotton. And as that was a considered decision of the Court of Appeal, it must be taken to be the then prevailing view of the law. Substantially it was to the same effect as *Brodie* v. *Brodie* (13)

(13) (1861) 2 Sw. & Tr. 259; 30 L. J. Mat. 185; 4 L. T. 307; 9 W. R. 815; 164 E. R. 995.

decided by the Full Court in 1861. The third view was that laid down in 1895 by the Privy Council in *Le Mesurier* v. *Le Mesurier* (7), and subsequently adopted in 1898 by Lord Gorell in *Armytage* v. *Armytage* (5), and in 1906 by the Court of Appeal in *Bater* v. *Bater* (14). And this third view may now be said to represent the true principles of English Law on this all important question of jurisdiction.

What course then was open to the Indian Legislature in 1869? It had to legislate not only for Englishmen but also for Scotsmen and Irishmen, the laws of whose countries on the subject of divorce differed from those of England. It almost must have felt some uncertainty as to what view the English Courts would eventually take on the questions of domicile and residence. But, this much is clear, *viz.*, that in section 2 of the Indian Divorce Act the Indian Legislature imposed certain conditions precedent to the exercise of any jurisdiction whatever under the Act, for it enacted that "Nothing hereinafter contained shall authorise any Court to grant any relief under this Act, except in cases where the petitioner professes the Christian religion and is resident in India at the" date of the petition. And if the petition is one for divorce, it is a further condition precedent that either the marriage shall have been solemnized in India, or else that the adultery shall have been committed there, or else that the husband has exchanged his profession of Christianity for some other religion.

Then comes section 7 which I regard as the dominating clause in the Act. It runs as follows:—

"Subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief."

(14) (1906) P. 209; 75 L. J. P. 60; 94 L. T. 835; 22 T. L. R. 408.

In my opinion the Indian Legislature intended by this clause to ensure reasonable uniformity between the various High Courts of this country and the English Courts, and as far as practicable to avoid the scandal of parties being regarded as married persons in India, though not in England, or perhaps as married persons in one Indian Province but not in another. I think it also intended to provide for the then uncertainty of the law on the subject, and for the possibility that the principles of the English Courts might be modified in course of time. Accordingly the Indian Courts are to give relief "on principles and rules which..are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England *for the time being* acts and gives relief." I draw particular attention to the words "for the time being." In my opinion, they were inserted to prevent the principles of law being rigidly fixed as at 1869.

It cannot be said that the "principles" referred to in section 7 do not include such a vital principle as the foundation of jurisdiction itself. Section 7 is evidently modelled closely on section 22 of the Matrimonial Causes Act 1857 which I have already quoted, except that it applies to divorce as well as all other proceedings, and that the principles to be adopted are those of the English Divorce Court *for the time being* and not those "on which the Ecclesiastical Courts have *theretofore* acted." In *Armytage* v. *Armytage* (5) the point for decision was whether the English Divorce Court had jurisdiction to grant a judicial separation on the ground of cruelty in a case where the husband was domiciled in Australia, but was living in England at the date of the suit. Lord Gorell held in effect that this was a question of principle within the meaning of section 22, and that its answer depended on what were the principles of the old Ecclesiastical Courts. After quoting section 22, the learned Judge said (page 186):—

"There are no special provisions of the Act or rules or orders which directly affect the present question. The present

suit is for judicial separation on the ground of cruelty. Before the Act it would have been a suit for divorce *a mensa et thoro* on the same ground, and the inqury is as to the principles and rules on which the Ecclesiastical Courts would have acted in the circumstances."

Then, after exhaustively considering the authorities on the subject including the various text-books on private international law, the learned Judge held at page 194 as follows:—

"In my opinion, if the parties had a matrimonial home, but were not domiciled within the jurisdiction of an Ecclesiastical Court, that Court would have interfered, if the parties were within the jurisdiction at the commencement of the suit, to protect the injured party against the other party in respect of the adultery or cruelty of the latter."

And then at page 195 he said:—

"It may be objected that a decree of judicial separation affects the status of the parties, and that a change of status ought on principle only to be effected by the Courts of the domicil. But the relief is to be given on principles and rules which, in the opinion of the Court, shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts gave relief. According to those principles and rules cruelty and adultery were grounds for a sentence of divorce *a mensa et thoro* which did not diesolve the marriage, but merely suspended either for a time or without limitation of time some of the obligations of the parties. The sentence commonly separated the parties until they should be re-conciled to each other".

Lord Gorell then concluded his learned and interesting judgment by holding that domicile was not the test for jurisdiction in cases of judicial separation: that in that particular case a decree for judicial separation ought to be made: and that consequently the Court had jurisdiction to provide for the custody of the children of the marriage.

Turning again to the Indian Divoce Act 1869, the qualifying opening words in section 7; *viz.*, "subject to the provisions contained in this Act" must of course receive their full effect. But they can be given their full effect by considering the express conditions laid down in the Act. The conditions precedent in section 2 are an example of this. Another example will be found in section 10, which entitles a wife to a divorce should her husband exchange his profession of Christianity for some other religion and go through the form of marriage with another woman. In both these examples, the English Divorce Law is expressly varied.

I also recognise fully that if section 2 be construed apart from section 7, it might well be argued that on the express conditions laid down in section 2 being satisfied, the Court was intended to have jurisdiction. I, however, regard section 7 as imposing yet a further condition, *viz.*, to act and give relief on the principles of the English Divorce Court for the time being. And in determining this difficult question of construction, I may call in aid the principle of construction which was conceded by Lord Justice James in *Niboyet* v. *Niboyet* (9). He there says (page 7):—

"Of course it is always to be understood and implied that the Legislature of a country is not intending to deal with persons or matters over which, according to the comity of nations, the jurisdiction properly belongs to some other sovereign or state."

So, too, in *Armytage* v. *Armytage* (5), Lord Gorell says (pages 185-6):—

"'The jurisdiction to dissolve marriages was conferred upon this Court by the Matrimonial Causes Act, 1857, and, although that Act does not expressly make domicile a test of jurisdiction, that test is applied by the Court to the exercise of jurisdiction in cases of dissolution of marriage. It is derived from the principles of private international law, an adherence to which is necessary, as Lord Penzance said in *Wilson* v. *Wilson*, (6) in order to 'preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another.' These principles are expounded by many jurists in this and other countries. They are based on the principle that a person's status ought to depend on the law of his domicile, though there may be limitations and exceptions

to this principle: see Dicey's Conflict of Laws, 1896, cap, 18, page 474 *et seq.* (*Cf.* Savigny, section 362, Guthrie's translation, 2nd Edition, page 148)."

It may be objected that this construction of the Act would give different results at different dates. But that objection applies equally to England as to India. In *Niboyet* v. *Niboyet* (9) the English Court of Appeal in 1878 dissolved a marriage between non-domiciled parties. According to the decision of the Courts in and after 1895, there was no jurisdiction to grant that decree. But technically *Niboyet* v. *Niboyet* (9) was not overruled until the decision of the Court of Appeal itself in 1906 in *Bater* v. *Bater* (14), for *Le Mesurier* v. *Le Mesurier* (7) was a decision of the Privy Council. So here in India the Courts in effect adopted the same principles as those in *Niboyet* v. *Niboyet* (9). And though the point arose in some cases, it was not until 1921 that the decision in *Keyes* v. *Keyes* (4) showed that the matter required serious re-consideration. If, therefore, the Indian jurisdiction be now limited as the English jurisdiction is limited, the history of litigation in the two countries will be very similar. Nor will divorce be the only subject to exemplify the uncertainty of litigation. Leading cases such as, *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants* (15) or *Bourne* v. *Keane* (16) illustrate that other branches of the law have also had their ups and downs.

On the other hand there will be this advantage in adopting this construction. It will be consistent with the principles of private international law as now laid down by the highest Courts of the British Empire. Accordingly it will not enable a Scotsman with a Scottish domicile to be divorced by an Indian Court according to obsolete principles of the English Divorce Court. Nor will the Indian Courts be asked as in *Francesco Giordano* v. *Flora Giordano* [*Bert Alasia*] (17), to divorce Italians with an Italian domicile, although by the law of Italy divorce is not permissible, and nationality as opposed to domicile is alone recognised as conferring jurisdiction in matrimonial matters in that country. (See Dicey, 1896, Edition, page 276 Note 1 and pages 390-1 and page 753.) And this construction is, I think, consistent with the course adopted by Parliament itself. By the Indian Divorces (Validity) Act, 1921, Parliament has ratified the past decrees of the Indian Courts as regards parties domiciled in the United Kingdom. The future, it has so far refused to legislate about.

My conclusion then is that the main principles of divorce jurisdiction in England having now been well established and brought to our express attention, we ought in India to follow those main principles, having regard to section 7 of the Indian Divorce Act, 1869, and no longer to claim jurisdiction to dissolve the marriages of persons not domiciled in India. This casts no reflection either on the Indian Legislature or on the past decisions of the High Courts of this country. On the contrary the construction of the Act which I would adopt shows that the Indian Legislature dealt with a very difficult question in a most skilful manner for by its flexibility it enabled all Courts both in India and in England to act on the same principles, despite the passage of time and the change of circumstances. And as regards our High Courts, their past decisions can well be justified by section 7. The Act obliges them to follow the principles of the English Courts. That they have done. But if, as is the case, the principles of the English Courts as laid down from time to time in those Courts have altered in a vital particular, then it is not the fault of the Indian Courts if they have to make corresponding changes. No doubt in theory the law as finally laid down by the English Courts must be taken to have been the true view of the construction of the Matrimonial Causes Act, 1857, all along. That Act can only have one right construction. If different constructions are given at different dates,

(15) (1901) A. C. 426; 70 L. J. K. B. 905; 65 J. P. 596; 50 W. R. 44; 85 L.T. 147; 17 T.L. R. 698.
(16) (1919) A. C. 815, 89 L. J. Ch. 17; 121 L. T. 426; 63 S. J. 606; 35 T. L. R. 560.
(17) 20 Ind. Cas. 512; 40 C. 215; 17 C. W. N. 491.

both cannot be right, But that does not imply that the earliest construction must be adopted whether right or wrong. The final and true view of the English Courts is now shown to us, and section 7 assists us materially in adopting it.

Accordingly in my judgment this Court has now no jurisdiction to dissolve the marriage of the present parties. On the other hand I am clearly of opinion that it has jurisdiction to grant a judicial separation, as the parties were resident within the jurisdiction at the commencement of the suit. Therefore, in my judgment, a decree for a judicial separation ought to be granted on the ground of the wife's adultery with the co-respondent, and the order of the Trial Judge should be varied accordingly.

It follows from what I have just said that I disagree with the argument of the Attorney-General in *Keyes* v. *Keyes* (4) to the effect that "reside" in section 2 means domiciled. Further it becomes unnecessary for me to come to a conclusion on the *ratio decidendi* of the learned President in that case, *viz.* that the Indian Councils Act, 1861, itself did not give power to the Indian Legislature to pass any law for the divorce *a vinculo* of non-domiciled persons. But in deference to the judgment of the learned President, and to the arguments of Counsel before him and before us, and having regard to the importance of the subject, I venture to state my own views on those points.

In the first place as regards section 2 of the Indian Divorce Act, it is generally quite erroneous to regard domicile and residence as synonymous terms. They are far from that, and the clear legal distinction between the two is illustrated by the cases I have already cited showing that in general the test for jurisdiction is domicile in divorce cases, and is residence in judicial separation cases. It may be that in the United States the Courts there have required such a high standard of residence for the purposes of divorce under their local Acts, that the word residence as there used has become in practice to be closely akin to our notion of domicile. [See *Bater* v. *Bater* (14).] But that is hardly a reason why in the Indian Divorce Act we should give to the word reside, what to a lawyer is an unnatural meaning.

Another reason why we should not adopt this forced construction is that *prima facie* the word reside in section 2 must have the same meaning as in section 3; where in the definitions of "High Court" and "District Court" there are references to the Court "within the local limits of whose..jurisdiction..the husband and wife reside or last resided together." The word "resided" here surely cannot mean domiciled. It would be a novel experience to me to hear persons described as being "domiciled together." And normally one speaks of domicile with reference to a country as a whole, and not to the local limits of one or other of its superior or subordinate Courts. But in fact the words "reside or last resided together" are clearly borrowed from section 17 of the Matrimonial Causes Act, as for the matter of that is the greater portion of the Indian Divorce Act *mutatis mutandis*. Thus section 17 provides that petitions for Judicial separations may either be presented to the new Court itself "or to any Judge..at the assizes held for the country in which the husband and wife reside or last resided together." Residence here must mean residence and not domicil, and none the less so because as we know from *Armytage* v. *Armytage* (5), the test of jurisdiction in judicial separations is residence and not domicile. This is further borne out by section 21, which enacts that "a wife..may..if resident within the metropolitan District apply to a Police Magistrate or if resident in the country to Justices in petty Sessions or in either case" to the new Court for a protection order in certain cases. Does any lawyer ever speak of being domiciled in the country or in a metropolitan District.

But if any doubt still remains, it must surely be dissipated by considering the point I have already mentioned, *viz.*, that this construction of section 2 would deprive our High Court of part of its old jurisdiction and be contrary to the principles

of international law. Section 4 of the Indian Divorce Act provides that the then existing jurisdiction of the High Court of divorce *a mensa et thoro* and in all other matters matrimonial should be exercised subject to the provisions in that Act and not otherwise. Section 22 provides that decrees are to be made for judicial separation and not for divorce *a mensa et thoro*, but are to have the same effect as under the existing law and certain other effects. This corresponds to section 7 of the Matrimonial Causes Act.

What then was the jurisdiction of the High Court and of its predecessor the Supreme Court? It is perhaps unfortunate that in *Keyes* v. *Keyes* (4) the High Court, then in question, *viz.*, that of the Punjab, was not established till 1918. But in Bombay the Supreme Court, and its successor the High Court, has exercised a wide jurisdiction not only in matrimonial matters but in practically every other branch of the law, except revenue matters, for over a hundred years. Speaking very generally it was given in 1823 within certain local limits the same extensive jurisdiction as that given to the High Court in England when first established in 1873 by the Judicature Act, 1873, but which up to that date no Single Court in England had possessed. Thus the Supreme Court Charter of 1823 conferred upon the Supreme Court of Bombay thereby established a general jurisdiction over "all such persons as have been heretofore described and distinguished, in our Charters of Justice for Bombay, by the appellation of British subjects, who shall reside within any of the Factories subject to or dependent upon the Government of Bombay," (See clause 23). So, too, by clause 5 a jurisidction similar to that of the King's Bench in England, and by clause 36 an equitable jurisdiction similar to that of the Court of Chancery was conferred on the Supreme Court, while clause 37 conferred jurisdiction over infants and lunatics and clause 38 gave a wide criminal jurisdiction. The clause 42 provides.—

"That the said Supreme Court of Judicature at Bombay shall be a Court of Ecclesiastical Jurisdiction, and shall have full power and authority to administer and execute, within and throughout the Town and Island of Bombay, and the limits thereof, and the Factories subordinate thereto, and all the territories which now are, or hereafter may be subject to or dependent upon the said Government, and towards and upon all persons so described and distinguished by the appellation of British subject, as aforesaid, there residing, the Ecclesiastical Law, as the same is now used and exercised in the Diocese of London in Great Britain, so far as the circumstances and occasion of the said Town, Island, territores, and people shall admit or require."

Then after conferring powers to grant Probate and Letters of Administration, clauses 48 and 49 gave full jurisdiction in Admiralty matters. I should explain that the clauses of the Charter itself are not numbered, but for convenience I have numbered them, beginning from the operative part.

The Bombay High Court was established in 1861, and if the High Courts Act and Letters Patent be looked at, it will be found that the old powers of the Supreme Court are still to a substantial degree retained. Thus the Indian High Courts Act, 1861, section 9, provided that the High Court should have all such Civil Criminal, Admiralty, Testamentary, and Matrimonial Jurisdiction as Her Majesty by Letters Patent might direct. By the Letters Patent of 1862 the old Ecclesiastical Jurisdiction of the Supreme Court was to cease except as thereinafter mentioned, and by clause 35 the High Court was to have 'jurisdiction in matters matrimonial between our subjects professing the Christian religion." Clause 35 of the Amended Letters Patent of 1865 was to the like effect except that the jurisdiction was exterded to the Presidency of Bombay. Further, section 130 of the Government of India Act, 1915, expressly provides that the repeal of the Acts there mentioned is not to affect "the validity of any....Charter or Letters Patent..under any enactment thereby repealed and in force at the commencement of this Act." In practice, therefore, we have still sometimes to refer to the Charter to ascertain our present-day jurisdiction though not in matrimonial cases.

WILKINSON v. WILKINSON.

That being briefly the history of our Courts, it follows that in 1861 Parliament had had some thirty-eight years' experience of their practical working before it passed the Indian Councils Act, 1861. The Indian High Courts Act, 1861 was, therefore, no new experiment. Substantially it effected an amalgamation of the King's Court then existing in the City of Bombay with the Courts of the East India Company in the rest of the Presidency. But what is there in that amalgamation or in the previous history to suggest that the old jurisdiction to grant judicial separations to residents was to be taken away? To do so would not only be contrary to the guiding principles referred to in section 7 of the Indian Divorce Act, 1869. It would also be contrary to the accepted principles of private international law. Thus in *Le Mesurier* v. *Le Mesurier* (7). Lord Watson says at page 526 :-

"There are unquestionably other remedies for matrimonial misconduct, short of dissolution, which according to the rules of the *jus gentium*, may be administered by the Courts of the country in which spouses, domiciled elsewhere, are for the time resident. If, for instance, a husband deserts his wife, although their residence be of a temporary character, these Courts may compel him to aliment her ; and, in cases where the residence is of a more permanent character, and the husband treats his wife with such a degree of cruelty as to render her continuance in his society intolerable, the weight of opinion among international jurists and the general practice is to the effect that the Courts of the residence are warranted in giving the remedy of judicial separation, without reference to the domicil of the parties."

And in *Armytage* v. *Armytage* (5), Lord Gorrell says at page 197 :—

"Could anything be more unreasonable than for this Court to hold that it has no power to suspend the wife's obligation to live with her husband while in this country, and leave her to proceed in the Courts in Australia to protect hereself against her husband in England? It may, I think, be safely laid down that the Ecclesiastical Courts would formerly, and this Court will now, interfere to protect a wife against the cruelty of her husband, both being within the jurisdiction, when the necessities of the case require such intervention"

In *Keyes* v. *Keyes* (4), the learned President has referred to Sir Charles Wood's Despatch dated May 14th 1862, which will be found in the 1907 Edition of our High Court Rules at pages 41 to 50. That was the Despatch accompanying the Letters Patent for the High Court of Bengal which are similar to our own. I find noting in that Despatch to warrant the suggestion that some of the old powers of the Supreme Court were to be curtailed in matters matrimonial. On the contrary in paragraph 33 the Secretary of State wrote :—

"Her Majesty's Government are desirous of placing the Christian subjects of the Crown within the Presidency, in the same position under the High Court, as to 'matters matrimonial' in general, as they noware under the Supreme Court.... But they consider it expedient that the High Court should possess, in addition, the power of decreeing divorce, which the Supreme Court does not possess ; in other words, that the High Court should have the same jurisdiction as the Court for Divorce and Matrimonial Causes in England,..I request that you will immediately take the subject into your consideration, and introduce into your Council a Bill for conferring upon the High Court the jurisdiction and powers of the Divorce Court in England, one of the provisions of which should be to give an appeal to the Privy Council in those cases in which the Divorce Court Act gives an appeal to the House of Lords"

The construction which I venture to adopt of the Indian Divorce Act, 1869, is in strict compliance with the intentions of Government as expressed in that Despatch of 1862. It receives some support from Sir Henry Duke himself when he says in *Keyes* v. *Keyes* (4), page 217 :—
"To create a jurisdiction in divorce such as is exercised in the Courts of this country (*i.e.* England) was, I have no doubt, within the powers conferred upon the Governor-General in Council by the East India Counoils Act of 1861."

And I attach importance to the fact that the learned President nowhere expresses any approval of the argument which Sir Gordon Hewart addressed to him on section 2. Its acceptance would mean that the Courts of this country could not even grant a protection order under section 27 or alimony under section 36, unless the parties were domiciled in this country, but would have to say to perhaps the Indian wives of English engine-drivers or clerks that they must travel to England some 6,000 miles away before they could obtain any redress. This answer would mean that in many cases there would in practice be no redress. And I am glad to think that in the view I take of the construction of the Act, no such hardship is enforced on the residents of this country. In my judgment, the word "resides" in section 2 means resides and not "is domiciled." Domicil involves the intention to establish a permanent home in a particular country. For residence a temporary home suffices, and perhaps less. In *Nusserwanji Pestonji Wadia* v. *Eleonara Wadia* (18) Sir Basil Scott said: "The residence of the petitioner must be *bona fide* and not casual or as a traveller".

I will now consider the true construction of section 22 of the Indian Councils Act, 1861, and the decision which Sir Henry Duke has given. This section is in very wide terms. It empowers the Governor-General in Council to:

"Make Laws and Regulations for all Persons, whether British or native, foreigners or others, and for all Courts of Justice whatever, and for all places and things whatever within the said territories, and for all servants of the Government of India within the Dominions of Princes and States in alliance with Her Majesty;....Provided always, that the said Governor-General in Council shall not have the power of making any Laws or....Regulations....which may affect the Authority of Parliament....or any Part of the unwritten Laws or Constitution of the United Kingdom of Great Britain and Ireland, whereon may depend in any degree the Allegiance of any Person to the Crown of the United Kingdom, or the Sovereignty or Dominion of the Crown over any Part of the said territories."

How then has this Act to be construed? On that point the learned President expressed his view in *Keyes* v. *Keyes* (4) as follows (pages 216, 217):—

"Without this proviso I should have thought it to be clear that the enacting words which I have quoted, reading them in their every-day meaning, could not be deemed to warrant the making of laws by the Indian Government to interfere with the status of subjects of the Crown not domiciled in India. The laws to be made are to be of local operation. The status of a citizen domiciled elsewhere is not a condition having local effect in India, or local limitations.....A Statute must be construed with due regard to its subject-matter and object, and the object of this Act is to provide for the Government of India by laws binding upon persons and things in India. As between two possible constructions, that which is conformable to international law as declared in our own Tribunals is to be preferred to that which would involve infringement of the rights of other communities."

In other words, Sir Henry Duke was, I think, of opinion that the Act ought to be construed as if it contained a proviso to the effect that the Indian Legislature should only have power to pass laws which were in conformity with the comity of nations.

Even accepting such a proviso, the English Court of Appeal thought as late as 1878 that the comity of nations was not violated by legislation for the divorce of residents within the jurisdiction. In *Niboyet* v. *Niboyet* (9) Lord Justice James said at page 7:

"But I do not find any violation of that comity in the Legislature of a country dealing as it may think just with persons native or not native, domiciled or not domiciled, who elect to come and reside in that country, and during such residence to break the laws of God or of the land."

(18) 20 Ind. Cas. 492; 15 Bom. L. R. 593; 38 B. 125.

No doubt in 1895 the comity of nations was held to require domicil and not residence, but we are dealing with an Act of 1861 at which date the new jurisdiction of divorce *a vinculo* had only been in operation some three years. On the other hand it would seem clear that the learned President was of opinion that section 22 gave the requisite legislative powers as regards persons domiciled in India, for at page 217 he says:

"To create a jurisdiction in divorce such as is exercised in the Courts of this country (*i. e.* England) was, I have no doubt, within the powers conferred upon the Governor-General in Council by the East India Councils Act of 1861."

In this connection I will refer to the leading case of *Empress* v. *Burah* (10) where the Privy Council laid down the principles which should guide our Courts in India in determining the legislative powers of the Indian Legislatures. Their Lordships had there to consider whether a certain Act of the Indian Legislature was inconsistent with the Indian High Courts Act, 1861, or with the Charter of the Calcutta High Court. In delivering the judgment of the Board, Lord Selborne stated at pages 903-5 as follows:—

"The ground of the decision.....of the majority of the Judges of the High Court was, that the 9th section was not legislation, but was a delegation of legislative power.....But their Lordships are of opinion that the doctrine of the majority of the Court is erroneous, and that it rests upon a mistaken view of the powers of the Indian Legislature, and indeed of the nature and principles of legislation. The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it, can of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions."

Adopting that test, does a law for the divorce of non-domiciled persons come "within the general scope of the affirmative words which give the power." *viz.*, section 22 of the Indian Councils Act, 1861? In my judgment, such a law is *prima facie* within the wide terms of section 22, for that section gives power to make laws for all persons within British India. Then adopting the second branch of the same test, does this law violate any "express condition or restriction by which that power of legislation is limited?" The only express limitations in section 22 which I need mention are those dealing with the authority of Parliament, and the allegiance of the subject. But nobody contends that the Indian Councils Act affects the authority of Parliament. The power of Parliament still remains supreme. (See, for instance, sections 65 and 131 of the Government of India Act, 1915, which Act consolidated a mass of previous legislation and is consequently convenient for reference)

It was, however, argued before us that as marriage conferred a status, the allegiance of the subject to the Crown depended in part on that status not being altered. This argument I do not accept. Section 22 refers to "the unwritten laws or constitution of the United Kingdom". But up to 1857 no English Court had power to dissolve a marriage. Divorce *a vinculo* could only be obtained by a private Act of Parliament as is or was until recently the case in Ireland, and that was a remedy only open to persons

of ample means. Accordingly in 1861 it could not, I think, be said that this status of marriage depended on the unwritten laws of the United Kingdom, for those laws had been altered by Parliament. Nor I think can it be said that this status formed part of the constitution of the United Kingdom either written or unwritten. Even if I am wrong in this, I think it would be going too far to say that the very allegiance of the subject depended on this status.

In the result, therefore, in the view I take, there is no such express condition or restriction to be found in section 22 as is referred to in *Empress* v. *Burah* (10). Why then should the *prima facie* meaning of the wide operative words of section 22 be cut down in construing the Act as a whole?

One main ground relied on by the learned President was that "no one would suppose..that the legislative authority created by section 22 could extend to the making of a law which should affect the heritable capacity of a man resident in India in respect of land in England or control his conduct in any matter of purely English concern". (page. 216). One answer to this is that presumably the British Parliament anticipated that the wide powers thereby conferred on the Indian Legislature would be exercised reasonably, both as regards domiciled and non-domiciled persons. The wide words of section 22 would enable oppressive laws to be passed, even if they were to be confined to domiciled persons. But the practical checks were that even if the Indian Legislature was so minded, there would still be safeguards, having regard to the powers of the Secretary of State, and Parliament and the Crown. (See for instance section 21 of the Indian Councils Act, 1861, and sections 68 and 69 of the Government of India Act, 1915). Further, section 131 of the Government of India Act, 1915, runs:—

"(1) Nothing in this Act shall derogate from any rights vested in His Majesty, or any powers of the Secretary of State in Council, in relation to the Government of India.

(2) Nothing in this Act shall affect the power of Parliament to control the proceedings of the Governor-General in Council, or to repeal or alter any law made by any authority in British India, or to legislate for British India and the inhabitants thereof."

Again section 112 of the Government of India Act, 1915, expressly provides that Original Side suits "against inhabitants of Calcutta, Madras or Bombay..in matters of inheritance and succession.. and in matters of contract and dealing between party and party" are to be decided according to the personal law or custom of the parties. The practical answer, therefore, is that though Parliament gave wide powers with the one hand, it retained, strong practical checks with the other hand. So any real injustice should be sure of a remedy.

The other main ground urged by the learned President was that as between two possible constructions of the Indian Councils Act, 1861, one should prefer that which is conformable to international law as declared in the British Tribunals. Now we are dealing with an Act of 1861, and if at that time there were old established Divorce Courts in England in which the principles of jurisdiction had long been laid down with abundant clearness, I should be disposed to attach mere weight to this argument than I in fact do. But what are the real facts? As I have already pointed out the English Divorce Court only dates from 1857 or to be more precise January 1, 1858, which was the earliest date for the Act to come into operation. (See Matrimonial Causes Act, 1857, section 1). Consequently it cannot be said that by 1861 sufficient time had elapsed to see on what principles this new jurisdiction of dissolving marriages would be exercised by the Court.

Further, to my mind the authorities show that at that time and up to a very much later date there was much difference of opinion or confusion as to the principles on which the Court should act. If, for instance, in *Niboyet* v. *Niboyet* (9), Judges of the eminence of Lord Justice James, Lord Justice Cotton and Lord Esher could hold these differing and to some extent incorrect views of the law in 1878, how can one say that the law on the subject was clearly settled some seventeen years before A reference to Dicey's Conflict of La

1896, Appendix Notes 8 and 9, pages 753 to 759, will show that the theories or principles on which divorce should be granted have been the subject of much difference of opinion in earlier days. And even now difficult cases may arise as to the effect of the law of a foreign domicile. (See *Rex* v. *Hammersmith Registrar of Marriages* (19).

As regards the earlier English authorities, it must be remembered that rightly or wrongly it was at one time thought that the Scottish Courts claimed to dissolve English marriages, provided the parties had resided in Scotland. As the English Ecclesiastical Courts had then no jurisdiction to make such a decree themselves, it is perhaps not surprising that they objected to the Scottish Courts assuming such a jurisdiction in the case of English domiciled persons. But as I have already indicated, it was really after 1857 when the new jurisdiction of divorce *a vinculo* was created, that the question of domicile became of importance. Lord Gorell thus sums up the position in *Armytage* v. *Armytage* (5) (pages 189, 190) :—

"Most of the writers on private international law and the conflict of laws treat at length the question of the laws and principles upon which the dissolubility or indissolubility of marriage depends, but there is little to be found in the works of such writers on the question of jurisdiction to decree the seperation or divorce *a mensa et thoro* of married persons who are residing but not domiciled in the country of the *forum*. The reasons are not far to seek. Dissolution of marriage has been permitted in some States and not in others, and has been allowed in some States on grounds different from those on which it could be obtained in others. There has been want of unanimity as to the *forum* which ought to take cognisance of the question of divorce, and as to the laws to be applied and the recognition to be accorded in one State to a decree of dissolution of marriage pronounced in another. Persons domiciled in a country where divorce has not been permitted or only permitted on certain grounds, have, in order to obtain divorces, temporarily resided or assumed domicile in another country where divorce has been permitted or more easily obtained than in the former country. Hence numerous difficult and varied questions have arisen and been discussed in reported cases and by different jurists upon the question of dissolution of marriage. But in practice suits for judicial separation or divorce *a mensa et thoro* and restitution of conjugal rights do not appear to have given rise to similar difficulties, and, therefore, cases and discussions as to jurisdiction in these suits are not often met with. Such suits generally occur before the Tribunals of the country in which the parties are in fact domiciled, and a case like that before me was not so likely to occur in former days as at the present time, when large numbers of people are to be found residing for more or less lengthy periods away from the place of their domicile."

If then the Indian Councils Act, 1861, had been expressly restricted to legislation in conformity with private international law as then understood, I think it by no means follows that such restriction, if written out in full, would have excluded non-domiciled persons. At that date there were at lest two conflicting decisions. As Lord Watson says in *Le Mesurier* v *Le Mesurier* (7) (pages 536) :—

"*Tollemache* v. *Tollemache* (20),.... was decided by three Judges in 1859, shortly after the passing of the Divorce Act....The learned Judges sustained the jurisdiction of the English Court, which was the *forum* of the husband's domicile, and disregarded as incompetent a decree of the Court of Session dissolving his marriage, although he had a matrimonial domicile in Scotland, where he had *bona fide* resided for four years with his wife, neither casually nor as a traveller. Then in *Brodie* v. *Brodie* (13), in the year 1861, three learned Judges decided the opposite, holding that residence of that kind, which had been found in *Tollemache* v. *Tollemache* (20) to be insufficient to give

(19) (1917) 1 K. B. 634; 86 L. J. K. B. 210; 115 L. T. 882; 81 J. P. 49; 15 L. G. R. 83; 61 S. J. 130; 33 T. L. R. 78.

(20) (1859) 1 Sw. & Tr. 557; 30 L. J. Mat. 113; 2 L. T. 871; 164 E. R. 858.

jurisdiction to a Scottish Court where the domicile was English, was nevertheless sufficient to give jurisdiction to themselves where the domicile was Australian."

The learned President has laid stress on *Shaw* v. *Gould* (21) which was decided in 1868. But that case did not necessarily negative the right of divorce if *bona fide* residence was proved, although falling short of domicile. On the contrary there are some observations from Lord Colonsay at page 96 which, though *obiter*, would tend to support the view that residence alone was sufficient. But the precise point did not arise, and on the facts of the case it is not surprising that the English Courts refused to accept the validity of the divorce that had been obtained in the Scottish Courts. One Buxton had married a minor by fraud, for which he was sentenced to three years' imprisonment. After the end of his sentence he lived with another woman. His wife wanted to marry some one else, and after first presenting a petition for divorce to the English Ecclesiastical Court, a collusive agreement was made with Buxton by which he was for a money payment to cross the border into Scotland, and submit to a divorce there as soon as practicable. This he did, and then returned to England. It appeared that a forty days' stay in Scotland was then sufficient to give the Scottish Courts jurisdiction in any suit whether for divorce or otherwise. The decision of the House of Lords was mainly based on the ground that an English marriage between domiciled English spouses could not be dissolved in this collusive way by a short trip over the border. Thus Lord Chelmsford said (page 79):—

"My opinion in this case is founded entirely upon the peculiar circumstances attending it; the first marriage having taken place in *England* between parties having an English domicile which they never changed, and the divorce in *Scotland* having been obtained by preconcerted arrangement, the parties resorting to the Scotch Courts for the sole purpose of making it instrumental to the attainment of their objects. If this does not amount to collusion.....I do not think that the Tribunals of this country can regard a divorce thus obtained as binding on their judgment."

Lord Colonsay's decision was based on much the same grounds (see page 95). So also I think was Lord Cranworth's. At page 70 he said:—

"The domicile to produce that result (*i.e.* found jurisdiction) must be a *bona fide* domicile for all purposes, not that which alone existed in this case, a mere residence of forty days, so as to give jurisdiction to the Scotch Courts."

And Lord Westbury in referring to *Lolley's case* (22), *M'Carthy* v. *Decaix* (23) said (page 86):—

"There are other and legistimate grounds of decision to which the judgment in *Lolley's case* (22) may, and..ought to be referred. Throughout the Scotch proceedings the domicile of both parties was in *England*, and the residence in *Scotland* was temporary only, and intended only for the purpose of having a suit for divorce instituted. The Judge, therefore, was not the Judge of the domicile; the suit was not *bona fide*, and the whole proceeding was in fraud of English Law, and injurious to English interests."

I cannot, therefore, regard *Shaw* v. *Gould* (21) as a clear authority against the sufficiency of *bonafide* residence. If it had been, the Court of Appeal in *Niboyet* v. *Niboyet* (9) would have been obliged to follow it instead of deciding as they did after full arguments and four months of deliberation that *bona fide* residence was sufficient.

I appreciate to the full the importance of, so far as practicable, construing legislation so as to comply with the comity of nations. I have already cited what Lord Justice James and other Judges have said on that point. But I do not think that that principle binds one down to a limited construction of the Act of 1861. Nor do I think that there is necessarily any inconsistency in applying that principle on the other hand to assist the wide construction I give to section 7 of the Indian Divorce Act, 1869. If one holdls that the Act of 1861 finally bound the Indian Legislature to accept

(21) (1868) 3 H. L. 55; 37 L. J. Ch. 433; 18 L. T. 833.

(22) (1812) 2 Cl. & F. 567*n*; 6 E. R. 1268; Russ. & Ry. 237; 37 R. R. 249.

(23) (1831) 2 Cl. & F. 568*n*; 2 Russ. & Myl. 614; 37 R. R. 250.

the principle of domicile as opposed to that of residence, what might have been the result, supposing the principles laid down in *Niboyet* v. *Niboyet* (9) in 1878 had been eventually adopted by the Privy Council in 1895 instead of the decision which their Lordships in fact gave? The result in such a case would have been a hopeless variance between the Indian Courts and the Home Courts, unless further legislation was passed on the subject by the British Parliament.

With very great respect, therefore, to the learned President, I prefer the view that the British Parliament intended to give the widest powers to the Indian Legislature, and that though relying on the latter's good sense not to abuse those powers, it yet retained practical checks in case of necessity. As I have already pointed out, in the view I take of the Indian Divorce Act, 1869, the Indian Legislature framed its divorce laws in such a way as to comply with the principles of the comity of nations as enunciated from time to time in the English Courts. If in some respects it went further and imposed restrictions which are nowadays not essential in the English Courts, that after all was only keeping well within the wide powers conferred upon it by the Act of 1861.

The conclusion then which I have arrived at is that the Indian Divorce Act, 1869. is, and always has been, within the legislative powers conferred upon the Indian Legislature by the Indian Councils Act, 1861.

For simplicity I have so far not dealt with any of the exceptions to the modern theory that jurisdiction in divorce is founded on domicile. One of those alleged exceptions is where a guilty husband deliberately changes his domicile in order to prevent his wife obtaining relief against him in the country where their domicile has hitherto been. That exception does not arise here, and I need not, therefore, deal with it,

But one other alleged exception I should mention to show that it has not been overlooked, although it was not referred to in argument, I have already stated that both the wife and the co-respondent have appeared absolutely and without protest; that the wife counter-petitioned for a judicial separation; and that the question of jurisdiction was not raised till the trial. In the 1896 Edition of Dicey, the case of *Zycklinski* v. *Zycklinski* (24) was quoted as an authority for holding that in such a case where the parties have appeared without protest, the Court has jurisdiction to entertain the proceedings. even though the parties are not domiciled within its jurisdiction. (see Dicey, p. 276, Exception to Rule 49; and p. 394 Note (1)

But that case was decided in 1862 when the jurisdiction in divorce was of recent date; it would seem wrong in principle and no detailed reasons are given. Further the proposition in question has been expressly dissented from in *Armitage* v. *Attorney-General*: *Gillig* v. *Gillig* (25) by Lord Gorell who says at page 140: 'That (proposition), I think, is not in accordance with the law of this country." In my judgment, therefore, the Court in the present case has not any jurisdiction to dissolve the marriage by reason of the appearance of the parties without protest. So I need not consider the possible operation of section 45 of the Indian Divorce Act and the relevant provisions of the Code of Civil Procedure.

At the trial a further point was raised, *viz.* that the parties had last resided together at Bombay, and that the Poona Court had no jurisdiction. That contention was negatived by the learned Trial Judge, and as it was not renewed before us, I need say no more about it except that in my opinion there is no substance in it.

I may also state that having regard to the express terms of the Indian Divorce Act, I consider that the fact that the present case arises in the District and not on the Original Side of the High Court is immaterial on the question whether there is any jurisdiction to grant a divorce between non-domiciled persons.

(24) (1862) 2 Sw. & Tr. 420; 31 L. J. Mat. 37; 5 L. T. 690; 164 E. R. 1059.

(25) (1906) P. 135; 75 L. J. P. 42; 94 L. T. 614; 22 T. L. R. 306.

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It may be convenient if after this lengthy judgment I summarize my conclusions. They are: (1) that the wife committed adultery with the co-respondent. (2) That the husband's and consequently the matrimonial domicile is English. But that on the other hand both spouses were at all material dates *bona fide* residents in India, and professed the Christian religion. (3) That the domicile of the spouses being English, this Court has no jurisdiction to dissolve their marriage, notwithstanding that it was solemnized in India and that the adultery in question was committed in India. (4) But that on the other hand the Court has jurisdiction in these circumstances to grant the husband a decree for judicial separation and to provide for the custody of the children. This is because the word "reside" in section 2 should be construed as such, and not as meaning "domiciled," and because under section 7 we should apply the principles of the English Courts which in such cases will grant judicial separation to non-domiciled parties. (5) That having regard to section 7 our Courts give or withhold relief on the principles of jurisdiction now finally established in the English Courts, and it is no objection to their so doing, that those principles as now enunciated are not the same as those enunciated in the English Court of Appeal in *Niboyet* v. *Niboyet* (9). In this connection it must be borne in mind that the jurisdiction to dissolve a marriage as opposed to granting a judicial separation, did not exist until it was given by the Matrimonial Causes Act, 1857. (6) Accordingly the decree of the lower Court should be varied by granting a judicial separation instead of a divorce. In other respects the decree of the lower Court should, in my opinion, be confirmed, including the findings as to damages and costs.

As regards the costs of the confirmation proceedings before us, I would direct the co-respondent to pay the whole of these costs, having regard to section 35 of the Act. In my judgment, he has committed adultery with the respondent, and I see no adequate reason why he should escape paying the costs, because we think the appropriate jurisdiction in this country is to grant a decree for judicial separation and not for divorce having regard to the domicile of the injured husband. I, however, agree with the Chief Justice's proposal that the costs here and below of respondent No. 1 be in the first instance paid by the petitioner, and then be recovered by him from the co-respondent:

If the husband wishes to obtain a divorce, it will be necessary for him to petition the English Courts for that relief. I recognise the hardship that this causes; but possibly the Probate Division might allow the evidence to be given by affidavit and thus avoid the expense of a commission to India, at any rate if the fact of adultery was there no longer contested.

The question as to the custody of the children has not yet been argued before us.

Crump, J.—On September 7, 1921, the petitioner Alfred Wilkinson filed a petition in the Court of the District Judge of Poona wherein he prayed for a decree for the dissolution of his marriage with the respondent Grace Emily Norah Wilkinson on the ground that she had committed adultery in British India with the co-respondent D'Arcy. The petition stated that the marriage was solemnized in St. Paul's Church, Poona, and further that the petitioner and his wife last resided together in Poona. The written statement of the respondent was filed on December 15, 1921. It contains a denial of the allegation of misconduct, alleges cruelty and puts forward a prayer for a judicial separation. The written statement of the co-respondent was filed on December 7, 1921, and is substantially to the same effect on the question of fact.

Upon these pleadings two main issues were raised:—

I. Whether plaintiff proves adultery between the respondents?

II. If plaintiff proves adultery had he condoned it by subsequent conduct?

There were certain minor issues which need not be considered now. There was no issue as to jurisdiction. The plea of condonation has been abandoned before us. The learned District Judge upon the evidence recorded before him held that adultery was proved and made a decree *nisi* for dissolution of marriage. That decree comes before us for

confirmation as required by section 17 of the Indian Divorce Act, 1869.

In the ordinary course the only question for our decision would be one of fact, *viz.*, whether adultery is proved, but though there was no defence in the pleadings on the point of jurisdiction, it appears that that defence was raised at the hearing. The learned District Judge has dealt with it in his judgment, and has held that his Court has jurisdiction. The point has been fully argued before us, and it is necessary that we should decide it for if there was no jurisdiction we cannot deal with the case.

Procedure in cases under the Indian Divorce Act is regulated by the Code of Civil Procedure. Section 45 of the Act lays down that "subject to the provisions herein contained all, proceedings under this Act....shall be regulated by the Code of Civil Procedure." There is nothing in the Act which lays down any special rule as to pleadings. Section 7, as I understand it, applies, not to points of procedure, but to the general principles and rules on which the Court will act in giving relief. These are rules of *quasi* substantive rather than of adjective law. It is, therefore, unnecessary to consider whether under the stricter system of pleading in force in England the respondents would be taken to have submitted to the jurisdiction. The only rule which need be considered is contained in section 21 of the Code of Civil Procedure, and that rule has never been held to confer jurisdiction where jurisdiction is completely absent. In such cases, as remarked by their Lordships of the Privy Council in *Ledgard* v. *Bull* (26), "when the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process" (page 145). It is the settled practice of our Court to entertain objections to the jurisdiction taken for the first time even in second appeal. And even in England the Court can raise the question of jurisdiction at any time in proceedings for divorce.

(26) 13 I. A. 134; 9 A. 191; 4 Sar. P. C. J. 11; 6 Ind. Dec. (N. S.) 561 (P. C.).

The point of jurisdiction may be shortly stated. It is contended that the petitioner has an English domicile. The domicile of the wife is the domicile of the husband, and in the case of persons not domiciled in India it is contended that the Indian Courts have no jurisdiction to give a decree for dissolution of marriage.

The question of fact involved in this plea, *viz.*, the domicile of the petitioner, does not (in my opinion) present much difficulty. It is clear that before the District Judge there was no contest on this matter, and the petitioner's evidence is too clear upon the point to leave any room for doubt. It is indeed conceded that the petitioner's domicile of origin was English. He came to India for business purposes some twelve years ago. He returned to England with his family on February 14, 1920, and did not intend to return to India. He returned to India for business purposes on March 13, 1921. There is no evidence of an *animus manendi* which can suffice to change the domicile of origin. An affidavit has been put in here, but it is no more than a bare assertion of the petitioner's intention. The point must be taken to be concluded against the petitioner for the purposes of this case.

The parties have, therefore, an English domicile, and the question is whether as between such parties the Indian Courts have jurisdiction to decree dissolution of marriage. That question must be determined on a consideration of the Indian Divorce Act, 1869. There are two aspects of the matter.

(1) Did the Indian Legislature intend to confer jurisdiction in such cases?

(2) Had that Legislature power to do so?

There is no doubt a third question which may arise elsewhere, *viz.*,

(3) What is the effect of a decree granted by an Indian Court outside British India?

But this third question does not and cannot arise for determination here. If the Indian Courts can give a decree valid throughout British India, we are bound to grant that relief if due cause is shown. Whether our decress will or will not receive extra-territorial recognition is a matter

for those Courts before whom they are cited for any purpose outside our jurisdiction. We can have no judicial opinion upon that matter. But so far as concerned the first two questions these are matters for our determination and for our determination alone within this Presidency—subject of course to correction by a Court of Appeal. The opinions of jurists, however eminent, are entitled to our respectful consideration but we are not bound by those opinions, and the judgments of English Courts stand in the same category.

Before coming more closely to these two points it is not out of place to observe by way of preface that the jurisdiction which is now questioned has been exercised uninterruptedly since the Legislature enacted the Act of 1869. So far as I am aware it has never been doubted that our Courts had jurisdiction in the cases now under consideration—at least within the territories comprised within British India, and between European British subjects. It is unnecessary to cite cases in which that jurisdiction has been exercised. Nay more, the decrees granted by our Courts have received extra-territorial jurisdiction without contest. Thus the point which is now taken involves a novel doctrine, and very substantial grounds would have to be made before it could be conceded. The doubt has, however, arisen and as it is based upon a decision by the President of the Probate, Divorce, and Admiralty Division of the High Court of Justice of England, we are bound to resolve it in one sense or the other, and cannot rest upon the uninterrupted practice since 1869.

The question arose in the case of *Keyes* v. *Keyes* (4). The petitioner there had obtained in 1918 a decree for dissolution of marriage from the Chief Court of the Punjab. Nothing turns on the status of that Court at the date of the decree as compared with the status of a Chartered High Court such as ours. In 1921 the petitioner filed a petition in the High Court of Justice in England. Clearly if the Indian divorce was good in England, there was no subsisting marriage which could be dissolved. It is material to note that the action was undefended. The King's Proctor was heard, and Counsel was allowed to address the Court on behalf of the Secretary of State for India as *amicus curiæ*. There was, it would seem, a conflict of views. The King's Proctor urged that the Indian divorce was bad *in toto* while for the Secretary of State it was argued that the Indian divorce was good not only in India, but also extra-territorially. The learned President, Sir Henry Duke, held that the Indian Divorce Act, 1869, was *ultra vires* of the Indian Legislature in so far as it purported to give jurisdiction to decree dissolution of marriage between parties not domiciled in India. The decision is not confined to the extra-territorial validity of such decrees—a matter with which as I have said this Court is not concerned. It lays down in express terms that such decrees are invalid even in India (see page 217).

"The Indian Divorce Act, 1869, accordingly furnished no sufficient authority for the divorce of the petitioner and the respondent which has been decreed by the Chief Court of the Punjab."

A decree for dissolution of marriage was pronounced. There was no appeal: indeed there could be no appeal for the Secretary of State, who alone was interested to contest the point, was not a party, and in any event the decree could not be impugned so long as it was conceded that an Indian divorce had no extra-territorial operation. The pronouncement was indeed to some extent *obiter* but it cast grave doubts on the validity of the Indian decrees since 1869. In consequence legislation became necessary, and a validating Act was passed by the Imperial Parliament. (The Indian Divorce Validity Act, 1921). No argument can be based on this legislative reversal of a judicial decision: it involves no admission that the decision is correct. No appeal was possible, and the decision affected or might affect the status of many persons not parties to the case who could not challenge it. Unfortunately the Act of Parliament does not assist the solution of the question before us. In substance it declares that past decrees granted by Indian Courts for the dissolution of marriage between parties domiciled in the United Kingdom are as valid as

they would have been, had such parties been domiciled in India. But the question whether the Courts in India have or have not jurisdiction to grant divorces valid in India between such parties is not answered.

Now as to the first question: Did the Indian Legislature intend to confer jurisdiction in these cases? The relevant portion of section 2 of the Act of 1869 runs as follows:—

"Nothing hereinafter contained shall authorize any Court to grant any relief.. except in cases where the petitioner professes the Christian religion and resides in India at the time of presenting the petition.

"or to make decrees of dissolution of marriage except in the following cases:— (*a*) where the marriage shall have been solemnized in India; or (*b*) where the adultery....complained of shall have been committed in India."

The above words are intended to restrict the powers of the Court. For those powers we must look to that which is "hereinafter contained." For the present purpose section 10 is relevant. The jurisdiction given is so to speak universal: "Any husband may present a petition.." From that we come back to the conditions or restrictions laid down in the words of section 2 set out above. Of those restrictions one only need be considered here *viz.*

That the petitioner at the time of presenting the petition resides in India.

In the ultimate analysis the whole matter turns on the word "resides."

The word "resides" has no technical meaning and must be taken to be used in its ordinary sense. It would have been easy enough for the Legislature to have substituted for "resides" the words "is domiciled in India." The Legislature did not do so. It is impossible to suppose that the Legislature was not aware of the distinction. The Bill was introduced by no less eminent a jurist than Sir Henry Maine and it contains the solution of this very question of jurisdiction which had delayed the measure for eight years. What was that solution?

"We (Courts) are bound to construe the section (of an Act) according to the plain meaning of the language used, unless....either in the section itself or in any other part of the Statute, anything that will either modify or qualify, or alter the statutory language....even if the result of such construction lead to anomalies, or be productive even of absurdity." Per Maclean, C. J. in *Rajib Panda* v. *Lakhan Sendh Mahapatra* (27) with reference to *St. John's Hampstead* v. *Cotton* (28).

"The proper course (interpreting an Act intended to codify a particular branch of the law is first) to examine (its) language....(for) its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view" per Lord Herschell in *Bank of England* v. *Vagliano Brothers* (29).

There is, in my opinion, nothing in any other part of the Act to modify, qualify or alter the plain meaning of the word "resides." That which is enacted in section 7 cannot be invoked for that section is expressly stated to be "subject to the provisions contained in this Act." Where a Statute is plain in itself, it is out of place to consider the presumed intentions of the Legislature but any argument of that nature favours the plain construction. The Government of India must have been well aware that to lay down domicil as the test would be to deny relief to those persons professing the Christian religion who were not domiciled in India. In 1869, even more than at the present time, there would have been in many cases difficulties almost insurmountable in the way of a petitioner who was barred from recourse to the Indian Courts. The cost would have been

(27) 27 C. 11 at p. 15; 3 C. W. N. 660; 14 Ind. Dec. (N. S.) 8.

(28) (1887) 12 A. C. 1 at p. 6; 56 L. J. Q. B. 225; 56 L. T. 1; 35 W. R. 505; 51 J. P. 340.

(29) (1891) A. C. 107 at pp. 144; 145; 60 L. J. Q. B. 145; 64 L. T. 353; 39 W. R. 657; 55 J. P. 676.

prohibitive, the evidence in many cases impossible to procure. There was nothing in the state of the law in 1869 which could have deterred the Indian Legislature from enacting "residence" as the test. That is a point to which reference may conveniently be made later. I cannot find in the judgment in *Keyes* v. *Keyes* (4) any definite pronouncement as to the intention of the Indian Legislature. I am not aware that any doubt has hitherto been cast on the true construction of the Indian Divorce Act so far as this matter is concerned. Certainly I find nothing in *Keyes* v. *Keyes* (4) bearing on this question, *viz.*, the construction of the Indian Act. I do not know whence the doubt has arisen.

I do not overlook the possibility of reading into section 7 an intention on the part of the Legislature to adopt whatever test the Court of Divorce in England might from time to time lay down upon this marter, but that is, in my opinion, a forced and unnatural construction. Also it would be necessary to omit the words "subject to the provisions contained in this Act." Indeed, had the Legislature intended any such result, it would have been easy to say in express terms that the provisions of the Act must be read as subject to the rules and principles applied from time to time by the Matrimonial Courts in England. They have chosen to say precisely the contrary. Any such construction would introduce an element of uncertainty where certainty is essential. The doctrine of the English Courts has varied from time to time upon this point. Since 1895 domicile alone is recognized as conferring jurisdiction. It is perhaps an extreme hypothesis that the English Courts should ever revert to "residence" as the test, but it is not illegitimate to test in this way the suggested construction of the Indian Divorce Act. It is difficult to see how a Statute can mean one thing in 1869, another in 1895, and possibly a third in 1930. I prefer the plain construction supported as it is by a long and uninterrupted current of decisions.

Now as to the second question: Had the Indian Legislature power to enact that which it has enacted? It is upon this point, not upon the construction of the Indian Act, that the decision in *Keyes* v. *Keyes* (4) is in reality based. The question is thus formulated "whether upon a true construction of the Imperial Statute of 1861 power is by that Statute conferred upon the Governor-General in Council to legislate for British subjects merely resident in India so as to affect their status as to marriage in the country of their domicile?" So stated the answer does not necessarily affect the power to decree divorce valid in India, but the penultimate paragraph of the judgment, portion of which is cited above, goes far beyond this. The *ratio decidendi* is as follows. Up to 1878, when the case of *Niboyet* v. *Niboyet* (9) was decided, the doctrine of the English Courts was unsettled, but that case laid down that residence of the parties gave jurisdiction. This decision must, however, be held to have been incorrect in view of the decision of the Privy Council in *Le Mesurier* v. *Le Mesurier* (7) in 1895. Therefore, when Parliament enacted the Indian Councils Act of 1861 it must be supposed that the true doctrine was present to their minds, and that therefore, Parliament could not have intended to empower the Indian Legislature to enact that residence should suffice to confer jurisdiction. Further, it is clear from section 22 of that Act that Parliament could not have intended to give the Indian Government power to make laws to interfere with the status of subjects of the Crown not domiciled in India.

To follow this decision would be to escape from an undesirable conflict of laws but with all due deference I am unable to do so, I would, however, point out that this conflict can equally well be avoided if, as hitherto, the decrees of Indian Courts receive extraterritorial recognition. As I have already said the first canon of statutory interpretation is that the words of the Statute should be read in their natural meaning. The general legislative powers of the Government of India were considered by the Privy Council in the leading case of *Empress* v. *Burah* (10) Lord Selborne expressed himself as follows (pages 904; 905)—

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"The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions".

This decision is binding on us, and it appears to me conclusive on the point. The powers are conferred affirmatively by section 22 of the Indian Councils Act, 1861. They include power "to make laws and regulations for all persons whether British or native, foreigners or others and for all Courts of Justice whatever and for all places and things whatever" within the Indian territories. The express conditions and restrictions are set out in the same section, and in sections 19 and 24. There are other statutory enactments bearing on this question which will be found fully set out at page 202 of Ilbert's Government of India, but nowhere is there any express restriction against "the making of laws to interfere with the status of subjects of the Crown not domiciled in India." It would not be difficult to cite instances where the the Indian Legislature has made laws "which may affect the heritable capacity of a man resident in India" who was a domiciled British subject (*e. g.*, section 31 of the Indian Succession Act). No doubt that Act only affects succession to immoveable property in British India in the case of such persons (*vide* section 5) but its validity within British India has never been questioned. There is thus in the present case no express restriction, and the question is, in the words of their Lordships of the Privy Council, whether "the legislation is within the general scope of the affirmative words which give the power." With all respect I do not see that the answer admits of any doubt. The power could hardly be expressed in wider terms.

If it is admissible to consider the state of the law in England when Parliament enacted the Indian Councils Act of 1861, is there anything from which an intention can be presumed to restrict the powers of the Indian Legislature in the manner suggested? In 1878—seventeen years later—the English Courts held that residence within the jurisdiction was sufficient to empower the Courts to give a decree for divorce *Niboyet* v. *Niboyet* (9). If in that year it had been suggested that Parliament could not have intended to empower the Indian Legislature to give jurisdiction to the Courts to grant a divorce between British subjects domiciled in England, *Niboyet* v. *Niboyet* (9), would have been conclusive to the contrary. How can the Statute Law of this country be affected by the later decisions of the English Courts? Had the Indian Legislature thought fit to do so, they could have amended the Indian Divorce Act to bring it into conformity with the views expressed in *Le Mesurier* v. *Le Mesurier*. (7). They have not done so, and in no other way save by an Act of the Imperial Parliament can the Act of 1869 be altered or modified. There has been no such legislation.

I find myself unable to hold that any restriction in the sense suggested was imposed by the Imperial Parliament on the powers of the Indian Legislature, nor can I hold that the true construction of the Indian Divorce Act, 1869, is open to any doubt. Still less can I hold that in enacting section 7 of that Act the Legislature intended that the power of the Courts to entertain a petition for dis

solution of marr age should depend upon the views which might from time to time prevail in the English Courts as to matrimonial causes. I hold that the jurisdiction, whatever it may be, is conferred by the Act in express terms, and that provisions which confer that jurisdiction are not in any way subject to any rules or principles which may from time to time be laid down by English Courts. Those provisions, in my opinion, confer upon the Courts in India jurisdiction to give decrees for dissolution of marriage between British subjects domiciled in England who in other respects are within the conditions prescribed by the Act.

I regret that I am unable to agree with my Lord the Chief Justice and my learned brother Marten as to the true construction of the Indian Divorce Act. I have already dealt with what appears to me to be the main principles on which that Act should be construed. I would willingly have rested my conclusions upon those principles, but in this conflict of views I find it necesssary to add a few words on the doctrines of private international law. It is not necessary to attempt to define that much debated phrase. The principle involved, as I understand it, may be stated as follows:—

It is a scandal when a man and a woman are held to be man and wife in one country and strangers in another. That scandal arises from a conflict of laws. That scandal can be avoided, if the Courts of one country decline to assume jurisdiction over the subjects of another country, who are merely resident within their jurisdiction. Alternatively if the Courts of all countries agree to accept domicile as the test that scandal is avoided.

It is conceded that Municipal Law can confer jurisdiction on the ground of residence but it is argued that in considering the intention of the Legislature the principle stated must be kept in mind.

I agree that this is so. I do not propose to rely on the obvious difference in the position of a British subject as compared with the subject of an independent sovereign state. I would only point out that British subjects, whether in India or in England, owe allegiance to the same Crown and are subject to the authority of the same legislative body, the Imperial Parliament, and if the Imperial Parliament so wills, the scandal on which the argument rests can be avoided by enacting that the decrees under consideration shall have extra territorial recognition. This they cannot do in the case of the subjects of an independent sovereign state. The object of these remarks is to elucidate what I believe to have been the true intention of the Indian Legislature.

I concede as I have said that the Indian Ligislature desired to avoid the scandal stated above, and that it is reasonable to interpret their intention in that light. But, in my opinion, the Indian Legislature acted in the belief that the decrees of the Indian Courts would receive extra-territorial recognition, and they chose that method of avoiding the difficulty. Nor were they unsuceessful. For over fifty years there was no scandal for until the decision in *Keyes* v. *Keyes* (4), so far as I am aware, there is no case in which the English Courts refused to recognize the validity of those decrees. The intention which I deduce from the principle of avoiding scandal leads me, therefore, to the conclusion not that the Indian Legislature desired or intended to exempt British subjects domiciled in England from the jurisdiction of the Indian Courts, but rather that they intended that the decrees of those Courts should be valid outside India.

I do not desire to burden this judgment by reference to cases. I would, however, emphasize once again that it has been consistently affirmed by eminent Judges in India that the test of jurisdiction in these cases is residence not domicile. I also desire to add a few remarks on the scope of section 7 of the Indian Divorce Act. It is true that in construing the Matrimonial Causes Act of 1857 the English Courts have—not without hesitation—arrived at the conclusion that the general words of section 27 must be cut down in view of the principles of private international law, but I must

admit that for reasons which I have endeavoured to indicate I doubt if the argument is in the special case of the Courts of India as strong as is supposed. But apart from that the Indian Act contains what the English Act does not contain, that is to say, a clear and definite statement (*vide* section 2) of the conditions upon which jurisdiction can be exercised—*expressio unius est exclusio alterius*. I see no warrant for reading into the Act what is not expressed. If then section 2 is exhaustive upon the point it is clear that section 7 can lay down nothing more by any process of implication. If section 7 is to have the dominating force, which is suggested, the rest of the Act might have been expressed in a few sections. With all deference I doubt whether it is safe to apply the decisions of the English Courts as to the meaning of anotner Statute.

But it may be said what is then the scope of section 7. It is, in my opinion, a residuary section intended to provide for any matters which by inadvertence or otherwise are not expressly dealt with n the Act. It is not unusual in statutory drafting to insert provisions of this nature *ex majore cautela*, more especially where an attempt is being made to codify in this country an unfamiliar branch of English Law. In the words of Mr. Justice Jenkins (now Sir Lawrence Jenkins) "The expression 'rules and principles'....point rather to the rules and principles on which the Court deals with these matrimonial causes in requiring a certain degree of evidence and other cognate matters" (*Bailey* v. *Bailey* (30). Upon this construction of section 7 that learned Judge declined to apply to the case before him a ruling of the Probate Court in England. In *Ramsay* v. *Boyle* (31) the same view was taken of the scope of this section.

I would conclude with a reference to a matter which has at least some historical interest. Since I wrote this judgment my attention has been attracted to the speech in which Sir Henry Maine moved the third reading of the Bill which became the Indian Divorce Act. The Bill had then passed through the hands of the Select Committee and it is interesting to note that this legislation was delayed for about eight years over this very question of jurisdiction. Maine clearly intended to base the jurisdiction on residence not on domicile, and expressed a confident hope that the decrees of the Indian Courts in the case of persons domiciled in England would receive extra territorial recognition. He further expressed himself as to the scope of clause 7 of the Bill in terms not dissimilar to those which I have used in discussing section 7 of the Act. I do not seek to support my views by these observations. Indeed, as I have said, the history of the legislation attracted my attention after my judgment was written. But the point is not without interest and this contemporaneous exposition of what was then believed to be the law, is not without value in considering the intention of the Legislature.

I now come to the facts of this case. At the outset it is necessary to remark that the decision proceeds to some extent on allegations of fact which go beyond the pleadings. The petition was filed on September 7th 1921 and paragraph 11 says that "the respondent has disappeared from her father's house." That was the petitioner's state of knowledge at that date. After that date it is alleged that he discovered that on September 6th and September 7th respondent and the co-respondent stayed together in an Hotel at Lonavla on nights of September 6th and September 7th. Strictly there should have been an amendment of the pleadings, but no objection was taken to evidence going on as to this matter. The case stood adjourned for that evidence without objection, and no substantial injustice has been done by the failure to conform to the strict rules of procedure. That evidence must, therefore, be read as good evidence for the purposes of the issue of fact.

It is necessary to state briefly the sequence of events. The parties were married in 1914. There are two children. On March 13th 1921 they returned from England to India and stayed with the wife's parents Major and Mrs. Wickham in Poona. On May 1st 1921 the peti-

(30) 30 C. 490 *note*.
(31) 30 C. 489 at p. 497.

tioner entered the service of Messrs. Thomson and Taylor in Bombay. The respondent and the children remained at Poona. In June 1921 the co-respondent became a boarder in Major Wickham's house. While in Bombay the petitioner received certain anonymous letters which excited his suspicions. On August 13th 1921 the petitioner went to Poona. There was some discussion on this matter. The details depend on the uncorroborated evidence of the petitioner, but it is clear from the respondent's evidence that she became aware of his suspicions. She says. "I think I promised not to have anything to do with Captain D'Arcy." On August 15th the petitioner returned to Bombay taking the elder child with him. On August 20th he returned to Poona and on August 21st he returned with the respondent and the two children to Bombay. They took rooms in a boarding house. The co-respondent was also in Bombay at this time. On the morning of August 23rd the petitioner left his place of business about 10 A. M. and returned to his rooms. He found the respondent and the co-respondent together on the Verandah. There was a quarrel. The parties then went together to a Solicitor. At 2-30 P. M. they returned together to the boarding house, and the respondent and the co-respondent went away together leaving the petitioner with the children. The respondent and co-respondent appear to have gone to the house of one Gove where the co-respondent was staying. They spent the rest of the day together, went to a theatre in the evening and the respondent then took the co-respondent to the Apollo Hotel about midnight where she spent the night. The petitioner telegraphed to his father-in-law at Poona. Major Wickham arrived at Bombay on the morning of August 24th. They found the respondent and the co-respondent together at Gove's house. There was a violvent altercation. Thence they took the respondent to the Apollo Hotel. The door of the room was found locked, and respondent admitted that the co-respondent had the key. The door was broken open, and the respondent's luggage removed. That night her father took her to Poona leaving the petitioner in Bombay.

There is not so far as I can find any dispute as to these facts. As to the reasons which actuated respondent in leaving her husband there are two conflicting stories. The husband says in effect that she left him to join her lover: the wife, that her husband turned her out of the house and that the respondent merely acted as a friend. Now the learned District Judge says—and I think most pertinently—"why did the respondent not go back to her father". The distance from Bombay to Poona is 114 miles by rail, and there is a frequent service of trains. The plea of want of money is futile in view of what actually happened. Further there is independent evidence which the learned District Judge has believed as to the circumstances in which respondent left her husband's protection. This witness is Mrs. Parish who kept the boarding house. This lady says "I begged her not to go but she said she must go where her affections were." The respondent admits that Mrs. Parish was present. The facts, therefore, plainly are that respondent knew that her conduct with the co respondent had excited her husband's suspicions; that she openly expressed a guilty affection, and went away with the co-respondent: that she did not take the proper course which was open to her, *viz*, to return to her father but stayed with the co respondent all day, went with him to the theatre, and allowed him to escort her to an Hotel at midnight. Next day she re-joined him. It is difficult to regard this conduct as consistent with innocence. Whether it would be safe to infer adultery need not be decided in view of the subsequent history of the case. But should it become necessary to do so, I should find it impossible to say that the District Judge was wrong in inferring adultery.

It appears that on the evening of August 24th there was some kind of reconciliation between the parties, though as I have said there was admittedly nothing which can amount to condonation as defined in section 14 of the Indian Divorce Act. After respondent returned to Poona on August 24th, certain letters

passed. There is nothing in the petitioner's letters, as I read them, which helps the decision of this case. Put shortly they are the letters of a man suffering from acute agony of mind, who desires to be reconciled with his wife. But there is a letter from the respondent dated September 1st 1921 which is very significant. The respondent had then made up her mind to leave her husband. She writes as follows :—

"I wish to inform you for 'Good and all' that I shall never live whith you again as your wife and the sooner we are separated or divorced the better for us both.... My life with you is misery to myself and must necessarily be so to you when you know I cannot even like you and I only see one thing to do, *viz.*, 'divorce me' (the word 'me' is not perfectly clear but I read it so.) Which eventually must come, I have always been afraid of you and Daddy but I do not intend to be any longer, as all you and Daddy think of is your name and what people will say etc. not my happiness.... If in future you interfere in any way whatsoever in my doings 'Beware' as things will not be so peaceful on the next occasion. You have your recourse, *viz*, the Law."

Now I have every desire to be scrupulously fair to the respondent but read in the light of the past events what does this letter mean ? Is it not fair to express the meaning thus "I am leaving you to seek my own happiness and you had better divorce me". I take it that the respondent who is twenty eight years of age and had been married for seven years knew that a husband cannot divorce his wife without cause, and had she intended to give him cause she could hardly have acted in a more appropriate manner. On September 2nd she left her parents' house with her two children and went to an Hotel at Lonavla 40 miles away by rail. She stayed there from September 2nd to September 8th. She sent for the co-respondent who came to Lonavla and occupied the bedroom next to hers. Whether he was there for one night or two nights is to my mind immaterial. I do not find it necessary to add any details to this narrative. They will be found in the judgment of the learned District Judge. The inference seems to me irresistible. I must hold that adultery is proved.

The order of the Court accordingly was as follows,—

The District Court of Poona had no jurisdiction to pass a decree for dissolution of marriage.

Adultery of respondent No. 1 with respondent No. 2 was proved.

Decree for judicial separation.

The District Court to determine question of alimony and the custody of the children.

The petitioner to pay the costs of respondent No. 1 and to recover such costs and his own from respondent No. 2.

Z. K.

Order accordingly.

PRIVY COUNCIL,

APPEAL FROM THE ALLAHABAD HIGH COURT.

November 14, 1923.

Present :—Viscount Haldane, Lord Dunedin, Lord Atkinson, Lord Shaw, Lord Phillimore, Mr. Ameer Ali and Sir Lawrence Jenkins.

Raja Bahadur Raja BRIJ NARAIN RAI—APPELLANT

versus

MANGLA PRASAD RAI AND OTHERS —RESPONDENTS.

Hindu Law—Alienation—Necessity—Antecedent debt—Manager or father, powers of—Father, whether alive or dead, effect of—Stare decisis, *principle of—Plea not taken in large number of cases, inference from.*

The managing co-parcener of a joint undivided estate cannot alienate or burden the estate *qua* manager except for purposes of necessity. [p. 693, col. 2.]

But if he is the father and the reversionaries are the sons he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt. [p. 693, col. 2.]

If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind more than his own interest. [p. 693, col. 2.]

Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached. [p. 693, col. 2.]

There is no rule that this result is affected by the question whether the father, who contracted the debt or burdens the estate, is alive or dead. [p. 693, col. 2.]

It is above all things necessary *stare decisis*, not to unsettle what has been settled by a long course of decisions. [p. 692, col. 2.]

When a long series of cases extending over a long period of time when parties were represented by eminent Counsel are decided in a way where if a plea which was evident had been taken and upheld, the decision would have been the other way, there arises an irresistible conclusion that the plea was not taken because it was felt to be bad. [p. 693, col. 1.]

Appeal from the judgment and decree of the Allahabad High Court (Tudball and Rafique, JJ.) dated the 28th October 1918, and published as 50 Ind. Cas. 101, from a decree of the Subordinate Judge, Ghazipur.

Messrs. *De Gruyther*, K. C. and *Dube*, for the Appellant.

JUDGMENT.

Lord Dunedin.—The facts in this case may be very shortly stated. On the 4th March 1908 Sita Ram granted a mortgage for Rs. 11,000 in favour of Raja Narain Brij Rai and Jagdish Narain Rai. The mortgage was secured on ancestral and joint property of which Sita Ram was at that time manager, the other members of the joint family being his two sons, minors. In 1912 the mortgagees brought a suit on the mortgage and obtained a decree *ex parte*. In 1913 the present suit was raised by the mother on behalf of her two minor sons (the elder has since become major) to have it declared that the mortgage was not binding on them and that the decree granted was so far as they were concerned null and void.

The mortgage in suit bears to have been executed in order to pay off two prior mortgages on the same property of date the 12th December 1905 and the 19th June 1907, respectively.

In the suit the plaintiffs cited the two mortgagees and their father, Sita Ram, who had granted the mortgage. Sita Ram did not appear to defend Jagdish Narain Rai made over his interest to his brother, Raja Narain Brij Rai, who appeared to defend and pleaded that the mortgage in question having been granted to pay off an antecedent debt of the plaintiffs' father, it was binding on the estate.

The Subordinate Judge found as facts.

(1) That the property was ancestral and joint.

(2) That the money raised under the mortgage was to the extent of Rs. 10,215 employed in paying off the earlier mortgages.

(3) That the sons had not been properly represented when the *ex parte* decree of 1912 was granted.

He then found in law that the plaintiffs' sons were not bound by the decree of 1912, and he accordingly set aside the decree of 1912 so far as the sons were concerned; he made no further declaration. The defendant appealed. The learned Appeal Judges affirmed the findings of fact of the Subordinate Judge with the variation that they found that the whole Rs. 11,000 had been employed in paying off the earlier mortgages, but in view of what had been said by this Board in the case of *Sahu Ram Chandra* v. *Bhup Singh* (1) decided after the date of the judgment under appeal, they remitted to the Subordinate Judge to find whether the earlier mortgages were incurred to discharge obligations not only previously incurred but incurred wholly irrespective of the joint family property. The learned Subordinate Judge set out additional evidence as to the two earlier mortgages. On this evidence being taken up by the learned Judges of the Court of Appeal, they came to the conclusion that it was impossible to say for what precise purpose the money raised by the two earlier mortgages had been used, or that the debt then incurred was incurred wholly irrespective of the family property. They accordingly dismissed the appeal. Appeal was then taken to the King in Council.

The defendant admits that the *ex parte* decree is not binding on the minors in

(1) 39 Ind. Cas. 280; 44 I. A. 126; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 39 C. 437 (P. C.).

respect that they were not properly represented, but contends that thereought to have been a declaration that under the circumstances the property become bound and is liable to be taken in execution.

In the case of *Sahu Ram Chandra* v. *Bhup Singh* (1) the suit was brought upon a mortgage 27 years old for Rs. 200, and Rs. 15,000 was demanded in respect of the principal and accrued interest. It was pleaded that the Rs. 200 had been borrowed for family necessity, but this contention was negatived in fact. It was, therefore, a simple case of a debt having been constituted by way of mortgage on the family estate by the father manager and been allowed to swell to gigantic proportions, no money having been paid thereon. The creditors had put forward the universal proposition that if debt was found to incumber the estate, it was necessary for the other members of the family who wished to affirm its non-efficiency to prove that it was incurred for immoral purposes. If they failed to do so, then the incumbrance must stand without further question. This view was negatived by the High Court, and in order to allow the point to be settled leave was given to appeal to the King in Council. The appeal was heard *ex parte*. At the appeal it became clear that there was in no sense an antecedent debt. The incumbrance itself was the debt, the money being advanced as the incumbrance was granted. In the course of the judgment, however, Lord Hobhouse's opinion in *Nanomi Bibusin* v. *Modhun Mohun* (2) was cited, and commenting on this it was said:—

"In their Lordships' opinion these expressions, which have been the subject of so much difference of legal opinion, do not give any countenance to the idea that the joint family estate can be effectively sold or charged in such a manner as to bind the issue of the father, except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate."

The learned Judges interpreted that to mean that a mortgage *per se* could not be an antecedent debt, for a mortgage is obviously a security which is not apart from the security of the estate over which it is constituted. If, therefore, it could not be shown that an anterior mortgage had been incurred in respect of an antecedent debt unconnected with the estate then the anterior mortgage could not be held to be a debt antecedent to the subsequent mortgage, and that subsequent mortgage could not stand though its proceeds were entirely used to pay off the prior mortgage.

Before the present case came up to their Lordships, the expression used in the case of Sahu Ram had come before the consideration of the High Court in Madras in the case of *Peda Venkanna* v. *Sreenivasa Deekshatulu* (3) and again in *Arumugham Chetty* v. *Muthu Koundan* (4) where the question was referred to a Full Bench. In the latter case the Pleader had gone the whole length of saying that no mortgage could ever be an antecedent debt the payment of which was capable to support a new mortgage. In both cases the Madras Court came to the conclusion that the judgment of the Board in *Sahu Ram's case* (1) ought not to be so interpreted.

Upon this appeal when their Lordships were satisfied that there was this discrepancy of opinion between the judgments of the High Court of Allahabad in this case and that of Madras in the others, they thought it advisable to have the question argued before a Full Board, which has been done. Their Lordships have had the advantage of a very full and able argument in which many authorities have been quoted. It is to be regretted that this case also is *ex parte*, but their Lordships are satisfied that the whole of the authorities bearing on the question have been fairly brought to their notice.

(2) 13 I.A. 1; 13 C. 21; 10 Ind. Jur. 151; 4 Sar. P. C. J. 682; 6 Ind. Dec. (N. S.) 910 (P. C.).

(3) 43 Ind. Cas. 225; 41 M. 136; 22 M. L. T. 334; 33 M. L. J. 519; 6 L. W. 649; (1918) M. W. N. 55.

(4) 52 Ind. Cas. 525; 42 M. 711; 9 L. W. 565; (1919) M. W. N. 409; 37 M. L. J. 166; 26 M. L. T. 96.

BRIJ NARAIN RAI *v.* MANGLA PRASAD RAI.

It cannot be denied that the law on the subject of what binds an estate when the manager of the joint family estate is the father, and the reversionaries are the sons, is in a state which is somewhat illogical and in the absence of binding authority could not be accepted. On the one hand it is settled law that the manager as such cannot bind the estate at his own free will and without any compelling cause so as to bind the reversionaries. He can bind it for necessity, the necessity being the necessity of the family, and so far there is no difficulty in principle, though the question of whether in any particular instance there was a necessity, may like other questions of fact liable to be involved in a question of decree, be difficult to decide. But then there comes in the further doctrine that debt has been contracted by the father, and the pious obligation incumbent on the son to see his father's debts paid prevents him from asserting that the family estate, so far as his interest is concerned, is not liable to purge that debt. It may become liable by being taken in execution on the back of a decree obtained against the father, or it might become liable by being mortgaged by the father to pay the debt for which otherwise decree might be taken and execution be sought. It is more than apparent how in practice these two principles may clash, nor is this in any sense a new discovery. Nothing clearer could be said than what was said by Lord Hobhouse delivering the judgment of the Board in *Nanomi's case* (2) already quoted :—

"Destructive as it may be of the principle of independent co-parcenary rights in the sons, the decisions have, for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority."

It is probably bootless to speculate as to how these seemingly conflicting principles were allowed to develop. On the one hand there is the general rule of the Mitakshara Law that the manager cannot burden the estate for his own purposes. This is set forth at some length in the judgment in *Sahu Ram's case* (1). On the other hand there is the obligation of the son to discharge his father's debts, based on the doctrine of pious duty, but perhaps reflecting a remanent, as suggested by Sadasiva Aiyar, J., in *Arumugham Chetty* v. *Muthu Koundan* (4) from the older laws of Manu under which the son had no interest during the father's lifetime. It is enough to say that both principles are firmly established by long trains of decision, and it certainly occurs to the view that the term "antecedent" debt represents a more or less desperate attempt to reconcile the conflicting principles For after all, if looked at straight in the face, what position could be more anomalous than this. A father who is manager, borrows a like sum from *A* and *B* To *A* he gives a mortgage on the family estate containing a personal covenant. To *B* he gives a simple acknowledgment of loan. *B* sues and gets a decree; on this decree execution can follow and the estate can be taken. *A*, suing upon his mortgage, cannot recover. It seems to have been felt that if the debt for which a mortgage was given was in any proper sense antecedent, then it so to speak escaped the direct infringement of the principle that the father manager could not burden the estate except for necessity.

In such a matter as the present it is above all things necessary *stare decisis*, not to unsettle what has been settled by a long course of decisions. Their Lordships entirely agree with the views of the learned Chief Justice in the Full Bench Madras case. They think that the case of *Sahu Ram Chandra* v. *Bhup Singh* (1) must not be taken to decide more than what was necessary for the judgment, namely, that the incurring of the debt was there the creation of the mortgage itself and that there was there no antecedency either in time or in fact. Moreover, if proper attention is paid to the word "incurred," they think that it will be seen to be a proper interpretation of the sentence which has caused the doubts.

There are, however, some observations in *Sahu Ram's case* (1) which are not necessary for the judgment but which

their Lordships are bound to say that they do not think can be supported. Founding upon them the learned Counsel in this case argued in the Court below that no liability of the sons, based on the pious obligation to pay a father's debt, could be made available to the creditor while the father was still alive. Here again, if the point was open, there would be much to be said in favour of a position which seems consonant with common sense. But their Lordships are satisfied that a long train of authorities have settled the question. Instances of sale being permitted when the father for whose debt the sale was made was still alive may be found in the cases reported as follows:—

Girdharee Lall v. *Kantoo Lall* (5), *Deendyal Lal* v. *Jugdeep Narain Singh* (6), *Nanomi Babuasin* v. *Madhun Mohun* (2), *Bhigbut Pershad* v. *Girja Koer* (7), *Minakshi Nayudu* v. *Immudi Kanaki Ramaya Goundan* (8), *Mahabir Pershad* v *Moheswar Nath Sahai* (9), *Sripat Singh Dugar* v. *Prodyot Kumar Tagore* (10).

It is true that the point was not actually taken so far as appears in any of these cases, but when a long series of cases extending over a long period of time when parties were represented by eminent Counsel are decided in a way where if a plea which was evident had been taken and upheld, the decision would have been the other way, there arises an irresistible conclusion that the plea was not taken because it was felt to be bad. The plea, however, was actually taken in *Badri Prasad* v. *Madan Lal* (11), see page 79, and was rejected by a Full Bench. In *Govind Krishna Gujar* v. *Sakharam Narayan* (12) Chandavarkar, J., says:—

"The law is now well established that under the Hindu Law, the pious obligation of a son to pay his father's debts exists whether the father is alive or dead."

The point was again taken and negatived in *Ramasami Nadan* v. *Ulaganatha Goundan* (13). (See at page 63.)

Their Lordships may sum up the propositions which they would wish to lay down as the result of these authorities as follows:—

(1) The managing co-parcener of a joint undivided estate cannot alienate or burden the estate *qua* manager except for purposes of necessity; but

(2) If he is the father and the reversionaries are the sons he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt.

(3) If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind more than his own interest.

(4) Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached.

(5) There is no rule that this result is affected by the question whether the father, who contracted the debt or burdens the estate, is alive or dead.

Applying these propositions to the present case, their Lordships consider that the present mortgage was raised in order to pay an antecedent debt, namely, the two older mortgages and consequently binds the estate,

The result will be that the appeal will be allowed and the decrees of the Courts below set aside with costs and a declaration made that the mortgage of the 4th

(5) 1 I. A. 321; 14 B. L. R. 187 (P. C.); 22 W. R. 56; 3 Sar. P. C. J. 380 (P. C.).

(6) 4 I. A. 247; 3 C. 198; 1 C. L. R. 49; 3 Sar. P. C. J. 730; 3 Suth. P. C. J. 468; 1 Ind. Jur. 604; 1 Ind. Dec. (N. S.) 715 (P. C.).

(7) 15 I. A. 99; 15 C. 717; 5 Sar. P. C. J. 186; 12 Ind. Jur. 289; 7 Ind. Dec. (N. S.) 1062 (P. C.).

(8) 16 I. A. 1; 5 Sar. P. C. J. 271; 12 M. 142; 13 Ind. Jur. 9; 4 Ind. Dec. (N. S.) 448 (P. C.).

(9) 17 I. A. 11; 17 C. 584; 5 Sar. P. C. J. 489; 8 Ind. Dec. (N. S.) 929 (P. C.).

(10) 39 Ind. Cas. 252; 44 I. A. 11; 32 M. L. J. 133; 15 A. L. J. 147; (1917) M. W. N. 193; 21 C. W. N. 442; 25 C. L. J. 220; 21 M. L. T. 222; 19 Bom. L. R. 290; 44 C. 524 (P. C.).

(11) 15 A. 75; A. W. N. 1893) 52; 7 Ind. Dec. (N. S.) 765.

(12) 28 B. 383 at p. 389; 6 Bom. L. R. 347.

(13) 22 M. 49; 8 M. L. J. 312; 8 Ind. Dec. (N. S.) 36.

BALDEO MISIR v. RAMLAGAN SHUKUL.

March 1908, affects the estate which may be brought to sale.

Their Lordships will advise His Majesty accordingly,

The respondents will pay the costs of the appeal.

Appeal allowed.

S. D.

Solicitor for the Appellant:—Mr. *Douglas Grant.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1167 OF 1921.

June 8, 1923.

Present:—Mr. Justice Lindsay and Mr. Justice Sulaiman.

BALDEO MISIR—DEFENDANT—APPELLANT

versus

RAMLAGAN SHUKUL—PLAINTIFF—RESPONDENT.

Pre-emption—Essential requisites of suit—Events subsequent to First Court's decree, effect of.

In order to maintain a suit for pre-emption, the plaintiff pre-emptor must establish that he had a right to pre-empt, (*a*) on the date of the sale, (*b*) at the time when the suit is brought, and (*c*) on the date of the decree of the Trial Court. [p. 694, col. 2; p. 695, col. 1]

Ram Gopal v. *Piari Lal*, 21 A. 441; A. W. N. (1899) 163; 9 Ind. Dec. (N. S.) 988, *Bhagwan Das* v. *Mohan Lal*, 25 A. 421; A. W. N. (1903) 83, *Rohan Singh* v. *Bhao Lal*, 3 Ind. Cas. 42; 31 A. 530; 6 A. L. J. 699, *Shankar Lal* v. *Kirari Mal*, 77 Ind. Cas. 144; (1924) A. I. R. (A) 81, followed.

The fact that subsequent to the passing of the decree of the Trial Court the plaintiff-pre-emptor has undergone a change in status, would in no way affect the right he possessed at the time when the decree in his favour ought to have been passed by that Court. [p. 695, col. 1.]

Second appeal from a decree of the Second Additional Judge of Gorakhpur.

Dr. *M. L. Agarwala* and Mr. *Lakshmi Narain Tewari*, for the Appellant.

Mr. *Haribans Sahai*, for the Respondent.

JUDGMENT.—This is a defendant's appeal arising out of a suit for pre-emption. The main plea taken on behalf of the defendant was that the plaintiff had no preference over him. The Court of first instance dismissed the suit on the 24th July 1920. On appeal the lower Appellate Court was of opinion that under the custom recorded in the *wajib-ul-arz* the plaintiff had a right of preference as against the defendant-vendee though the latter was a co-sharer in the same *thok*. The decree of the First Court was accordingly set aside and the suit decreed. A second appeal was preferred to this Court on the 28th July 1921 and one of the grounds raised in the memorandum of appeal was that, inasmuch as the plaintiff-respondent had ceased to be a co-sharer at the time of the lower Appellate Court's decree, his suit should have been dismissed.

An affidavit was filed in support of the allegation implied in that ground and time was given to the opposite party to file a counter-affidavit if necessary. No such affidavit was filed.

We may, therefore, take it that it is the appellant's case that on the 20th April 1921 the share of the plaintiff pre-emptor, on the strength of which he had instituted the suit was sold at auction and purchased by a third party. This sale was subsequently confirmed and a sale certificate of a later date was issued, a certified copy of which is produced along with the affidavit. We may, therefore, take it that the plaintiff-respondent ceased to be a co-sharer on the 20th April 1921. This, however, was a date subsequent to the date of the First Court's decree. But we would like to note that, although the auction-purchase had taken place before the passing of the decree of the lower Appellate Court, the fact was never brought to the notice of that Court.

It is well-settled law that a plaintiff pre-emptor in order to be able to maintain a suit for pre-emption must establish his right to pre-empt on three important dates. He must have a right of pre-emption at the time when the sale took place otherwise he would have no cause of action at all. He must also have the

same right at the time when the suit is brought or else he would have no *locus standi* to sue. A possible view to take might have been that nothing which happens after the institution of a suit can alter the position of the parties. But it has been held in a number of cases by this Court that it is incumbent on the plaintiff to prove that his right to pre-emot continues up to the date when the decree ought to have been passed in his favour, namely; the date on which the case was disposed of by the First Court. It matters little whether the Court of first instance did actually dismiss or decree his suit. The date of that Court's decree is the date on which, if the plaintiffs' contention is correct, the decree ought to have been passed in his favour. This principle was the basis of the decision in the following cases.

Ram Gopal v. *Piari Lal* (1), *Bhagwan Das* v. *Mohan Lal* (2), *Rohan Singh* v. *Bhro Lal* (3) and of *Shankar Lal* v. *Kirari Mal* (4) recently decided by this Bench. The last crucial date in such cases must, therefore be taken to be the date of the First Court's decree. If subsequent events were allowed to alter the form of the decree it would lead to much confusion. It is impossible to hold that having regard to the position of the parties, as it stood on the date of the First Court's decree, any other decree could have been passed on that date. Further more, an Appellate Court cannot take into account these subsequent events without admitting fresh evidence in appeal, which may not always be permissible.

We are, therefore, of opinion that the subsequent loss of the share by the plaintiff can in no way affect the right he possessed at the time when the decree in his favour ought to have been passed by the First Court.

The other grounds taken in the memorandum of appeal have not been seriously pressed. The result, therefore, is that the appeal fails and is hereby dismissed with costs including in this Court fees on the higher scale.

W. C. A. *Appeal dismissed.*

(1) 31 A. 441; A. W. N. (1899) 163; 9 Ind. Dec. (N. s.) 988.
(2) 25 A. 421; A. W. N. (1903) 83.
(3) 3 Ind. Cas. 421; 31 A. 530; 6 A. L. J. 699.
(4) 77 Ind. Cas. 144; (1924) A. I. R. (A.) 81.

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL NO. 3 OF 1922.

MAY 10, 1922.

[*Present:*—Mr Wazir Hasan, A. J. C.

Kunwar BEHARILAL—PLAINTIFF APPELLANT

versus

KALKA AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s 92, proviso (1)—Recital in rent receipt as to period for which rent is paid—Oral evidence whether admissible to contradict recital—Fraud, effect of.

In a suit for the recovery of rent oral evidence cannot be given to contradict recitals in receipts for rent granted by the plaintiff specifying the period for which the payments were made. [p. 697, col. 1.]

Where, however, it is alleged that the recitals as to the periods for which payments were made are fraudulent, oral evidence is admissible to prove the allegation under proviso (1) to section 92 of the Evidence Act. [p. 696, col. 1.]

Appeal against a decree of the Third Additional District Judge, Lucknow, dated the 12th December 1921, reversing that of the Honorary Assistant Collector, Lucknow, dated the 26th September 1919.

Mr. *Basudeo Lal*, for the Appellant.

Mr. *Rajeshwari Prasad*, for the Respondents.

JUDGMENT.—This is a second appeal arising out of a suit brought by the plaintiff appellant for the recovery of rent for the period of *Kharif* 1328 *Fasli* to the end of *Rabi* 1330 *Fasli* under section 108, clause (2) of the Oudh Rent Act (XXII of 1886.) The defendants-respondents pleaded payment and in proof thereof they filed a large number of receipts granted by or on behalf of the plaintiff landlord. Each of the receipts

on which reliance was placed by the defendants in proof of the payment of the rent for the years in suit contains a recital to the effect that the payment was made with regard to a period previous to the one for which this suit was brought. The defendants further gave oral evidence in proof of the facts that there were no arrears due for the years to which the recitals in the receipts relate and that the payments evidenced by those receipts were made in discharge of the liability for payment of the rent for the years in question.

The Court of first instance declined to take the oral evidence into consideration for the reasons that the recitals in the receipts as regards the period for which the payments were made could not be permitted to be superseded or contradicted by oral evidence. The learned Assistant Collector relied for this view of the law on section 92 of the Indian Evidence Act. The result was that except for a paltry sum of Rs. 16 the plaintiff-appellant's suit was decreed. The defendants appealed to the Court of the District Judge of Lucknow and the appeal was heard by the learned Third Additional District Judge of that district. The learned Judge held that section 92 of the Indian Evidence Act was no bar to the admissibility of oral evidence in proof of the facts already stated and on consideration of the evidence and circumstances in the case he came to the conclusion that the payments evidenced by the receipts were really made in discharge of the liability for rent for the years for which the present suit was brought. The result was that he allowed the appeal, set aside the decree of the First Court and dismissed the plaintiff's suit with costs. The appeal before me is from that decision of the learned Additional District Judge.

The first contention urged before me is that the view taken by the Court of first instance as regards the inadmissibility of oral evidence for the purpose of superseding the recitals contained in the receipts in respect of the period for which the payments evidenced by the receipts were made was correct and that the contrary view taken by the lower Appellate Court was erroneous. The grounds upon which the learned Additional Judge has proceeded are not at all convincing to me. He says:—"Section 92 of the Evidence Act is inapplicable to the case. The Evidence Act does not say that no statement of fact in a written instrument may be contradicted by oral evidence; but that the terms of the contract may not be varied etc. The receipts were not executed by the defendants. They were executed by or on behalf of the landlord." Section 92 of the Evidence Act, however, excludes oral evidence as between the parties to the instrument or their representatives-in-interest. Whether such parties appear on the face of the instrument as executants of it or not is wholly immaterial. It cannot be doubted for a moment that the landlord who gave or executed the receipts in question and the tenants in whose favour the receipts were executed or to whom they were granted and who accepted those receipts were parties thereto. Further, the recitals in the receipts as to the period for which the payments were made and accepted do clearly to my mind evidence one of the terms of the contract. On the evidence in this case and in the absence of any evidence to the contrary, I must hold that the original contract between the parties was the letting of the lands in suit by the landlord in consideration of an annual payment of Rs. 77 as rent for the same by the defendants-tenants—(See paragraph 1 of the plaint and the corresponding paragraph of the written statement). The annual payment of the rent was, therefore, an essential consideration supporting the contract of tenancy and was, therefore, a term of the contract. But the consideration for which a contract is made may be executed or executory. In the former case the consideration is executed by one party in return for the promise of the other; and nothing remains to be done but to perform the promise according to its terms. In the latter the consideration is a promise made by one party in return for the promise of the other; there are mutual promises which have to be performed on both sides, and the promise on one side

may be dependent or conditional upon the performance on the other according to the construction of the terms. In other words an executory consideration is a promise to do or give something in future. Contracts of leases are in their very nature founded upon executory consideration inasmuch as the payment of rent on the part of the lessee is to be made in future at the stipulated points of time to the lessor. In the present case, therefore, the recital in the receipts that the payments were made in discharge of the liability under the executory contract is to my mind a recital of an essential term of the contract. I am, therefore, unable to uphold the decree of the lower Appellate Court on the ground on which it has admitted oral evidence in supersession of the recitals in the receipts.

Yet there is another ground upon which the decree of the lower Appellate Court must be affirmed. In paragraph 6 of their written statement the defendants Nos. 1, 2 and 3 alleged that false entries had been made in papers by the plaintiff's agent, Shadi Lal, and that he had realized the amount of rent due from them. To my mind this is a clear averment of fraud on the part of the plaintiff's agent and as he committed it in the discharge of his usual duties plaintiff-appellant must suffer the consequences of his servant's acts. The Court of first instance entirely overlooked this aspect of the case but the lower Appellate Court has approached the decision of that point and has given its finding on it. The question raised being one of fraud, oral evidence for the purpose of superseding the recitals in the receipts in respect of the period for which several payments were made was admissible under proviso (1) of section 92 of the Evidence Act. The finding of the lower Appellate Court is "Having considered the evidence on the record carefully, I am of opinion that the defendants have succeeded in proving that they had made payments for the years in suit and that the payments were not correctly specified in the receipts in question." This finding amounts to this that the landlord or his agent fraudulently entered the period in the receipts as different from and previous in point of time to the period for which the rent was actually paid. The finding being one of fact is conclusive in second appeal.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

Z. K.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 259 OF 1921.

January 20, 1922.

Present:—Mr. Kanhaiya Lal, J. C.

JAGAT SINGH—DEFENDANT—APPELLANT

versus

ACHHAIBAR SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Partition—Property left undivided, nature of—Money realised by one member after partition—Suit for recovery—Limitation Act (IX of 1908), Sch. I, Art. 127.

Anything left undivided at a partition of Hindu joint family property ceases to be joint family property and a suit for the recovery of money realised by one member of the family to the exclusion of another is not governed after separation or partition by Art. 127 of the Limitation Act but must be brought within three years from the date of separation or partition. [p. 698, col. 2.]

Gajraj Singh v. *Sadho Singh*, 16 Ind. Cas. 882; 15 O. C. 397, followed.

Appeal against a decree of the Subordinate Judge, Fyzabad, dated the 18th July 1921, reversing that of the Munsif, Akbarpur, dated 20th January 1921.

Mr. *Ghulam Husain*, for the Appellant.

Mr. *S. M. Ahmad*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs-respondents for the recovery of possession of a one-fourth share of certain property. Their allegation was that the entire property had been mortgaged by Sheo Narain Singh, the predecessor-in-title of certain defendants with possession in favour of Ranjit Singh the predecessor of the present plaintiffs and certain other defendants for Rs. 600 on the 22nd June 1895; that Mahpal Singh, a brother of Ranjit Singh, owned a half share of the mortgagee right, that the remaining half share of that mortgagee right devolved

on the death of Ranjit Singh on his sons, Jagat Singh, Ramsaran Singh, Abhairaj Singh and Achhaibar Singh, and that in June 1912 the heirs of the mortgagor took illegal possession of the mortgaged property without paying the mortgage-money. The plaintiffs, Abhairaj Singh and Achhaibar Singh, claim a one-fourth share of the mortgagee right and sue for the recovery of possession of their share alone.

The heirs of the mortgagor pleaded that in June 1912 they had redeemed the mortgage and lawfully obtained possession of the mortgaged property. Jagat Singh, one of the brothers of the plaintiffs, pleaded that the plaintiffs used to live as members of a joint family with him, that they had gone to Burma after executing a power-of-attorney in his favour, and that in June 1912 the heirs of the mortgagor paid half the mortgage-money to Mahpal Singh by executing another mortgage-deed in his favour and the remaining half to him as representing the sons of Ranjit Singh in redemption of the mortgage. He further pleaded that the money so recovered was spent over joint family purposes, that is to say, Rs. 150 were paid to Bahraich in satisfaction of a debt due by Ranjit Singh and the remaining Rs. 150 were spent on the marriage of Abhairaj Singh, one of the plaintiffs. He also stated that in 1915 the plaintiffs separated from him and Ramsaran Singh and that the plaintiffs had no cause of action against any of the contesting defendants.

The Court of first instance dismissed the claim. Its finding was that the mortgage in question had been duly redeemed by the heirs of the mortgagor and their possession was, therefore, not unlawful. It also found that the mortgage-money received by Jagat Singh had been applied in payment of a debt due by Ranjit Singh and for the expenses connected with the second marriage of Abhairaj Singh. The lower Appellate Court, however, held that Jagat Singh had failed to prove that the sum of Rs. 300 received by him had been applied for family purposes and passed a decree for half of that amount in favour of the plaintiffs against Jagat Singh.

The present appeal has been filed by Jagat Singh whose contention is that the relief granted by the lower Appellate Court was barred by limitation and is foreign to the suit which was brought for the possession of the mortgaged property on an allegation which was found to be untenable.

There can be no question that the effect of the redemption obtained by the heirs of the mortgagor by the payment made to Mahpal Singh and Jagat Singh was to release the mortgaged property from all liability under the mortgage, because Mahpal Singh was the owner of half the mortgagee interest and Jagat Singh represented the joint family, comprising the four sons of Ranjit Singh, who held the remaining half. Mahpal Singh and Jagat Singh received Rs. 300. The redemption took place in June 1912. In January 1915 the plaintiffs separated from Jagat Singh and Ramsaran Singh and an agreement was executed by Jagat Singh and Abhairaj Singh, dividing the property equally between them (Exhibit A-5). Abhairaj Singh and Ramsaran Singh were not parties to that agreement but it is obvious from the circumstances that Achhaibar Singh represented his brother, Abhairaj Singh, while Jagat Singh represented his brother, Ramsaran Singh, in that transaction. The money realized by Jagat Singh could have been taken into account at the time of that partition, if it had not been spent for family purposes. Anything left undivided there after ceased to be joint family property, and as pointed out in *Gajraj Singh* v. *Sadho Singh* (1), a suit for the recovery of money realised by one member of the family to the exclusion of another was not governed after separation or partition by Art. 127 of the Indian Limitation Act (IX of 1908). The realization in this case had been made while the family was still joint. The suit ought, therefore, to have been brought within three years from the date of separation or partition

(1) 16 Ind. Cas. 882; 15 O. C. 397.

and is now clearly barred by time. The plaintiffs had moreover come to Court on false allegations, concealing the real facts on which the relief, granted by the lower Appellate Court is sought to be based.

The appeal is, therefore, allowed, the decree of the lower Appellate Court set aside and that of the Court of first instance restored with costs throughout.

Appeal allowed.

K. S. D.

BOMBAY HIGH COURT.

CIVIL REFERENCE NO. 10 OF 1923.

September 4, 1923.

Present:—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Crump.

In re AMBALAI SARABHAI.

Contract Act (IX of 1872), ss 239, 253—Income Tax Act (VII of 1918), s. 12 (1)—Super Tax Act (XIX of 1920), s. 3—Agreement to become partners, effect of—Rules determining partners' mutual relations, when apply—Sole owner of business taking wife as partner—Agreement fixing wife's rights and liabilities—Business whether a firm.

A, the sole owner of a business, admitted his wife *S* as a partner in the business by means of an agreement which provided that he shall pay her one anna in the rupee out of income of the commission but that nothing therein contained shall in any way limit, restrict or interfere with his right to forego the whole or any part of the commission or to admit other people as partners and that *S* shall have the right to take one or more partners on the death of *A*:

Held, (1) that the document was sufficient to constitute a partnership between the two executants; [p. 699, col. 2.]

(2) that by virtue of the agreement the business was constituted a firm within the meaning of section 12 (1) of the Income Tax Act, read with section 3 of the Super Tax Act. [p. 699, col. 2.]

Per *Shah, A. C. J.*—When the parties agree to become partners it is not necessary to state in terms that they agree to combine property, labour or skill. [p. 700, col. 2.]

Per *Crump, J.*—The rules laid down in section 253 of the Contract Act have no application when there is a contract to the contrary. [p. 701, col. 1.]

Civil reference made by the Chief Revenue Authority, Bombay Presidency.

Sir *Chimanlal Setalvad* and Mr. *B. J. Desai*, instructed by Mr. *Madhavji & Co.*, for Ambalal Sarabhai.

Mr. *Kanga*, Advocate General, (with him Mr. *A. Kirke-Smith* Acting Government Solicitor), for the Chief Revenue Authority.

JUDGMENT.

Shah, Ag. C. J.—This is a reference made by the Chief Revenue Authority under section 51 of the Indian Income Tax Act VII of 1918. The question has arisen with reference to the income of the opponent for the year ending March 31, 1921. The question referred for our decision is in these terms:—

"Whether the agreement dated June 29, 1916, between Ambalal Sarabhai and his wife Saraladevi made the business of Karamchand Premchand & Co., a partnership firm, and whether it constituted the said Saraladevi a partner of her husband Mr. Ambalal so as to render the business liable to be assessed separately to super-tax as an unregistered firm as required by sections 3 and 4 of the Super-tax Act, 1920, as read with section 12 (1) of the Income Tax Act, 1918?"

The answer to this question depends upon the view which we take of the said agreement of June 29, 1916. It is clear on reading section 12 (1) of the Indian Income Tax Act VII of 1918 with section 3 of the Super Tax Act XIX of 1920, that if this agreement constitutes Karamchand Premchand & Co,. a firm, then the requirements of section 3 would be satisfied. It is common ground that it is, if a firm, an unregistered firm. After considering the arguments and the terms of the document referred to I am of the opinion that in virtue of that agreement the business of Karamchand Premchand & Co. is constituted a firm within the meaning of section 12 (1) of the Indian Income Tax Act VII of 1918 and of section 3 of the Super Tax Act XIX of 1920.

The reasons for the contrary view have been stated at some length in the letter of reference; and the substance thereof may be stated in the words of the referring authority:—

"Mr. Ambalal's contention has not been allowed on the ground that the alleged partnership is not valid in law

inasmuch as the conditions of partneship are contrary to the spirit underlying the law relating to partnerships."

The question has been argued before us on the tooting that the requirements of the definition of "partnership" as given in section 239 of the Indian Contract Act are not satisfied by this document. It is not necessary for the purposes of this reference to determine the general question as to whether the meaning of the word "firm" must necessarily be determined with reference to the provisions of section 239 of the Indian Contract Act.

But it is contended before us on behalf of the referring authority that it is not a firm, because the requirements of section 239 of the Indian Contract Act are not satisfied according to the terms of the document. In other words, it is contended that the persons who executed the document did not constitute a partnership within the meaning of the Indian Contract Act. The document is sufficient, in my opinion, to constitute a partnership between the two executants of the document. The first clause of the document in terms provides that the said Saraladevi Ambalal has been admitted as a partner with the said Ambalal Sarabhai. Paragraphs 2 and 3 of the document have been relied upon as indicating that as the sole control of management, and the power of determining the partnership, and of admitting new partners are reserved by Mr. Ambalal only his wife is not constituted a partner in law by this document. I am unable, however, to accept this contention.

This reference has been made on the footing that the document evidences a real transaction between the parties. The learned Advocate-General has not suggested, and I do not think that on this reference it could be suggested, that the document does not evidence a real transaction between the parties to the document. But he contends that the question of law that arises is whether on a proper construction of this document the two persons are constituted partners in law. In support of his contention it is urged that there is nothing in the document to show that the parties agreed to combine their property, labour or skill in the business of Karamchand Premchand as Agents and Treasurers of the Ahmedabad Manufacturing and Calico Printing Co. Ltd. There is nothing in the document to exclude the idea of combining her porperty, labour or skill in the business of this firm. Indeed the papers sent up with the reference tend to show that she did agree to render herself liable to the Bank as a partner of this firm along with her husband. That involves the idea of contributing property to the business of the firm. But apart from that, even if those papers were not there, in my opinion, the idea of combining property, labour or skill is not excluded on the terms of the document. I do not think that it could be held, as contended by the learned Advocate-General, that it was so excluded in this case. When the parties agree to become partners it is not necessary to state in terms that they agree to combine property, labour or skill. That may be implied and in the present case I see nothing to exclude the idea of combining property labour or skill when and so far as necessary between the partners. The fact that the control is kept with Mr. Ambalal and that he has certain extra rights as a major partner does not in any sense negative a partnership according to law. It is open to two partners to agree, on the lines on which they have agreed in this case, to allow the business of the partnership to be conducted by one of the partners.

The real reason of the reference seems to be that this is an unusual document between husband and wife, and that it is difficult to accept the idea that they have become partners in law. In my opinion, they have become partners by this document within the meaning of Indian Contract Act, and that the business of Karamchand Premchand is constituted a firm. As it is an unregistered firm, my answer to the question referred to us in the affirmative. We make no order as to costs in the case.

Crump, J.—I agree. In my opinion the question referred to us must be decided on the construction of the document before us, and if on a fair and reasonable construction that document appears

to constitute a partnership between these two persons, then the answer must be in the affirmative.

I assume for the purposes of this reference, though the point is by no means free from doubt, that we must apply the definition contained in section 239 of the Indian Contract Act in considering the question of the construction of this document. The first clause in this document, as I read it, constitutes a partnership between Ambalal and his wife, and if that is so, the inference would be, having regard to the definition in section 239 of the Indian Contract Act, that these two persons did agree to combine their property, labour or skill in the business which forms the subject of document. There is nothing before us to exclude that interpretation of the word 'partnership and, therefore, *prima facie* a partnership is constituted. The second clause of the agreement, on which some stress has been laid, merely provides for the exercise of the management of the firm by Ambalal alone, a matter which is not uncommon in partnerships, and which in itself does not affect the question before us. The third clause of the agreement reserves certain powers to Ambalal, but unless and until those powers are exercised, I cannot see how the existence of those powers prevents the document constituting a partnership between these two persons.

The reference lays stress upon the rules laid down in section 253 of the Indian Contract Act. But as regards these, it is enough to remark that these rules have no application when there is a contract to the contrary.

On these grounds, I am of the opinion that we have here a firm within the meaning of the definition in section 239 of the Indian Contract Act, and that therefore, the question referred to us should be answered in the affirmative.

Answer accordingly.

K. S. D.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 22 OF 1922.

April 21, 1922.

Present:—Mr. Ashworth, A. J. C., and Mr. Simpson, A. J. C.

BABU RAM—DEFENDANT—APPLICANT

versus

Musammat RAM DULARI DEBI—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. IX, r. 9—Application for foreclosure decree, nature of—Dismissal in default—Restoration—Revision, whether competent.

An application for a final decree for foreclosure is not a proceeding in execution.

Where an application for a final decree for foreclosure was dismissed in default and then restored by the Trial Court:

Held, that the Court had jurisdiction to restore the application and the High Court will not interfere with the order of restoration in revision.

Gopala Row Gadai Row Sahib v. *Maria Susaya Pillai*, 30 M. 274 at p. 276; 17 M. L. J. 225, followed.

Revision against an order of the Additional Subordinate Judge, Fyzabad, dated the 15th February 1922.

Mr. *Har Dhian Chandra*, for the Applicant.

Mr. *Niamat Ullah*, for the Opposite Party.

JUDGMENT.—This is an application in revision. The order complained of is an order passed under O. IX, r. 9, of the Code of Civil Procedure restoring an application. The application was one for a final decree for foreclosure.

The facts as found by the Court below are that the Pleader was present in Court until 2-30 P. M., when another case of his was called on for hearing in another Court and he went there to conduct the same; that in the meantime this case was called on for hearing and was dismissed for his default.

We do not propose to decide the question whether we should ourselves have regarded this as sufficient cause for the absence of the plaintiff, who, we note, is a *pardanashin* lady, nor do we propose to invoke the inherent power of the Court to restore, for reasons, which are not sufficient. We adopt the opinion of the Chief Justice of the Madras High Court in *Gopala Row Gadai Row Saheb* v. *Maria Susaya Pillai* (1):—

(1) 30 M. 274 at p. 276; 17 M. L. J. 225.

"It seems to me a very strong thing for an appellate or revisional authority to interfere in a case when the Court, before which the suit has been instituted and has been dismissed without being tried, is of opinion that the case ought to be tried; and I think a generous construction should be placed on the enactment which gives the power to restore. The general policy of the Legislature in a matter of this sort is shown by the fact that a right of appeal is given against an order refusing to restore, but no right of appeal is given against an order of restoration."

The Court below may have been right or wrong, but it had jurisdiction, and we are not prepared to disturb its order in revision.

One point was taken by the applicant, that the order was contrary to law because O. IX, r. 9 does not apply to proceedings in execution, and an application for a final decree for foreclosure is a proceeding in execution. The only authorities which he could quote are earlier than the present Code of Civil Procedure. The point was at one time doubtful, but under O. XXXIV, r. 3 of the Code it was laid down that the final decree is a decree, and not merely an order. The wording of the rule was expressly intended to set this point at rest. And since the present Code was enacted we hold, there is no force in the contention that such an application, as this, is an application in execution.

For these reasons we dismiss the application with costs.

K. S. D. *Application dismissed.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 208 OF 1922.

September 6, 1923.

Present:—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Crump.

NAGAVA GURLINGAVA NANDI—APPLICANT—APPELLANT

versus

THE COLLECTOR OF BELGAUM—OPPONENT—RESPONDENT.

Guardians and Wards Act (VIII of 1890), s. 19 (c)—Bombay Court of Wards Act (I of 1905), ss. 11, 22—Jurisdiction of District Court when ousted—Property of minors in charge of Court of Wards—Mother appointed guardian of persons—Appointment when liable to be cancelled.

The jurisdiction of the District Court is ousted, under section 19 (*c*) of the Guardians and Wards Act, only when there is a Court of Wards competent to appoint a guardian of the person of a minor.

Where the mother of certain minors was appointed guardian of their persons but as their property had already been taken charge of by the Court of Ward, the Collector applied for the cancellation of her appointment on the ground that she was not well-behaved and took no care of the minors:

Held, (1) that the Court of Wards had not assumed superintendence over the persons of the minors, it was not competent to appoint a guardian of their persons and, therefore, the appointment of the mother could not be cancelled under section 19 (*c*) of the Guardians and Wards Act;

(2) that the application of the Collector should be considered on its merits.

Appeal from the decision of the District Judge, Belgaum, in Miscellaneous Application No. 50 of 1921.

Mr. *G. S. Mulgaokar*, for the Appellant.

Mr. *S. S. Patkar* (Government Pleader), for the Respondent.

JUDGMENT.

Shah, Ag. C. J.—The facts which have given rise to this appeal are these. It appears that one Nagava Gurlingaya Nandi made an application under Act VIII of 1890 to be appointed a guardian of the person of her three minor children; one son Shivlingava, and two daughters, Gangava and Shivlingava. Notices of this application were issued, but apparently no notice of it was given to the Collector at the time. On January 5, 1922, the learned District Judge made an order appointing her guardian of the person of the minors.

Thereafter, on February 11, 1912, the Collector wrote to the District Judge a letter bringing to his notice certain facts and praying for a cancellation of the order of January 5. It appears from that letter that Dundaya had applied under section 9 of the Court of Wards Act I of 1905 that the estate should be taken charge of by the Court of Wards. The Notification in the Government Gazette of 1920, Part I, page 690, shows that Dundaya, the grandfather of these minor children, and Durlingayya the father of these children were declared landholders for the purposes of the Bombay Court of Wards Act under the powers conferred upon Government

by clause (*b*) (*i*) of section 2 of that Act on account of the extent and value of their interest in land.

It also appears from the Notification published in the *Bombay Government Gazette of* 1920, Part I, page 2680, that the Court of Wards assumed superintendence of the property of Dundaya Shivlingaya Nandi, and that the assumption of the superintendence of the said property was sanctioned by His Excellency the Governor in Council under sections 4 and 9 of the Act.

It also appears in the letter of the Collector that under section 5, sub-section (1), clause (*c*) (*i*), of the Court of Wards Act, Durlingaya or Gurlingaya was declared by the District Court to be incapable of managing or unfitted to manage his own property owing to mental defect or infirmity. As a fact, at the date when the mother of these minors was appointed a guardian of the person, the property was under the superintendence of the Court of Wards and the minors were staying with Lundaya.

After this letter was received, the learned District Judge heard the Pleaders for the parties and, on February 25, 1922, cancelled the order appointing the mother as a guardian of the person of the minors on the ground that under section 19 (*c*) of the Guardians and Wards Act the Court had no power to make the appointment of the guardian of the person of the minors under the circumstances of this case.

Before considering whether section 19 (*c*) of the Guardians and Wards Act applies to the facts of this case, it must be noted that it is not suggested in this case that under section 11 of the Court of Wards Act with the previous sanction of His Excellency the Governor in Council the Court of Wards has assumed the superintendence of the person of any of these minors. In fact the estate of Dundaya and Gurlingaya has been taken by the Court of Wards under its superintendence with the sanction of His Excellency the Governor in Council; but the Court of Wards has not assumed superintendence over the person of either of these, and the provisions of section 11 of the Court of Wards Act could not apply to either of those persons, namely, Dundaya or Gurlingaya, because neither of them falls under clause (*a*) or (*d*) of section 5 of the Court of Wards Act. But apart from that consideration it is clear that so far as the present minors are concerned there is nothing to show that the superintendence over their person has been assumed by the Court of Wards. Section 19 of the Guardians and Wards Act provides, among other things, that nothing in this Chapter (*i. e.* Chapter II of the Act) shall authorise the Court to appoint or declare a guardian of the person of a minor whose property is under the superintedence of the Court of Wards competent to appoint a guardian of the person of the minor.

In the present case it is doubtful to my mind whether the property of the minors could be said to be under the superintendence of the Court of Wards. The property which is under the superintendence of the Court of Wards in the present case is the property of Dundaya and his son Gurlingaya.

Assuming, however, without admitting, that the property of the minor sons may be said to be under the superintendence of the Court of Wards it is clear that the Court of Wards in this case was not competent to appoint a guardian of the person of the minors. Section 22 of the Court of Wards Act provides that the Court of Wards may appoint guardians for the care of persons of Government wards whose persons are, for the time being, under its superintendence. Now, as I have already pointed out, it is not suggested anywhere in the letter that the person of the minors in question is under the superintendence of the Court of Wards. Therefore, the Court of Wards would not be competent to appoint a guardian of the person of these minors, and section 19 (*c*) of the Guardians and Wards Act would not apply to the facts of this case. It was open to the District Court under the circumstances to consider the question of appointing a guardian of the person of the minors.

The order is based upon the ground that the Court would have no power to appoint a guardian of the person of these minors; and the matter has not been considered on the merits in a proper manner. The mother was appointed the guardian

of the person of her children, and the Collector has objected to it, on the ground that "the mother Nagava who has now been trying to become their guardian took no care of them, and has been residing with her father in a village for some years past. It was owing to the ill-designs of her father that Dundaya sought the intervention of the Court of Wards." In brief the contention of the Collector appears to have been that it was not for the welfare of the minors under the circumstances that the mother should be appointed a guardian of their person. This matter, however, requires to be considered on the merits, and any allegation against the mother as to her conduct with regard to the children, must be proved like any other fact. In determining the question regard must be had, as required by the Guardians and Wards Act, to the welfare of the minors. The learned Judge appears to have acted upon the allegation that Nagava, according to the Collector was not well-behaved, and did not take care of the minors when they were with her as alleged by the Collector. In any case it is necessary for the District Judge to consider whether a case is made out to deprive (*a*) the son and (*b*) the daughters of the care of their mother. I am of opinion that as the learned Judge has based his conclusion upon his view of section 19 (*c*) of the Guardians and Wards Act, the matter must be remanded to the District Court for disposal on the merits.

I do not desire to express any opinion whether under the circumstances the omission to give any notice to the Collector of the first application made by the mother would have any effect upon the order made by the District Judge, and whether notice under section 11, sub-section 2 of the Guardians and Wards Act to the Collector was necessary in an application for the appointment of a guardian only of the person of the minor, nor do I consider it necessary to express any opinion whether notice to the Collector was necessary under the rules framed by this Court under the Guardians and Wards Act.

I would set aside the order made by the District Judge cancelling the order made by him on January 5, 1922, and remand the case for disposal according to law.

Costs of the appeal to come out of the estate.

Crump, J.—I agree. I should like, however, to add a few words. The object of the Legislature in enacting section 19 (*c*) of the Guardians and Wards Act appears to be to avoid a possible conflict of jurisdictions. If there is a Court of Wards competent to appoint a guardian of the person of a minor, then the jurisdiction of the District Court is to that extent ousted. But the competency of the Court of Wards in this Presidency depends upon section 22 of the Bombay Court of Wards Act, and if that section be referred to, it clearly gives power to the Court of Wards to appoint a guardian of the person only in those cases where the Court of Wards has assumed superintendence of the person and that is not the case here. Therefore, the District Judge was, in my opinion, wrong in relying upon section 19 (*c*) of the Guardians and Wards Act as having any application to the matter before him.

As regards the report made by the Collector, I would say this that I do not see how that report can be treated as evidence in the case. It is only when the Court calls upon the Collector for a report under section 40 of the Guardians and Wards Act, that it is open to the Court to treat the report as evidence, and that is not what was done in the present case.

I agree, therefore, that the grounds on which the order of the District Judge of February 25, 1922, is based, are not such as can be sustained, and I, therefore, concur in holding that the matter must be sent back to him for a legal decision in accordance with what has been said in the judgment of this Court. I would add as to the other points discussed by the learned Chief Justice in his judgment, that I agree with the opinions expressed there on those points.

K. S. D.

Order set aside;
Case remanded.

CHITU v. CHARAN SINGH.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1621 OF 1921.

April 18, 1923.

Present:—Mr. Justice Daniels.

CHITU—PLAINTIFF—APPELLANT

versus

CHARAN SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 7—Transfer by non-owner, effect of—Guardian, de facto, whether entitled to sell minor's property.

A man has no right to deal with property which is not his own, and unless he can show some right to deal with it, either as agent or guardian of the owner or trustee or the like, any transfer which he purports to make cannot bind the lawful owner. [p. 706, col. 1.]

Although a *de facto* guardian of a minor might assume important responsibilities in relation to the minor's property, he cannot by his *de facto* guardianship clothe himself with legal power to sell it. [p. 706, col. 2.]

Mula Din v. *Ahmad Ali*, 13 Ind. Cas. 976; 34 A. 213; 16 C. W. N. 338; 11 M. L. T. 145; (1912) M. W. N. 183; 9 A. L. J. 215; 15 C. L. J. 270; 14 Bom. L. R. 192; 15 O. C. 49; 23 M. L. J. 6; 39 I. A. 49 (P. C.), followed.

Second appeal from a decree of the District Judge, Agra, dated the 1st September 1921.

Mr. *N. P. Asthana*, for the Appellant.

Mr. *P. L. Banerji*, for the Respondent.

JUDGMENT.—The plaintiff-appellant claims the poperty in suit as reversioner of *Musammat* Sumitra, widow of Dule Ram. His case was that *Musammat* Sumitra came into possession of the property as a Hindu widow on her husband's death. The plaintiff and the defendant Nathi are the two reversioners to Dule Ram and are entitled to the property in equal shares on *Musammat* Sumitra's death. The reversionary right of the plaintiff and Nathi is not disputed. On *Musammat* Sumitra's death Nathi took possession of the whole of the property and executed two usufructuary mortgages. The dispute is as to how far these mortgages are binding on the plaintiff's share. The mortgages were both executed on the same day. One was for Rs. 1,500 in favour of the respondent Charan Singh and the other for Rs. 375 in favour of the respondent Khashera. The Court below has held these mortgages to be binding on the plaintiff's share to the extent of Rs. 1,142-13-9 and Rs. 232-2-2 respectively and has given the plaintiff a decree for possession subject to these amounts.

Among the pleas raised in answer to the suit was one that *Musammat* Sumitra was in adverse possession of the property. The Trial Court rejected this defence and held that *Musammat* Sumitra obtained the entire properties as the widow of Dule Ram. The lower Appellate Court came to the conclusion that part of the property was inherited by her from her husband on his death but that the major part of the property was never in Dule Ram's possession but was held by three persons Darjan, *Musammat* Phula and Jual and that *Musammat* Sumitra's possession of it was adverse. The learned Judge does not come to any finding as to how long she had been in possession of it but as the plaintiff had failed to prove that she had been in possession for less than 12 years he held that she had acquired absolute title by adverse possession. The large portion of the consideration of the two mortgages in dispute was applied to pay off previous mortgages executed by *Musammat* Sumitra while in possession of the property. The Trial Court considered the question how far these mortgages were for legal necessity and held that no portion of the consideration was for legal necessity or was binding on the plaintiff. The lower Appellate Court held that as regards the property of which *Musammat* Sumitra was in adverse possession it did not matter whether the mortgages were for legal necessity or not as she had an absolute right to encumber the property. The learned Judge, therefore, held that whatever portion of the consideration of Nathi Singh's mortgages was in lieu of previous mortgages by *Musammat* Sumitra was binding on the share of the plaintiff. This reasoning would not however apply to that portion of the property which even on the learned Judge's finding *Musammat* Sumitra inherited as a Hindu widow and one of the grounds of appeal is that the Court below has erred in not distinguishing between the two classes of property. It should have come to a finding as to what portion of the property was inherited by *Musammat* Sumitra as a Hindu widow and should have considered the question of legal necessity in

respect of this portion of the property. This plea is unanswerable and as regards the property inherited by *Musammat* Sumitra as a Hindu widow the decree of the Court below clearly cannot be sustained without a finding as to how far the debts were binding.

The second plea taken by the appellant is, that the lower Court has erred in throwing on the plaintiff the burden of proving that *Musammat* Sumitra had not acquired title by 12 years' adverse possession to the property which she did not obtain from her husband. Here again the learned Judge is certainly wrong. It is not disputed that the plaintiff and Nathi are the reversioners of the persons who were previously in possession of this property. Title, therefore, is with them and it is for the defendants who seek to avoid that title on a plea of adverse possession to establish it.

These, however, are subordinate pleas. The appellant's main plea is one which goes to the root of the case. His case is that in whatever capacity *Musammat* Sumitra came into possession of the property and whatever the nature of the debts incurred by her, Nathi was on her death admittedly only entitled to a half share in it. He was entitled to encumber that half share or deal with it in any way he liked, but he had no legal right to execute mortgages on property which was not his own and these mortgages cannot in any event be binding on the plaintiff. It seems superfluous to quote authority for the proposition that a man has no right to deal with property which is not his own and that unless he can show some right to deal with it, either as agent or guardian of the owner or trustee or the like, any transfer which he purports to make cannot bind the lawful owner. Section 7 of the Transfer of Property Act has been referred to as embodying this principle. *Mata Din* v. *Ahmad Ali* (1) was a case in which it was sought to validate a sale of property by persons who were not the owners of it by describing them as *de facto* guardians. Their Lordships of the Privy Council said that though the so called *de facto* guardian might assume important responsibilities in relation to the minor's property he could not by his *de facto* guardianship clothe himself with legal power to sell it. In one passage in his judgment the learned District Judge speaks of Nathi as the *de facto* administrator of the property but this expression is not based on anything in the evidence and merely means that Nathi was in actual possession.

The respondents-mortgagees, therefore, who seek to bind the property of the plaintiff by an alienation made by Nathi must show some principle on which that alienation can be treated as binding. This they have not attempted to do. They cannot appeal and in fact have not appealed, to sections 69 and 79 of the Contract Act as these sections will merely give Nathi a right to be re-imbursed for any expenditure incurred. It is not alleged that the mortgages entered into by Nathi were necessary in order to preserve the plaintiff's property. It is not shown that the property was in danger of being sold under the mortgage executed by *Musammat* Sumitra and indeed before the mortgagees could lawfully bring the plaintiff's property to sale it would have been necessary to implead him in the suit. It follows that the mortgages executed by Nathi are not binding on the plaintiff, and the plaintiff was entitled to an unconditional decree for possession of the property. I accordingly allow the appeal and modifying the decree of the Court below give the plaintiff-appellant an unconditional decree for possession. The appellant will get his costs throughout including in this Court fees on the higher scale.

Z. K.

Appeal allowed.

(1) 13 Ind. Cas. 976; 34 A. 213; 16 C. W. N. 338; 11 M. L. T. 145; (1912) M. W. N. 183; 9 A. L. J. 215; 15 C. L. J. 270; 14 Bom. L. R. 192; 15 O. C. 49; 23 M. L. J. 6; 39 I. A. 49 (P. C.).

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 237 AND 265 OF 1919.

April 10, 1923.

Present:—Justice Sir Asutosh Mukerjee, KT., and Mr. Justice Rankin.

SAUDAMINI DASSYA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Alluvion and Diluvion Act (IX of 1847), ss. 3, 6, scope of—Revenue Survey map, value of—Additional revenue, when can be assessed—Malikana, *meaning of*—Quasi *rent charge, whether tenure.*

Per *Mookerjee, J.*—The expression "any such new map" in section 6 of the Bengal Alluvion and Diluvion Act refers to the "new map" made according to "new Survey" as contemplated in section 3 of the Act. That section provides for periodical surveys at intervals of not less than ten years, after a Revenue Survey has been completed and approved. The object of the "new Survey" is to ascertain the "changes" that may have taken place since the date of the last survey, that is, changes by alluvion or dereliction (not changes by possession). Section 6 then imposes upon the Revenue Authorities the duty to assess what may be called added land, whenever, on inspection of the new map, it appears that land has been added to an estate paying revenue directly to Government. There must consequently be a comparison between two maps, made at an interval of not less than ten years and each showing the revenue paying estate concerned. That estate must, accordingly, be in existence as a revenue paying estate, if not before, at least on the date of the first of the two maps taken as the basis for comparison. [p. 709, col. 1.]

Section 3 of the Bengal Alluvion and Diluvion Act is all comprehensive in scope, and sections 5 and 6 both refer to all estates paying revenue directly to Government, no matter whether they were or were not in existence in 1793. What is essential to attract the application of the Act is that there should have been in the case of the estate concerned, a Revenue Survey. [p. 709, col. 2.]

The Revenue Survey map is taken as the basis of comparison, but the comparison of the maps is not conclusive. The comparison sets the Revenue Authorities in motion, and they may, then, on the best materials they can procure, proceed to assess what land they deem to be assessable. [p. 709, col. 2.]

It is only when on inspection of the new map it appears that land has been added, that there is legislative authority for assessment of additional revenue. [p. 710, col. 1.]

When the proceedings have been commenced in accordance with the statutory requirements, there are no restrictions prescribed as to the evidence to be used for the solution of the problem in controversy. What is liable to be assessed with revenue is land not previously assessed—not land which has been formed since the Revenue Survey map. There is no inflexible rule of law that the state of things depicted on the Revenue Survey map was in existence at the time of the Permanant Settlement. Proof of the existence, at a particular time, of a fact of a continuous nature only gives rise to a rebuttable presumption within logical limits that it exists at a subsequent time or has previously existed. [p. 711, cols. 1 & 2.]

The fact that the proprietor of the original estate had a right to receive *malikana* does not necessarily entitle him to an accretion. The *malikana* holder is entitled to receive periodically a specified amount from the income of land. This right may have the qualities of a rent charge but this is not sufficient to show that the land or estate is still held by him as *zemindar* immediately from Government, and unless this is established, he cannot, maintain his title to the accretion. [p. 713, col. 2.]

Per *Rankin, J.*—In every case the question what lands were included in the Permanent Settlement, is a question of fact, and not of law. [p. 715, col. 1.]

Jagadindra Nath Roy v. *Secretary of State*, 30 I. A. 44; 30 C. 291; 7 C. W. N. 193; 5 Bom. L. R. 1; 8 Sar P. C. J. 412 (P. C.), followed.

Government cannot under Bengal Alluvion and Diluvion Act levy an additional revenue from any area within the limits of a settled estate: there must be land added to the estate. [p. 716, col. 1.]

Malikana is a right to a sum of money and it is charged on the land. It may be described as a *quasi* rent charge. But the reservation by Government of a sum to be paid to Government by the immediate holder of resumed lands, which sum is to go to the persons who have refused to take settlement from Government, does not operate to prevent the new estate from being an entirely independent tenure in substitution for and in extinguishment of the *zemindar's* original interest in the newly settled lands. Physically land is added to land. In point of right, the right to the new land is *accretio* to the right to the old. A *quasi* rent charge is not tenure or *dominium*. The right to take settlement enures to the tenure-holder. [p. 717, col. 2; p. 718, col. 1.]

Appeals against the decrees of the Subordinate Judge, Backerganj, dated the 21st June 1919.

Babus *Joges Chunder Roy, Dwarka Nath Chuckerbutti, Upendra Lal Roy* and *Kunj Lal Das*, for the Plaintifis.

Babus *Surendra Nath Guha* and *Ramendra Mohan Majumdar* for the Secretary of State, for Defendant No. 1.

Babu *Narendra Chandra Bose*, for Defendants Nos. 2 to 7.

JUDGMENT.

IN APPEAL NO. 237 OF 1919.

Mookerjee, J.—This is an appeal by the plaintiffs in a suit instituted by them with a view to test the legality of an assessment of revenue made under the Bengal Alluvion and Diluvion Act (IX of 1847). The case for the plaintiffs is that the disputed lands, which have been assessed, with revenue, belonged to them as appertaining to their estate No. 4823, on the Revenue Roll of the Collector of Backerganj. They maintain that the assessment could not have been validly made under the provisions of Act IX of 1847 as the lands are not added lands within the meaning of that Statute and they ask for a declaration that the assessment proceedings are without jurisdiction, that the settlement made with the defendants by the Secretary of State is illegal and for consequential reliefs. On behalf of the Secretary of State, who is the first defendant, the claim has been resisted on the ground that the disputed lands are not included within estate No. 4823 but are accretions to estates Nos. 1721 and 1722 held by the other defendants and have been rightly assessed with revenue. The Subordinate Judge has held that the disputed lands form an alluvial increment to estate No. 4823, that the plaintiffs as proprietors of that estate are entitled to hold the lands subject to the payment of the revenue assessed, and that the settlement made with the defendants is invalid and inoperative. The plaintiff as well as the defendants other than the Secretary of State are dissatisfied with this decision. The plaintiffs have appealed on the ground that the lands are included in their permanently settled estate and are not liable to be assessed with revenue. The defendants have appealed on the ground that the lands are accretions to their estate and have been rightly settled with them. The appeal preferred by the plaintiffs (No. 237 of 1919) requires examination first, in the light of the relevant statutory provisions.

The provisions of Act IX of 1847 were analysed in the judgment of the Judicial Committee delivered by Lord Herschell in the case of *Secretary of State* v. *Fahamidannissa Begum* (1), the Judicial Committee affirmed the decision of the majority of the Full Bench in *Fahamidannissa Begum* v. *Secretary of State* (2), which had overruled in part the decision of Wilson, J., in *Suratsundari Dabi* v. *Secretary of State* (3). Act IX of 1847 was framed for the assessment of lands gained from sea or from rivers by alluvion or dereliction. Section 3 empowers the Government to direct new surveys of riparian lands, and provides as follows:

"Within the said Provinces it shall be lawful for the Government of Bengal, in all districts or parts of districts of which a Revenue Survey may have been or may hereafter be completed and approved by Government, to direct from time to time, whenever ten years from the approval of any such survey shall have expired, a new Survey of lands on the banks of rivers and on the shores of the sea, in order to ascertain the changes that may have taken place since the date of the last previous survey, and to cause new maps to be made according to such new Survey."

Section 4 lays down that the approval of the Revenue Surveys of districts or parts of districts, which may be hereafter surveyed, shall be deemed to have taken place on such day as may be specified as the day of such approval in the *Calcutta Gazette*. Sections 5 and 6 deal respectively, with the question of deduction from *jama* of estates from which lands have been washed away, and the question of the assessment of increments to revenue paying estates. Section 6, which is relevant in the case before us, provides as follows:

"Whenever on inspection of any such new map it shall appear to the local Revenue Authorities that land has been added to any estate paying revenue directly to Government, they shall without delay assess the same with a revenue payable to Government according to the rules in force for assessing alluvial increments, and shall report their proceedings forthwith

(1) 17 C. 590; 17 I. A. 40; 5 Sar. P. C. J. 291; 8 Ind. Dec. (N. S.) 933 (P. C.).
(2) 14 C. 67; 7 Ind. Dec. (N. S.) 46.
(3) 11 C. 784; 5 Ind. Dec. (N. S.) 1282.

to the Board of Revenue, whose orders thereupon shall be final."

The expression "any such new map" plainly refers to the "new map" made according to "new survey" as contemplated in section 3. That section provides for periodical surveys at intervals of not less than ten years, after a Revenue Survey has been completed and approved. The object of the "new survey" is to ascertain the "changes" that may have taken place since the date of the last previous survey, —that is, changes by alluvion or dereliction (not changes by possession); *Bibi Wakilan* v. *Deo Nandan Prosad* (4). Section 6 then imposes upon the Revenue Authorities the duty to assess what may be called added land, whenever, on inspection of the new map, it appears that land has been added to an estate paying revenue directly to Government. There must consequently be a comparison between two maps, made at an interval of not less than ten years and each showing the revenue paying estate concerned. That estate must, accordingly, be in existence as a revenue paying estate, if not before, at least on the date of the first of the two maps taken as the basis for comparison. We may usefully re-call here the following passage from the judgment of Wilson, J., in *Saratsundari Dabi* v. *Secretary of State* (3), which except in one particular, remains unaffected by the decision of the Full Bench and of the Judicial Committee in *Fahimidannissa Begum* v. *Secretary of State* (2) and *Secretary of State* v. *Fahamidannissa Begum* (1): "The object of the Act is to provide for the assessment of riparian estates from time to time, in accordance with the changes which periodical surveys may show to have taken place in their area and boundaries. Section 3 of the Act refers to a Revenue Survey which is to be approved by Government as fixing the boundaries of estates, and provides that at intervals of not less than ten years, fresh surveys of such estates may be made. Section 5 then provides for a reduction in the *suader jama* when on a comparison of two successive surveys it appears that the area of an estate has been diminished, and section 6 provides for an addition to the *jama* when on inspection and comparison of the new map land appears to have been added to the estate since the last survey. In every case the starting point is to be the Revenue Survey which, it would appear, is to be taken as representing the boundaries of the estate as they existed at the time of the Permanent Settlement, and it is apparently not open to the Revenue Authorities to go behind that survey and enquire whether in fact the boundaries at the time of settlement were not other than therein represented."

Wilson, J., in this passage, had apparently in view the case of an estate which was in existence at the time of the Parmanent Settlement of 1793. Section 3 of Act IX of 1847, is, however, all comprehensive in scope, and sections 5 and 6 both refer to all estates paying revenue directly to Government, no matter whether they were or were not in existence in 1793. What is essential to attract the application of Act IX of 1847 is that there should have been, in the case of the estate concerned, a Revenue Survey. This *prima facie* furnishes the boundaries, as presumably, though not conclusively, accurate; see the judgment delivered by Wilson, J., on behalf of the majority of the Full Bench in *Fahamidannissa Begum* v. *Secretary of State* (2), which to this extent, overruled his previous decision in *Saratsundari Dabi* v. *Secretary of State* (3). The true position is that the Revenue Survey map is taken as the basis of comparison; but the comparison of the maps is not conclusive. The comparison sets the Revenue Authorities in motion, and they may, then, on the best materials they can procure, proceed to assess what land they deem to be assessable. This view is confirmed by the observations of Lord Herschell in *Secretary of State* v. *Fahamidannissa Begum* (1), section 3, according to him, empowers the Government of Bengal, in any district in which a Revenue Survey has been completed and approved by the Government, to direct decennially a new survey of lands on the banks of rivers, and on the shores of the sea, in order to ascertain the changes that may have taken place since

(4) 59 Ind. Cas. 298; 5 P. L. J. 681; 2 P. L. T. 81.

the last previous survey and to cause new maps to be made according to such new survey. Section 6 then provides that whenever, on inspection of any such new map, it shall appear to the local Revenue Authorities that land has been added to any estate paying revenue directly to Government, they shall, without delay, duly assess the same according to the rules in force for assessing alluvial increments. Such added land cannot obviously be land which was already comprised in a Permanent Settlement but had become derelict of the sea or a river; for it would be a contradiction in terms to maintain that such land had been 'added' to the estate to which they already belonged. Lord Herschell then refers to section 5 which deals with the question of deduction from *jama* of estates from which lands have been washed away, and points out that the Act provides no machinery for making such abatement where the land was covered with water at the time of the original survey; it is only "when on inspection of the new map" it appears that land has been washed away that there is any legislative authority for making an abatement. These remarks apply equally to a case under section 6, and it is only when on inspection of the new map it appears that land has been added, that there is legislative authority for assessment of additional revenue. Lord Herschell finally adds that it would be an erroneous interpretation of Act IX of 1847 to hold that it rendered the Board of Revenue supreme and enabled them to make valid and effectual a proceeding on their part which the law had declared to be wholly illegal and invalid.

In the case before us, the history of the estates mentioned by the plaintiffs and defendants respectively has been traced. Dapdapia was a *mouza* on the bank of the Barisal river, a public navigable river, at the time of the Permanent Settlement of 1793. This *mouza* appertained to estates Nos. 1721 and 1722. Lands accreted to the *mouza* owing to the recession of the river and steps were taken in 1846 for the assessment of the new lands. At that time, the proprietors of estates Nos. 1721 and 1722 refused to take settlement with the result that the accreted lands were constituted into a new estate which was permanently settled with the predecessors of the plaintiffs on the 30th December 1848. The plaintiffs accordingly became proprietors of the new estate, which was numbered 4823, while the original estates numbered 1721 and 1722 created in 1793 remained the property of the predecessors of the defendants.

On the 2nd July 1912 proceedings were instituted by the Revnue Authorities, under section 6 of Act IX of 1847, on the allegation that new maps had been prepared for the lands of East Char Dapdapia, and West Char Dapdapia, which had been compared with the Revenue Survey Maps of 1860-61 as well as with the Deara Settlement *Chita* of 1846-47, and that from such comparison it appeared that lands had been added to estate No. 4823 which would be assessed with revenue payable to Government according to the rules in force for assessing alluvial increments. The notice, which was issued on the 3rd July 1912 mentioned, however, only the *Daimi* Settlement *chita* and not the Revenue Survey map. When the matter came to be heard before the Revenue Authorities on the 13th February 1913 three objections were urged against the assessment: (1) that the new map should have been compared with the Revenue Survey map and not with the *Daimi* Settlement *chita* prepared in 1846-47; (*ii*) that the river-bed was included in the permanently settled estate; and (*iii*) that as the District Settlement Record had been finally published and as the objectors had been in possession of the disputed area for upwards of 60 years, no proceedings for assessment could be taken under Act IX of 1847. These objections were overruled. The first objection, the Deputy Collector pointed out, was opposed to the decision of the Judicial Committee in *Secretary of State* v *Fahamidannissa Begum* (1). The second objection was held untenable, inasmuch as the Revenue Survey map showed that the river-bed was a part of the public domain and the river was excluded from the Daimi Settlement. The third objection

was manifestly groundless. The proceedings of the Deputy Collector were confirmed by the Collector on the 7th July 1914. He held that there was no foundation for the contention that only such accretions are liable to assessment as can be shown to have taken place since the date of the Revenue Survey map, and he relied upon a resolution of the Board of Revenue in a case which culminated in the litigation mentioned in *Secretary of State* v. *Narendra Nath Mitter* (5). The view taken by the Collector appears to have been approved by the Board of Revenue and settlement was made with the defendants on the 12th November 1914. The plaintiffs now contest the validity of the proceedings for assessment of revenue on the accreted lands under Act IX of 1847.

It is plain that the proceedings for assessment cannot be successfully attacked on the ground that they were not taken in conformity with the provisions of Act IX of 1847. In this case, the estate was permanently settled in 1848-49. There was a Revenue Survey in 1859-60, which was followed by a Cadastral Survey in 1901-02. Consequently, unlike the case of *Sreenath Roy* v. *Secretary of State* (6), it is shown here that the proceedings were instituted upon a comparison of two requisite maps in terms of section 6 before the Revenue Authorities set in motion the machinery at their disposal. Jurisdiction was thus assumed in compliance with the statutory requirements. It has been urged, however, that for the purpose of the assessment proceedings the Revenue Authorities were restricted to a comparison of the Revenue Survey map and the map newly prepared. This is manifestly fallacious. When the proceedings have been commenced in accordance with the statutory requirements, there are no restrictions prescribed as to the evidence to be used for the solution of the problem in controversy. That problem is, whether land has been "added" to a revenue paying estate and has not been assessed with revenue. What is liable to be assessed with revenue is land not previously assessed—not land which has been formed since the Revenue Survey map. In the determination of the question, whether the land sought to be assessed is added land, we have to determine the land included in the estate at the time of its creation as a permanently settled estate. For this purpose, the Revenue Survey map is valuable but not conclusive evidence. This is clear from the decisions of the Judicial Committee in *Jagadindra Nath Roy* v. *Secretary of State* (7), *Haradas Acharjya Chowdhuri* v. *Secretary of State* (8), *Secretary of State* v. *Maharaja of Burdwan* (9) and *Naresh Narayan* v. *Secretary of State* (10) decided on 23rd January 1923. There is no inflexible rule of law that the state of things depicted on the Revenue Survey map was in existence at the time of the Permanent Settlement. In the case first mentioned, *Jagadindra Nath Roy* v. *Secretary of State* (7), Lord Lindley pointed out that it could not be maintained as a matter of law that the *thak* and survey maps constituted sufficient proof that what was part of the bed of the river at that time was included in the Permanent Settlement of 1793, and no Court could properly act on the assumption that in 1793 a state of things existed different from what appeared from any evidence before the Court; see also *Prafulla Nath Tagore* v. *Secretary of State* (11), *Secretary of State for India* v. *Upendra Narain Roy* (12). Proof of the existence, at a particular time, of a fact of a continuous nature only gives rise to a rebuttable presumption within logical limits that it exists at a subsequent time or has previously existed. The limits of time within which the inference of continuance possesses sufficient probative force to be relevant, must obviously vary with each case, always strogest in the beginning, the inference steadily diminishes in force with

(5) 61 Ind. Cas. 91; 32 C. L. J. 402.

(6) 70 Ind. Cas. 510; 36 C. L. J. 345; (1923) A. I. R. (C.) 233; 50 C. 276.

(7) 30 I. A. 44; 30 C. 291; 7 C. W. N. 193; 5 Bom. L. R. 1; 8 Sar. P. C. J. 412 (P. C.).

(8) 43 Ind. Cas. 361; 26 C. L. J. 590; 22 M. L. T. 438; (1918) M. W. N. 28; 20 Bom. L. R. 49 (P. C.).

(9) 67 Ind. Cas. 835; 48 I. A. 565; 35 C. L. J. 92; 42 M. L. J. 61; 4 U. P. L. R. (P. C.) 1; 26 C. W. N. 619; (1922) A. I. R. (P. C.) 6; 49 C. 103 (P. C.)

(10) 77 Ind. Cas. 1048 *Infra*; (1923) A. I. R. (P. C.) 1; 32 M. L. T. 162; (1923) M. W. N. 511; 50 C. 446; 45 M. L. J. 444; 28 C. W. N. 453 (P. C.).

(11) 57 Ind. Cas. 29; 31 C. L. J. 320; 24 C. W. N. 639.

(12) 71 Ind. Cas. 849; 36 C. L. J. 536; (1923) A. I. R. (C.) 247.

apse of time, at a rate proportionate to the quality of permanence belonging to the fact in question, until it ceases or is perhaps supplanted by a directly opposite inference. In the present case, we have to determine the land included in the Permanent Settlement of the estate in 1848-49. We have, on the one hand, the *Daimi* Settlement *chita* prepared in 1846-47; we have, on the other hand, the *thak* and Revenue Survey maps prepared in 1859-60 according to the actual possession at that time. Clearly the Court is competent to consider and examine the value of all this evidence, and this is precisely the course adopted by the Subordinate Judge.

The *robokari* of the Deputy Collector Rajnarain Basak dated 29th July 1847 gives a detailed history of the proceedings then taken for the resumption and Settlement of Char Dapdapia. An Amin Golakchandra Sen was appointed to make a survey, and he prepared a map as also a *chita*. The map, which is mentioned in the *robokari* of the Deputy Collector, has apparently disappeared, but the *chita* dated the 1st, 5th and 20th April 1846 is in existence and has been produced. It cannot be overlooked that we have thus placed at our disposal the very materials which formed the basis of the Permanent Settlement of the estate in 1848. There was much controversy in the Trial Court, whether it was possible to relay the *dags* of the *chita* of 1846. The Civil Court Amin appointed by the lower Court to prepare a map of the locality has re-produced the lines of the *thak* and the Revenue Survey and the District Settlement maps; but the Amin found himself unable to compare the *chita* in the locality. On behalf of the Secretary of State, however, a surveyor Pyarimohan Hazra was examined to show that the *chita* could be and had been relaid. He had worked under the Deputy Collector in charge of the proceedings under Act IX of 1847. In connection therewith the surveyor had compared in the locality the *chita* of the West Chor as also of the East Char and had prepared a map showing the line of the river at the time of the *chita*. He further placed the Revenue Survey and the *thak* lines on the District Settlement map and finally prepared a consolidated map. A careful examination of all these materials shows that the river line as it was in 1846 can be ascertained with sufficient precision, although it may not be practicable to fill up all the details in respect of each plot depicted on the *chita*; this, however, as pointed out by the Judicial Committee in *Haradas Acharjya Choudhuri* v. *Secretary of State* (8) is not always essential. The Subordinate Judge came to the conclusion that the finding of the river line was a much more feasible task than the placing of all the *dags* of the *chita*, and he found no difficulty in ascertaining the contour of the river in the locality, which was receding in a peculiarly regular way. The Subordinate Judge further observed that as the river is known to have been receding, the *thak* map made in 1860, that is, 12 years after the Permanent Settlement in 1848, could not be assumed to furnish an accurate picture of the estate in its inception. Upon a scrutiny of all the criticisms which have been directed against the comparative maps prepared in the Diara proceedings, there is little doubt left that they are untenable and that the river line depicted therein may be safely accepted as accurately reproduced for all practical purposes. In this view the conclusion of the Subordinate Judge that the disputed lands do not appertain to estate No. 4823 must be upheld.

IN APPEAL NO. 265 OF 1919.

This is an appeal by the defendants other than the Secretary of State, against the decree of the Subordinate Judge in so far as it declares that the settlement made with them is *ultra vires* and invalid. They contend that the circumstance that the predecessors of the plaintiffs accepted Settlement in 1848 does not entitle the plaintiffs to the accretions now in dispute; and they claim settlement of those accretions on the ground that as they are still in receipt of *malikana* as proprietors of the parent estate, their refusal to accept settlement in 1848 does not debar them from successfully setting up title by accretion. This contention has been overruled by the Subordinate Judge as untenable.

Section 1 of the Bengal Alluvial Land

Settlement Act (XXXI of 1858) is in the following terms:—

"1. When land added by alluvial accession to an estate paying revenue to Government becomes liable to assessment, if to be so agreed on between the Revenue Authorities and the proprietor or proprietors, the revenue assessed upon the alluvial land may be added to the *jama* of the original estate; and in such case a new engagement shall be executed for the payment of the aggregate amount, and that amount shall be substituted in the Collector's rent-roll for the former *jama* of the original estate.

"If the proprietor or proprietors object to such an arrangement, or if the Revenue Authorities are of opinion that a settlement of the alluvial land cannot properly be made for the same term as the existing settlement of the original estate, the alluvial land shall be assessed and settled as a separate estate with a separate *jama*, and shall thenceforward be regarded and treated as in all respects separate from and independent of the original estate, whether the separate settlement be made with the proprietor or proprietors or the land be let in farm in consequence of the refusal of the proprietor or proprietors to accept the terms of settlement.

"The separate settlement may be permanent, if the settlement of the original estate is permanent."

Section 3, which has been repealed by the Repealing and Amending Act (I of 1903), provided that "every separate settlement of alluvial land heretofore made shall be as good and effectual for the purposes specified in section 1 as the same would have been if made subsequently to the passing of Act XXXI of 1858." Section 1 leaves no room for controversy that when alluvial land has been settled as a separate estate with a separate *jama*, it shall thenceforward be regarded and treated as in all respects separate from and independent of the original estate. Consequently, when in 1848, a separate estate was created and settled with the predecessors of the plaintiffs, by reason of the refusal of the predecessors of the defendants, the new estate became a separate estate independent of the original estate in all respects. The fact that the proprietors of the original estate had a right to receive *malikana* does not affect the question. As pointed out by Peacock, C. J., in *Bhoolee Singh* v. *Neemoo Belco* (13), *malikana* is a right to receive a portion of the profits of the estate for which the Government have made a settlement with another person, the real proprietor having neglected to come in and make a settlement. In the language of section 44 of Regulation VIII of 1793 it is an allowance in consideration of proprietary rights; see also *Heeranund Sahoo* v. *Ozeerun* (14), *Govind Chunder Roy* v. *Ram Chunder* (15). No doubt, *malikana* has sometimes been described as an "unalienable right of proprietorship" (Fifth Report, Vol. II p. 152, Vol. III, p. 180; Field on Bengal Regulations, p. 51). But this does not justify the inference that a person in receipt of a *malikana* allowance under section 5 of Regulation VII of 1822, even though he be regarded as the holder of "a distinct proprietary right constituting an interest in land" can be deemed to be a person to whose land or estate alluvial accretion has been annexed, within the meaning of section 4 of Regulation XI of 1822. The *malikana* holder, it may be conceded, is entitled to receive periodically a specified amount from the income of land; this right may have the qualities of a rent charge; but this is not sufficient to show that the land or estate is still held by him as *zemindar* immediately from Government, and unless this is established, he cannot maintain his title to the accretion. In this view, the claim put forward by the defendants must be held to have been rightly dismissed.

The result is that the appeal by the plaintiffs, No. 237 of 1919 is dismissed with costs in favour of the Secretary of State, while the appeal by the defendants, No. 265 of 1919 is dismissed with costs in favour of the plaintiffs.

IN APPEAL No. 237 OF 1919.

Rankin, J.—This is the plaintiffs' appeal from a decision of the Additional Subordinate

(13) 12 W. R. 498; 4 B. L. R. A. C. J. 29.
(14) 6 W. R. 151 on appeal 9 W. R. 102.
(15) 19 W. R. 94.

Judge of Bakarganj. They complain now of so much only as holds them liable to assessment of additional revenue in respect of that portion of their *char* lands which was included as belonging to them by the Revenue Survey map of 1860. Proceedings under Act IX of 1847 were instituted in respect of the lands in 1912. By 1915 these had resulted in a finding by the Revenue Authorities that additional revenue was asssessable in respect of some 160 acres. As to a portion of this area there is not now any complaint as it has to be conceded that since the Revenue Survey map of 1860 some lands have been added by alluvion. The petitioners object, however, to being assessed to additional revenue in respect of any lands shown as belonging to their estate by the map of 1860. They say that the whole of such lands were, or must be deemed to be, included in the estate, numbered 4823 permanently settled in 1848 with their predecessors-in-title. The burden of proving this is initially on them, but, if they do prove it, the Civil Court has jurisdiction to give relief and will not omit to do so. If they do not prove it, then the mills of the machinery of the revenue law must continue to grind. Upon the question of fact the Trial Court has found against the plaintiffs; but this is a first appeal and it turns entirely upon the correct inferences to be drawn from maps and documents. The oral evidence adduced by the plaintiffs fails—not unnaturally—to contribute anything of value as regards the state of the lands before 1860.

It may be pointed out that if the petitioners fail to show that portion of the area, assessed as having been added to the petitioners' estate, was really comprised in the estate itself, they cannot hope to succeed in showing otherwise that the revenue proceedings have been *ultra vires*. The procedure laid down by Act IX of 1847 has been adopted, new maps have been made, inspection does show that some new lands have been added. The enquiry is solely as to amount.

The lands in question are really two *chars* thrown up by the River Barisal. They are, and have long been, known as East Char Dapdapia and West Char Dapdapia. From a *robokari* of 29th July 1847 it appears that they attracted the attention of the Collector of the District in 1818 and proceedings were taken for assessment to revenue under Bengal Regulation II of 1819 and Bengal Regulation III of 1828. In 1832 the Collector decided that they were not within the Decennial Settlement (*i. e.* Permanent Settlement of 1793) and after contest this was affirmed by the Commissioner in 1845. The lands now in question were found to be alluvial accretions to estates Nos. 1721 and 1722. In 1845 one Golok Chundra Sen was appointed Amin to make a survey and his field books of April 1846 are in evidence. He took and recorded measurements: he classified the lands and prepared a *jarip jamabandi*, or Rent Roll with particulars of holdings. His work was checked in December 1846 by a further inquiry on the spot; it was supervised by a Deputy Collector; and it was acted on in 1848 when the *chars* were permanently settled. Much of the present contest is solely due to the fact that although, as the appellants contend, a map was almost certainly prepared from the Amin's field books at the time, it has not in the present proceedings been produced. Neither side is in a position to complain of this and at this late stage of a long litigation the evidence must be taken as it stands.

When in 1848 settlement was effected of the lands found to have accreted the *zemindars* or proprietors of the estates Nos. 1721 and 1722 refused to take settlement and the petitioner's predecessors-in title who were *shikmi talukdars* holding under the proprietors and who were found in possession of the accreted land were given settlement and thus became immediate holders under Government by a new tenure of a new estate numbered 4823. The present contest is entirely between the owners of this new estate No. 4823 and the Secretary of State as to whether the whole of the area appearing twelve years afterwards—*i. e.*, by the Revenue Survey map of 1860—to belong to this estate was in fact comprised in the Settlement

of 1848 or whether part thereof was added to that estate by alluvion between 1848 and 1860. The learned Vakil for the appellants takes his primary stand upon the map of 1860 as affording a presumption that the whole of the land was comprised in the settlement. (He points out that from 1860 down through the years until 1912 Government took no steps to claim additional revenue from his clients). He concedes that the effect of this map may be overborne by positive proof that the map was wrong. His complaint is that the Trial Court had no reason adequate in strength and certainty for refusing to accept the map of 1860 as correctly showing the limits of estate No. 4823 settled in 1848. The field books prepared by Golok Chundra Sen in 1846 are lacking in sufficient detail and precision to enable all the *dags* in these two *chars* to be drawn upon a map. In these circumstances it is said that the Trial Court had insufficient grounds for placing the new lines of 1848 along points substantially short of the new lines of 1860 *i. e.*, broadly speaking, to the southward of the 1860 lines.

Now the argument on behalf of the appellants as to the presumption afforded by the map of 1860 requires to be carefully perused and kept within the decisions. "In every case the question what lands were included in the Permanent Settlement is a question of fact and not of law": *Jagadindra's case* (7). A Revenue Survey map is plainly admissible in evidence. Primarily the map of 1860 is evidence of the state of things in 1860. When the question is as to the state of things in 1848 evidence of the position in 1860 is valuable evidence of facts relevant to that issue. Even in the absence of any other evidence *e. g.*, of any more direct evidence a map of 1860 will, in general but not always, afford a ground of inference as to 1848 upon which the Court can act. That is to say, the Court will be prepared in the absence of reason to the contrary not only to accept it as true account of the facts of 1860 but even as showing the position at the date of settlement. In many cases indeed the state of things at the Permanent Settlement of 1793 has been freely inferred from map of 1860. But when the Revenue Survey map is not the sole evidence relevant to the question as to what happened at the date of settlement then it is necessary to be on one's guard against what is *prima facie* an error and very commonly an invidious error,—the process, namely, of taking one piece of evidence by itself, founding doctrines of onus upon that, and calling upon the other facts in the case to dislodge the presumption. Everything depends upon the right so to start by selecting one fact rather than another. Thus in *Jagadindra's case* (7) *thak* and survey maps of 1851-3 showed what then was the bed of the Brahmaputra river as included in the Permanent Settlement of 1793. The Judicial Committee held: "It is difficult to suppose and it ought not to be assumed that those lands were included in the lands permanently assessed in 1793" and they refused to save the correctness of the map by assuming that in 1793 the river had flowed over other land. "When the question arises whether lands shown on a particular *thak* or survey map made since 1793 were or were not included in the lands charged with the assessment permanently fixed in 1793 the inquiry is at once enlarged; and it would not be right in point of law to direct the Judge of first instance that he ought in all cases to act on the last *thak* or survey map and to treat it as decisive in the absence of evidence to the contrary."

The question in the present case is whether the appellants on a fair view of the whole evidence have succeeded in showing that all the land up to the river line of 1860 was included in the Settlement of 12 years earlier. The evidentiary value of the *thak* and Survey maps is in this case a special problem depending on the circumstances and on the other evidence, some of which is more direct.

The evidence as to 1846 may be first considered from the point of view of area. The Amin's field books show that the total quantity of land "resumed, by the Hon'ble Company" was as follows (I leave out minor fractions). (I) West Char 4 *drones* 7 *kanis*. (II) East Char 3 *drones* 10 *kanis*. The total land resumed was 8 *drones* 2 *kanis*. The petitioners predecessors-in-title took

settlement of the whole area of the West Char with its 56 *dags* as measured by the Amin. Of the East Char they took settlement of 1 *drone* 5 *kanis* only, the balance being given in settlement to other people as accretions to other subordinate tenures. Taking both *chars* together the area settled with the petitioners' predecessors in 1848 was 5 *drones* 13 *kanis* (=175.5 acres). Of this over 15 *kanis* was waste land unfit for cultivation and the revenue was arrived at by classfying the culturable land and assessing each class at an appropriate rate.

When we come to 1860 map No. 5 is the *thakbust* map of the West Char and it can be read easily enough with the *thakbust* statement (p. 56 of paper-book in Appeal No. 265 of 1919). That statement gives the area as 224 acres for this *char* alone. As regards the East Char it appears in like manner that the area in this *char* belonging to estate No. 4823 was at this date over 38 acres, the total area as I understand the statement being 145 acres for this *char*. There can I think be no doubt on the evidence (1) that the plaintiffs have not been assessed on any land of which they are not in possession or of which they are in possession by any other right, (*ii*) that before arriving at the additional assessment deduction has been made for the full amount of the areas described in the documents of 1846 and 1848 as the area settled with them.

The learned Vakil for the appellants has pointed out that under Act IX of 1847 the position is quite different from that which under the Bengal Tenancy Act may give rise to a claim by a landlord for additional rent. Government cannot under Act IX levy an additional revenue from any area within the limits of a settled estate: there must be land added to the estate. It is not necessary to consider whether the settlement of 1848 was in the case of either *char* a settlement by description of parcels or a settlement by area. Where a holding is described or referred to it may often occur that a statement of area if inaccurate has no effect. In the present case, however, there is no reason requiring any one to suppose that the measurements of 1846 as to area were gravely at fault. It is much more probable that the river which is known to have been changing before 1846 and after 1860 did not cease to change between 1848 and 1860 in like manner. One must, therefore ascertain whether what may be broadly called the southern line of 1846-8 can be ascertained. If it cannot the argument as to area has no force. If it can, then the next thing to ascertain is whether the river line of 1846-8 can be relaid in whole or in part so that with reasonable certainty it may be said that the original limits of of estate No. 4823 did not at all events go beyond that.

Now it is hardly open to a serious contest that the datum line of 1846, the line dividing the accreted lands from the lands already settled, is little likely to have fallen into oblivion or even into obscurity between 1846 and 1860. Prior to 1845 sometime had apparently been spent in litigating over this and the measurement, description, classification and assessment of the lands has throughout been done with the assistance of the plaintiff's predeces or-in-title. The *thakbust* statements and *thak* maps (2014, 2019) give the boundaries of the adjacent *mouzas* and the Amin's measurements were made in the presence of the parties found to be in possession. The *thak* maps of the adjacent *mouzas* are also in evidence. It is not known whether the map of 1848, if there was one, was utilised or not; but if the appeal is to the maps of 1860 it seems hardly reasonable to begin by supposing that the new estate No. 4823 was credited therein with land that had for a long time been settled as part of other estates still less with acres and acres of such land. When one looks to the evidence as to the natural features of the locality such an assumption is seen to be most unreasonable. The *khals* and *halats* mentioned in the field books, the difference of level between the *char* and the *asli* lands, the correspondence of certain *dags* when measured with the figures given in the field books are sufficient in the case of both *chars* to rebut any notion that the proceedings of 1860 to define estate No. 4823 were based on any error as to the lines dividing it from the parent estates. It is quite true that the *shikmi talukdars*

held lands in the parent estates but this fact does not lead one to suppose that the *thak* maps are likely to be wrong as to the boundary of the new estate granted to them.

Now the attempt to find from the field books the river line of 1848 discloses in the case of each *char* very convincing corroboration of the view adopted in the recent settlement proceeding. The Civil Court Amin endeavoured to relay all the *dags* from the details afforded by the field books of 1846 and came to the conclusion that this could not be done. He was troubled, not so much by the task of finding the southward boundary of estate No. 4823, as by the fact that the *dags* as re-laid on the settlement map were not in a number of instances consistent in all respects with the details given in the field books. On certain assumptions, however, he indicated the river line of 1848 as regards the East Char for a certain distance, but being unable to relay the *dags* with certainty his view was that the riverbank of 1848 could not be relaid from the field books in the case of either *char*. He does not seem to have attempted such a task before with materials quite so difficult. He gave evidence however at the trial identifying certain *dags* or the field books with those shown on the settlement map. The witness whose evidence most impressed the learned Subordinate Judge was Peary Mohun Hazra a surveyor under the Barisal Collectorate, who on the maps I and II, drew the yellow lines representing the river bank of 1846. If the *thakbust* statement (B. 5) and the *thak* map (No. 4) of the East Char be taken, it will be seen that the estate No. 4823 consisted of 7 strips of land, all save one (Chauk No. 6) being of a simple rectilinear configuration. Now field book, Exhibit D, gives the measurements of the south to north line for a great many of the *dags* described and a good many of them are described as lying east of other *dags* and as bounded on the north by the river. Strips belonging to other estates than No. 4823 lie alongside strips belonging to No. 4823; in the case of this *char* the *rupor asli* line is particularly plain and I do not doubt that the learned Judge was quite rightly convinced by Peary Mohun Hazra that the river line of 1848 could be placed with reasonable certainty from the field books if they are taken together with the other evidence. The Amin in his evidence identified a good many *dags* in this *char*. As regards the West Char the *Doul* of 1848 and the *thakbust* statement of 1860 suggest that something like 150 acres has grown meanwhile into 224. The question is whether Exhibit C contains substantial indication when compared with the locality of the river line 1848. Now the field book shows that *dags* Nos. 38 and 46 had the river as their north boundary; that *dags* Nos. 1, 2, 3 and 6 had it as their western boundary, that east of *dags* Nos. 5 and 6 there was *khal*, that *dag* No. 27 was a *khal*, that west of *dag* No. 7 there was a *khal*, that *dag* No. 8 west of *dag* No. 7 was a *khal*. The measurements of the following *dags*—to mention only a few—tally with the existing actual measurements, Nos. 9, 10, 11, 28, 44, 45, 46. It seems to me that from these circumstances all interlinked and re-enforcing each other it may be taken as well-established that the line drawn on map (1) as the river line of 1848 is by no means an imaginary line but one which included the whole of the land settled in 1848. The *thak* and Survey maps of 1860 have not been put aside but have been used together with other and more direct evidence to establish the facts of 1848. I think that the plaintiff's appeal fails.

IN APPEAL No. 265 OF 1919.

This appeal is brought by defendants Nos. 3 to 6 who with the non-contesting defendants Nos. 2 and 7 own the *zemindari* interest in the parent estates Nos. 1721 and 1724. The land settled with the plaintiffs' predecessors in 1848 was land which had accreted to these estates. The *zemindars* having refused to take settlement of the accreted lands settlement was made with the *shikimi talukdars* (*i.e.*, the plaintiffs' predecessors) but *malikana* was reserved. The nature of a right to *malikana* has been explained by Sir Barnes Peacock in *Bhoalee Singh* v. *Neemoo Behoo* (13). It is a right to a sum of money and it is charged on the land. It may be described as a *quasi* rent-charge. But the reservation by Government of a sum to be paid to Government by the immediate holder under Govern-

GOPAL SARAN NARAYAN SINGH v. SITA DEBI.

ment, of resumed lands, which sum is to go to the persons who have refused to take settlement from Government, does not, in my opinion, operate to prevent the new estate from being an entirely independent tenure in substitution for and in extinguishment of the *zemindar's* original interest in the newly settled lands. Physically land is added to land. In point of right, the right to the new land is *accretio* to the right to the old. A *quasi* rent-charge is not tenure or dominium. The right to take settlement enures to the tenure-holder (*Cf.* section 4 of Bengal Regulation XI of 1825).

I am of opinion that the learned Subordinate Judge arrived at a correct conclusion and that this appeal also should be dismissed.

K. S. D. *Appeals dismissed.*

PATNA HIGH COURT.

MISCELLANEOUS APPEAL NO. 78 OF 1923.
CIVIL REVISION NO. 142 OF 1923.
July, 27, 1923.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Kulwant Sahay.

Maharaj Kumar GOPAL SARAN NARAYAN SINGH OF TIKARI—OPPOSITE PARTY—APPELLANT

versus

SITA DEBI—PETITIONER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 151— *Inherent power of Court, extent of—Order directing defendant to pay to plaintiff portion of amount in dispute, legality of.*

Section 151 of the Civil Procedure Code saves the Court's inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court, but there is no rule of law or equity which requires, in the interests of justice, that a plaintiff suing to enforce a contract for the payment of money, where the claim is disputed, should be awarded a portion of the amount claimed before his right has been established by the suit brought for that purpose. A Court has, therefore, no jurisdiction to make such an order in the exercise of its powers under section 151 of the Code. [p. 720, col. 1.]

Revision from an order of the Subordinate Judge, Gaya, dated the 29th March 1923.

Messrs. *S. Ahmad, N. K. Prasad II,* and *H. L. Nandkeolyer,* for the Appellant.

Messrs. *K. B. Dutt* and *B. N. Mitter,* for the Respondent.

JUDGMENT.

Miller, C. J.—In this case there is both an appeal and an application in revision from an order of the Subordinate Judge directing that the defendant should pay to the plaintiff an allowance of Rs. 1,250 per month until the disposal of the suit. The plaintiff brought the present suit against the defendant the Maharaj Kumar Gopal Saran Narayan Singh of Tikari to enforce a charge upon certain properties belonging to the defendant which were charged with the payment of an annuity of Rs. 36,000 per annum payable by monthly instalments of Rs. 3,000 under a deed granted by the defendant to the plaintiff in the year 1913 and under a further deed of the year 1917 whereby a portion of the annuity amounting to Rs. 15,000 per annum was made permanent and heritable. The plaintiff who is by birth an Australian British subject was married to the defendant in the Hindu form at Lucknow in 1909.

The plaint in the suit was filed on the 26th January this year and on the following day a petition out of which this application arises was presented to the Subordinate Judge of Gaya praying that a Receiver might be appointed of the property charged with the payment of the annuity and that he should be directed

to pay to the plaintiff the sum of Rs. 3,000 per month, or such other sum as the Court should think fit pending the final determination of the suit and, further, that he should be allowed to sell a sufficient portion of the property to pay the plaintiff that portion of the annuity which was in arrears. It appears that from the date when the first bond was executed in 1913 up to September 1921 the annuity had been regularly paid although sometime before 1917 when the second deed was executed the plaintiff and defendant separated and were living apart. The written statement has not yet been filed but it appears from the defendant's petition in objection to the application that he challenges the validity of the instruments sued on. He further denies that the plaintiff was his lawfully wedded wife. It is important to bear in mind, however, that the suit is not one for maintenance nor is there any claim for alimony *pendente lite*.

The learned Subordinate Judge before whom the application came considered that it was not a case for appointing a Receiver apart from any immediate right which the plaintiff might have to be paid the annuity or any portion thereof. The only ground upon which the Court was asked to appoint a Receiver was that it was feared that the defendant might either wilfully or through lack of funds refuse or neglect to pay the Government revenue upon the property charged, and that in consequence the plaintiff might lose her security. No instance was alleged in which the defendant had on previous occasions defaulted in payment of revenue nor was anything suggested whereby it might be presumed that the defendant would act in the manner which the plaintiff feared. In order to meet the plaintiff's apprehensions the defendant undertook during the course of the hearing of the application before the Subordinate Judge to deposit in Court one month before the due date of the payment of revenue the *chalan* shewing the payment, and, he having given this undertaking, the learned Subordinate Judge thought that was quite sufficient to meet any apprehension on the part of the plaintiff that the property might be put in jeopardy by the revenue not being paid, and in these circumstances he refused to appoint a Receiver.

With regard to the other point, namely, whether he should order the defendant to pay to the plaintiff a sum of Rs. 3,000 or a smaller sum pending the hearing or the suit, he considered that under the provisions of section 151 of the Civil Procedure Code he was entitled to make the order prayed. He, therefore, passed an order that the plaintiff should until the disposal of the suit get an allowance from the defendant of Rs. 1,250 per month.

From that decision the present application has been brought. It has been pointed out to us that there is no right of appeal from an order made under section 151. There is also, however, an application in revision asking us to set aside the Judge's order on the ground that it was made without jurisdiction. As I have already stated this is not an application for maintenance nor is it an application for alimony *pendente lite*. So much is admitted by the plaintiff. She relies entirely upon the instruments created in her favour in 1913 and 1917 and in the suit she is seeking solely to enforce the charge then created upon the property and for present purposes the question that she is, or claims to be, the lawfully wedded wife of the defendant is immaterial. The learned Government Advocate on behalf of the appellant has argued that the Subordinate Judge was acting without jurisdiction in passing the present order and he contends that the provisions of section 151 of the Civil Procedure Code, although they preserve the inherent powers of the Court to pass orders in the interests of justice, are confined to matters of procedure only and do not allow a Judge by passing an order in favour of one or other of the parties really to decide the suit or any part of the suit before it has come before him for trial. Before such an order as the present could be passed it would have to be decided that the plaintiff was actually entitled under the documents upon which she relies to the charge which she is claiming. It seems to me that the

only ground which would justify an order compelling the defendant to pay the annuity or a portion thereof to the plaintiff is that the defendant's liability on the bonds has been established. That liability, however, cannot possibly be determined until the evidence is taken and the suit heard and decided. There appears to me to be no ground disclosed in this case, and certainly no authority has been cited before us to justify the learned Subordinate Judge in passing an order granting the plaintiff a portion of the relief claimed before the suit has been tried, and in the absence of any authority supporting such a contention it seems to me that we ought not to allow the present order to stand. Section 151 of the Code saves the Court's inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court, but I am not aware of any rule of law or equity which requires, in the interests of justice, that a plaintiff suing to enforce a contract for the payment of money, where the claim is disputed, should be awarded a portion of the amount claimed before his right has been established by the suit brought for that purpose. In my opinion the Subordinate Judge had no jurisdiction to make the order and it should be set aside.

The learned Counsel for the respondent contended, however, that in any case he was entitled to a Receiver and that the learned Subordinate Judge had in fact ordered that a Receiver should be appointed if the defendant failed to carry out the order which he had made. That is hardly stating correctly the effect of the Subordinate Judge's order. He refused to appoint a Receiver on any general grounds or upon the grounds disclosed in the petition because he thought it was sufficient if the defendant gave an undertaking, which he did to file in Court the *chalan* shewing the receipt of the Government Revenue one month before the due date, the fear of non-payment being the only ground upon which a Receiver had been asked for. He, however, did order a Receiver to be appointed in the event of the defendant failing or refusing to pay to the plaintiff the Rs. 1,250 per month which he had ordered him to pay, but the appointment of the Receiver in that case was merely for the purpose of carrying out the learned Subordinate Judge's order directing the payment of the money. I have listened to the learned Counsel for the respondent on this question of the appointment of a Receiver and it does not seem to me that in the circumstances of the present case, and having regard to the undertaking given by the defendant, any good ground has been made out for appointing a Receiver at the present moment. If, however the defendant should fail to comply with his undertaking to deposit the revenue *chalans* within the time stipulated then it will be open to the plaintiff to make a further application to the Court asking the Court to re-consider the question and to appoint a Receiver in order to preserve the property. In my opinion the application succeeds and the decision of the learned Subordinate Judge will be set aside. The application in revision is allowed with costs. Hearing fee one gold *mohur*. The appeal is dismissed.

Kulwant Sahay, J.—I agree.

Appeal dismissed.
Application allowed.

Z. K.

JANG BAHADUR *v.* EMPEROR.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPLICATION NO. 430 OF 1923.

November 13, 1923.

Present:—Mr. Wazir Hasan, A. J. C.

JANG BAHADUR AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 144, scope of—Immediate action, when justified—Expression of opinion in miscellaneous proceedings—Main case, effect on—Transfer, grounds for.

The gravamen of the provisions of section 144, Criminal Procedure Code, consists in providing speedy remedy in cases of emergency and a Magistrate is justified in passing an *ex parte* order under sub-section (2) of the section immediately on receiving a Police report if he is satisfied that immediate action is necessary. An aggrieved party can move the Court for a rescission or alteration of the separate order under sub-section (4). [p. 722, col. 2.]

The mere fact that a Court has expressed a *prima facie* opinion in a miscellaneous proceeding on a matter which is also in issue in the main case does not show that it has prejudged the main case itself. [p. 723, col. 2.]

In the course of a trial under sections 147 and 323, Indian Penal Code, after a charge had been framed against the accused, the Magistrate received a Police report and passed an order under section 144 of the Criminal Procedure Code. The accused applied for a transfer of the case on the ground that by passing the aforesaid order the Magistrate had formed his conclusions with regard to the case against the accused:

Held, that inasmuch as the Magistrate had jurisdiction to entertain the report he was justified in taking action under section 144 of the Criminal Procedure Code and that the expression of his opinion in that matter was not a sufficient ground for transfer of the case. [p. 722, col. 1.]

Mr. *A. P. Sen*, for the Applicant.

The Government Pleader, for the Crown.

Pandit *Jagat Narain*, for the Complainants.

ORDER.—This is an application under section 526 of the Code of Criminal Procedure for the transfer of a case pending against the applicants under sections 147 and 325 of the Indian Penal Code in the Court of Mr. Imamuddin Hyder, Sub-Divisional Maigstrate of Bahraich. The ground of the application is that in proceedings arising out of section 144 of the Code of Criminal Procedure against these applicants the Magistrate has formed his opinion with regard to the issue of possession of immoveable property in respect of which the case under sections 147 and 325 of the Indian Penal Code is still *sub judice* in the same Court.

The first witness for the prosecution in the case for the transfer of which this application is made was examined on the 1st August 1923. The evidence thus begun was continued to the 6th of the same month. On the 7th August 1923 an application for adjournment was made on behalf of the accused. The reason for this application was that the accused desired to move the District Magistrate for the transfer of the case from the Court in which it was pending. The adjournment asked for was granted and the 20th August 1923 was fixed for the hearing of the case. An application for transfer was made to the District Magistrate but he refused to accept it. The case again came up for hearing on the 20th August 1923. On that date an application asking for an adjournment of the trial was made on behalf of the accused, the reason stated being that the accused wanted to move this Court for the transfer of the case. The Court again acceded to the prayer and adjourned the case to the 4th September 1923. No application was, however, made to this Court. The case accordingly came up for hearing on the 5th September 1923. The evidence for the prosecution was again begun and finished on the 7th of the same month and on the last mentioned date the Court framed charges against the accused under the sections already stated. It may be mentioned here that the witnesses for the prosecution were cross examined on behalf of the accused as they were produced from time to time. After framing the charge they again asked that they might be given an opportunity to exercise their right of further cross-examination. This was acceded to. The case was fixed for the 13th September 1923. An application was again made for adjournment. The reason for this was stated that the accused were not ready to proceed with the cross-examination. The adjournment was refused. The case was then taken up on the 14th September 1923 and on this date nothing seems to have taken place for the reason that the accused stated that they could not proceed with the

cross-examination because of the absence of their Pleader. Apparently the Court again yielded to this frivolous excuse on the part of the accused and fixed the following day for proceeding with the case. On this date nothing happened better. The Pleader was again absent and adjournment was again asked for. The Court again yielded and fixed the 17th September 1923 for the further progress of the case. On this last mentioned date some of the accused did not appear and the reason for their absence as stated then was that they were ill. The 19th September 1923 was then fixed and the prosecution witnesses were cross-examined for the prosecution right up to the 29th September 1923 on which date the evidence for the prosecution was finally closed. Between the 19th September and the 29th September, that is, on the 22nd of that month, the Magistrate in whose Court this case was and is pending received a report from the Police station Bhinga. The Magistrate perused the report and passed an order on the 23rd September 1923 under section 144 of the Code of Criminal Procedure.

It is urged that in disposing of the report and in passing the order under section 144 the learned Magistrate seems to have formed his conclusions with regard to the case of riot then pending against these applicants in his Court. On the question whether he has definitely formed any opinion or not on the merits of the case under sections 147 and 325 of the Indian Penal Code I will give my views later. It appears to me that in the circumstances the Magistrate would have been guilty of slackness in the performance of his duty if he had delayed a moment longer the disposal of the subject-matter of the Police report. That he had jurisdiction to entertain that report and to act under the provisions of section 144 of the Code of Criminal Procedure is not disputed. Being seized, therefore, of the report and possessing the jurisdiction to pass orders which he thought fit in respect of that report he had no alternative left but to decide as to the course of his own action in that behalf. The Police report indicated, as the Magistrate says in the order which he passed under section 144, that the case was one of emergency and it may be mentioned that the gravamen of the provisions of section 144 consists in providing speedy remedy in cases of emergency. The Magistrate was, therefore, justified in taking action under that section without loss of time if in his opinion it was a fit case which required speedy remedy and as I read the order which he has passed in this behalf I am convinced that he entertained no doubt that immediate prevention was necessary. Having formed that opinion what else could he do except to pass an *ex parte* order under sub-section 2 of the section 144. As the record reveals the facts to me I hold not only that he acted within his jurisdiction in this matter but that he has acted rightly too. The law makes provisions for rescission or alteration of any *ex parte* order passed under sub-section 2. If these applicants found themselves in any manner prejudiced by the *ex parte* action of the Magistrate, they could have moved him under sub-section 4 of the same section asking for rescission or alteration of that order and I have no doubt that the learned Magistrate would have given them a hearing as required by law. But these applicants did nothing of the kind and from this conduct of theirs I think I am justified in drawing the inference that they had really no substantial grievance as against the action of the learned Magistrate. It was suggested that the learned Magistrate should have sent the Police report for disposal either to the District Magistrate or to some other Magistrate in the district competent to entertain it. That he might have done it need not detain us at all. The fact remains that he has not done it. In my opinion he should have not done it considering the emergent nature of the allegations, and as I have said before, it was his duty not to have delayed the disposal of this report a moment longer.

As to the expression of opinion on the question of possession in proceedings under section 144 of the Code of Criminal Procedure which was also the question in the riot case, a Court has often to pre-

judge a case for the purpose of miscellaneous proceedings but such a judgment is always founded on materials which afford a *prima facie* ground in support of the opinion thus formed. Take for instance cases in Civil Courts in which applications for injunction or for appointment of a Receiver are frequently made. A decision in such miscellaneous matters does not affect the judgment arrived at on the merits of the main case. No Court can refuse to exercise a jurisdiction which is vested in it when that jurisdiction is invoked and the learned Magistrate did nothing more than exercising the jurisdiction with which he was vested. In this particular case it is a matter of some importance that the order under section 144 happened to be passed after the charges under sections 147 and 325 of the Indian Penal Code were framed against these applicants. The case for the prosecution, as I am told, and this is not disputed, is that the opposite party is in possession of the lands in dispute in respect of the crops of which the proceedings under section 144 came up and in respect of which the riot with which these accused were charged was committed. The law lays down in the provisions of section 254 of the Code of Criminal Procedure specific ground for the framing of a charge aginst an accused person and that ground is that the Court shall frame a charge against the accused if it is of opinion that there is ground for presuming that the accused has committed an offence triable by it and which could be adequately punished by that Court. I must presume that the Magistrate in the case before me acted according to law and, therefore, he framed the charge because he was satisfied on the evidence then before him that there was ground for raising a presumption that the accused had committed the offence for which they were being tried. Here again this is generally considered and must be considered in the very nature of things to be formation of a judgment wholly *prima facie*, liable to be displaced by the consideration of the whole of the materials on the record. The presumption would stand rebutted if the Court on the whole is of opinion that the accused is not guilty of the offence with which he is charged. I have taken some pains to enter into this question with a view to dispel the notion commonly entertained that once a Court has expressed a *prima facie* opinion in a miscellaneous proceeding on a matter which is also in issue in the main case it has prejudged the main case itself. I need hardly add that such a notion is not well founded. The history of the case a part of which I have given at the outset of this order discloses a protraction which for reasons that need not be analysed here was not justifiable; and the impression left on my mind is that the Court was a little over indulgent to the accused in this behalf. Undoubtedly the motive which prompted the Court was a laudible one, it being not to afford any ground for suspicion in the mind of the accused as regards the strict impartiality of the Magistrate. Be that as it may it has resulted in a deplorable delay of proceedings, justice in relation to which consisted in expedition.

I dismiss the application.

Application dismissed.

S. D.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION NO. 62 OF 1923.

April 3, 1923.

Present :—Mr. Justice Moti Sagar.

ALLAH DITTA AND OTHERS—CONVICTS —PETITIONERS

versus

EMPEROR—RESPONDENT.

Railways Act (IX of 1890), s. 127—Penal Code (Act XLV of 1860), s. 147—Criminal Procedure Code (Act V of 1898), s. 439—Rioting and throwing stones at train—Separate offences—Revision—High Court, power of, to scrutinise evidence.

The accused assembled at a railway station with the object of preventing people by force and violence from proceeding to a particular place

by a train and force and violence was used towards th passengers in the prosecution of the common object As soon as the train started the accused b gan to throw stones at the train. They were convicted of separate offences under section 147 of the Penal Code and 127 of the Railways Act and separate sentences were awarded for each offence :

Held, (1) that the throwing of stones at the train was a distinct offence by itself which had no connection with the offence of rioting, the latter offence being complete as soon as the train had started and the stones not having been thrown in furtherance of the common object with which the accused had assembled at the railway station; [p. 726, col. 1.]

(2) that, therefore, the conviction of the accused for separate offences under section 147 of the Penal Code and 127 of the Railways Act was perfectly legal. [p 726, col. 1.]

It is not the practice of the High Court to go behind a finding of fact in revision, but there is no provision of law which debars it from going into the evidence in revision if it is of opinion that it is necessary to do so in the interests of justice. [p. 725, col. 2.]

When dealing with a case on revision the High Court has power to scrutinise the evidence with a view to find out whether the convictions of those of the accused who did not appeal from the order of the Trial Magistrate are justified. [p. 725, col. 2.]

Petition, under section 439, Criminal Procedure Code, for revision of an order of the Sessions Judge, Gujranwala, dated the 26th October 1922, affirming that of the District Magistrate, Gujranwala, dated the 20th May 1922.

Dr. *Gokal Chand Narang*, for the Petitioners.

Mr. *Zafar Ullah Khan*, for the Government Advocate, for the Respondent.

JUDGMENT.—The facts of the case out of which this application for revision has arisen are given in ample detail in the judgment of the Courts below and need not, therefore, be repeated here at length. Briefly stated they are as follows:—

In February 1922 a big *mela* was organized at Lahore in honour of the visit of his Royal Highness the Prince of Wales. In order to make the function a success a large number of villagers from the *mufassil* were invited to join and take part in the festivities. Special facilities were provided for their travelling in the way of reserved compartments and reserved carriages in the railway trains. For the convenience of the passengers coming from the western districts of the Punjab it was arranged that a special train should also run from Lamsusa to Badami Bagh in which all those, who were desirous of joining the *mela*, should be able to travel free of charge. This train was so timed as to pass Gujranwala at about 4 in the evening. Before the arrival of the train a large number of persons belonging to the Khilafat Committee, the Congress Committee and the Sikh League, who were opposed to the visit of his Royal Highness, assembled at the railway platform with the avowed object of asking people not to go to Lahore and boycott the *mela*. When the train arrived the crowd numbered between 400 and 500 persons. They, at first, pursuaded the people to refrain from going but when they found that their attempts in this direction were proving fruitless their persuasions took a more voilent form. They abused the passengers, took out their luggage, and, in some cases, dragged them out of the train. Those who wanted to get into the train at Gujranwala were forced to go back and insulted in every possible manner. When the train left and was in motion, stones were also thrown with the result that several glass-pains were broken and some of the passengers, who were inside the compartments, were seriously hurt. There were some Police constables in plain clothes on special duty at the railway platform on this occasion. After the departure of the train they went back to the Police station and made a report to the Sub-Inspector, Ghulam Rasul, as to the incidents that had taken place on the railway station. The Sub-Inspector incorporated their report in his confidential diary and submitted it to his superior officer, the Superintendent of Police, for inspection. The latter officer ordered an inquiry into the matter and this led to the arrest of 21 persons and to their being placed before the District Magistrate to take their trial under section 147/149 of the Indian Penal Code and section 127 of the Indian Railways Act. After a protracted trial, lasting for about two months, all the 21 accused were convicted by the learned District Magistrate and sentenced to various terms of imprisonment as set forth in his judgment, dated the 20th of May 1922. Of the 21 persons so convicted 17 were non-co-operators and did not prefer an appeal

to the Sessions Judge. The other four, namely, Allah Ditta, Aya Singh, Gopal Singh and Mula Mal did prefer an appeal which was, however, dismissed.

They have now filed an application for revision to this Court. The case has been argued at considerable length by Dr. Gokal Chand Narang, for the petitioners, and it has been contended that the prosecution has been guilty of a large number of irregularities which have prejudiced the case of the accused to a considerable extent. It is pointed out that the First Information Report has not been placed on the record, that no opportunity was given to the accused to cross-examine the prosecution witnesses in respect of certain new matter introduced in the re-examination of those witnesses, that certain documents which the accused wanted to produce in evidence were not allowed to be produced, that a free use was made of the *zimmis* without an opportunity being given to the accused to inspect them, and that advantage was taken by the prosecution of the fact that a large number of the accused were non-co-operators. I do not think there is any force in these contentions and they must be overruled. It is clear from the evidence that the First Information Report was prepared from the confidential diaries, which had been submitted to the Superintendent of Police for inspection on the 25th of February 1922. The report so prepared has been placed upon the record, and it is only the confidential diaries which have been withheld on the ground that they were privileged documents. In my opinion the learned Sessions Judge was right in holding that they could not be produced and, in any case, I do not think that the accused have, in any way, been prejudiced by their non-production. As to the objection that the accused were not allowed to cross-examine witnesses, it is clear that the objection is frivolous, and that every latitude was given to the accused to cross-examine witnesses at any length they liked. The objection that documents were not allowed to be produced is certainly not well founded. There is no application on the record showing that the accused wanted to summon any documents which was disallowed by the District Magistrate. As to the *zimmis* it is obvious from the judgment of the learned District Magistrate that they were referred to only in the interests of the accused and not to their prejudice. In my opinion the objections raised are palpably frivolous and they must be overruled.

The main question in the case is whether the evidence upon which the convictions are founded is or is not worthy of credit. It is contended by Mr. Zafar Ullah Khan for the Crown that the evidence has been believed by two Courts and that it is not the practice of this Court to go behind a finding of fact in revision. There is no doubt that ordinarily this is so, but I do not think there is any provision of law which debars a Court of revision from going into the evidence if it is of opinion that it is necessary to do so in the interests of justice. In the present case it is all the more desirable that I should examine the evidence inasmuch as a larger number of the accused are non-co-operators who did not even prefer an appeal to the lower Appellate Court. It is urged by Dr. Gokal Chand that now that the whole case is before me I should scrutinise the evidence with a view to find out if the convictions of the other accused, who did not file an appeal, were justified. Mr. Zafar Ullah Khan, for the Crown, does not dispute the powers of a Court of revision to do so and concedes that I can go into the evidence and see if all the accused have been rightly convicted.

I have carefully read the evidence against each of the accused, and the conclusion at which I have arrived is that so far as the present petitioners are concerned, there is abundant evidence upon the record to justify their convictions A large number of witnesses have come forward to state that all the four accused were seen on the railway station taking part with the crowed in the excesses committed upon the passengers and also throwing stones at the railway train when it was in motion. I do not see any reason to disbelieve these witnesses and must, therefore, uphold the convictions.

Of the other 17 accused, Ladha Singh has been convicted of rioting under section 147 of the Indian Penal Code. In

my opinion this conviction is wholly unjustified, and the gentleman is entitled to an honourable acquittal. He denies his presence at the railway platform at the time when the disturbance in question took place, and there is evidence on the record to show that he is telling the truth. A large number of prosecution witnesses have stated that they did not see him on the platform and it appears to me that the witnesses, who have deposed to his presence, are either telling lies, or that they mistook some other person for him. Some of the witnesses have ever gone so far as to say that he participated in throwing stones at the passengers. I do not think that a gentleman of Ladha Singh's position and antecedents would be guilty of such an offence. I hold that Ladha Singh was not on the railway station on the 23rd of February 1922, and that he did not take part in the excesses committed on that occasion. I, therefore, acquit him.

The next case which requires consideration is that of the accused, Banka Dayal. He has been convicted under two sections, namely 147, Indian Penal Code, and 127, Indian Railways Act. He admits his presence at the railway station, but denies that he threw stones at the passengers, or that he took part in any of the acts of rowdyism perpetrated by the crowd on the railway station. As to his presence on the station and his persuading people not to go to Lahore there is sufficient reliable evidence, the veracity of which I have no reason to doubt. The evidence as to his having thrown stones at the moving train is, however, conflicting, and I do not think that upon the evidence produced he should have been convicted of an offence under section 127 of the Indian Railways Act. Even the prosecution evidence shows that he was asking people to desist from doing so, and it is impossible to believe that a man who was persuading others not to do an act by which the safety of the passengers would be endangered would be guilty of participating in that very offence himself. I consequently set aside his conviction under section 127 of the Indian Railways Act and acquit him of that charge.

With regard to the other 15 accused I entirely concur with the finding of the learned Sessions Judge that their guilt is fully established, and that there is no occasion to interfere with their convictions.

It has been contended by Dr. Gokal Chand that the accused should not have been convicted of two offences under section 147 of the Indian Penal Code, and section 127 of the Indian Railways Act inasmuch as the stone throwing was part and parcel of one and the same transaction, and that no separate offence was committed by those who have also been convicted under section 127 of the Indian Railways Act. I do not think there is any force in this argument. The throwing of stones at the railway train was a distinct offence by itself which had no connection with the offence of rioting committed under section 146 of the Indian Penal Code. It has been found that the object of the crowd assembled at the railway station was to prevent people from going to Lahore by force or violence. This offence was complete as soon as the train had left, and it cannot be said that the stones were thrown in furtherance of the common object for which they had collected at the railway station. In my opinion these accused have been rightly convicted of the two offences, and I uphold the convictions.

As to sentence, however, I am inclined to think that two years' rigorous imprisonment under section 127 of the Indian Railways Act is rather excessive. Taking all the circumstances of the case into consideration, I am of opinion that a sentence of one year's rigorous imprisonment under that section would be quite sufficient to meet the ends of justice.

I accordingly accept the petition, set aside the conviction of Ladha Singh and direct that he be released forthwith. Banka Dayal's conviction under section 127 of the Indian Railways Act is set aside, but his conviction under section 147, Indian Penal Code, and the convictions of the other 19 accused are, however, maintained. The sentences of those who have also been convicted under section 127 of the Indian Railways Act are reduced to one year's rigorous imprisonment each.

EMPEROR v. MOULABUX.

The sentences under the two sections 147, Indian Penal Code, and 127 of the Indian Railways Act shall, however, run concurrently as ordered by the learned District Magistrate.

z. k. *Order accordingly.*

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE NO. 71 OF 1923.

June 21, 1923.

Present:—Mr. Kennedy, J. C.
and Mr. Raymond, A. J. C.

EMPEROR—PROSECUTOR
versus
MOULABUX—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 183—Offence committed during journey—Place of trial.

When an offence is committed whilst the offender is in the course of performing a journey and he is arrested and taken to the destination, a Court having jurisdiction at the latter place can try the offence, though it was committed outside its jurisdiction.

Reference by the District Magistrate, Upper Sind Frontier.

Mr. *T. G. Elphinston*, Public Prosecutor, for the Crown.

JUDGMENT.—This is a reference by the District Magistrate, Upper Sind Frontier, requesting the transfer of case of theft pending before the First Class Magistrate of Jacobabad to some Magistrate in Shikarpur Division on the following grounds:—

It appears both the accused and the complainant were travelling from Shikarpur to Jacobabad and the complainant fell asleep after the train left Shikarpur. On the journey he felt that some one was tampering with a bundle that was tied round his waist in which he had currency notes of the value of Rs. 65 and on awakening he saw the accused with a bundle of notes in his hand. He caught hold of the accused and raised cries and when the train arrived at Hamayun Railway Station, the accused was arrested by the Police. He was taken to Jacobabad and *challaned* by the Police before the First Class Magistrate of that place. He however, after examining the complainant was of the opinion he had no jurisdiction to try the accused inasmuch as the offence was committed between Sultan Kot and Hamayun and, therefore, he was of the opinion that the accused should be tried by some Magistrate in Shikarpur Division. He, therefore, referred the case to the District Magistrate, Upper Sind Frontier who makes this reference to which I have above adverted to.

Both the First Class Magistrate and the District Magistrate seem to have overlooked the provisions of section 183 of the Criminal Procedure Code in terms of which the accused could be tried by the First Class Magistrate, Jacobabad Both the complainant and the accused were according to the facts found, travelling from Shikarpur to Jacobabad and it was in the course of that journey that the theft was committed. Consequently, under section 183, Criminal Procedure Code, the accused could be tried by the Magistrate who exercised jurisdiction within the limits of Jacobabad.

Under these circumstances, we must return the reference to the District Magistrate as we are of the opinion that the case is triable by the First Class Magistrate, Jacobabad, and no order is needed on this reference.

Reference returned.

P. B. A.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION NO. 112 OF 1923.

November 14, 1923.

Present:—Mr. Wazir Hasan, A. J. C.

HIRA LAL AND ANOTHER—OPPOSITE PARTY—APPLICANT

versus

EMPEROR—APPLICANT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 145, 435, 438—Proceedings under s. 145—Moveable property—Revision—Powers of District Magistrate.

Ordinarily, no revision lies in respect of proceedings under Chapter XII of the Code of Criminal Procedure except where the order is wholly *ultra vires* and without jurisdiction. [p. 728, cols. 1 & 2.]

Proceedings under section 145 of the Criminal Procedure Code cannot be instituted with respect to moveables. [p. 728, col 2.]

Under section 435 of the Code, a District Magistrate is empowered either to reject the application in revision or to take action under section 438 of the Code. His power under the latter section is limited to report for orders to the High Court the result of an examination of the proceedings made under section 435 of the Code. He cannot set aside the order of the Magistrate himself. [p. 729, col. 2.]

Application against an order of the District Magistrate, Fyzabad, dated the 11th August 1923, modifying that of the Magistrate, First Class, Fyzabad, dated the 31st July 1923.

Mr. *Hyder Hussain*, for the Applicant.

The Government Pleader, for Crown.

Mr. *Niamat Ullah*, for the Complainant, *Musammat* Mahadei.

JUDGMENT.—This is an application in revision. It has arisen out of proceedings initiated under section 145 of the Code of Criminal Procedure. A First Class Magistrate exercising jurisdiction in Fyzabad received a Police report on the 23rd April 1923. The perusal of this report induced him to take action against certain persons under the above-mentioned section. He issued notices to those persons to appear in his Court on the 5th May 1923 with evidence in support of their respective possessions. On the last-mentioned date, *Musammat* Mahadei and Hira Lal appeared before the Court in obedience to the summons. The statements of Pleaders for both the parties were recorded, and the preliminary order required by the provisions of that section was drawn out. As a part of the same order, directions were issued to the Police to make over certain moveables to one Deo Narain. The Court observed, and rightly, that proceedings under section 145 could not be instituted with respect to moveables. The parties were directed to produce their evidence of possession and title with respect to the house in dispute, and, till then, "refrain from exercising any right or do any act to assert possession over the house in question." On the 28th May 1923 Hira Lal filed his written statement. *Musammat* Mahadei filed her written statement on the 29th May 1923, and on the same date two witnesses were examined on behalf of Hira Lal and the case was then adjourned to the 5th June 1923. Nothing happened on the 5th June 1923, except an adjournment of the case on grounds wholly insufficient, the ground being, that the parties had a case in some other Court and were in a hurry to go to that Court. The case came up for hearing on the 11th June 1923 before another Magistrate. The Magistrate, who had taken proceedings so far, had gone on leave. The case was again adjourned to the 28th June 1923. Nothing was done in the case till the 11th July 1923, except adjournments from time to time. On the 11th July 1923, the parties appeared. The Presiding Magistrate at the time was again different from the one who had initiated the proceedings. On this date, further facts were elicited as the order says. The case came up again for hearing on the 19th July 1923. On that date, an order was recorded to the effect, that the possession was doubtful, and that consequently the parties should file written statements as to their rights, and the 23rd July 1923 was fixed to enable them to do so. On the 23rd July 1923 these written statements were filed and accepted. Finally, on the 31st July 1923, the Magistrate disposed of the case by an order which is certainly extraordinary if nothing else. I quote the last portion of his judgment which contains the final order. "It appears to me that Mangre Teli had died heirless and that the property should escheat to Government. I order that the property is to remain in posses-

sion of a satisfactory *suppurdar* connected with neither party or the idol. The case is then to be reported to District Court of Fyzabad for his orders as to the final disposition of the property." With a view to explain the connection of the idol with the matter in dispute, I may mention, that Hira Lal, one of the parties to these proceedings, had stated, that he had dedicated the property of the deceased Mangre Teli to an idol. *Musammat* Mahadei filed an application in revision to the District Magistrate of Fyzabad against the last mentioned order of the Court of first instance. That application was disposed of by an order, dated the 11th August 1923. It opens with the following remarks:—"I do not understand the order of the lower Court in this case." I may say that I share the learned District Magistrate's inability to understand the order of the Court of first instance. Be that as it may, the learned Magistrate ordered that *Musammat* Mahadei be put in possession of the property in dispute and directed any other claimant to sue *Musammat* Mahadei in the Civil Court. At the end, he said that "this order refers to all the property of Mangre Teli deceased." The record of the case shows, that, on the 22nd September 1923, the learned District Magistrate made out another final order in this connection. This order was directed to S. D. O. Suddar. It recited the effect of the previous order, that the house was made over to *Musammat* Mahadei under section 145 of the Code of Criminal Procedure.

Now the jurisdiction of a District Magistrate to deal with matters in revision is prescribed and defined by the provisions of sections 435, 436 437 and 438 of the Code of Criminal Procedure. Sections 436 and 437 are inapplicable to the facts of the present case. Section 435, sub-section (3), clearly excludes proceedings under Chapter XII of the Code of Criminal Procedure from the operation of the main part of that section. Ordinarily, therefore, no application in revision could lie to the District Magistrate under section 435 in respect of proceedings under Chapter XII of the Code. Section 145 is the first section of that Chapter. There was, however, a series of decisions of all the High Courts in India, including this Court, which lay down, that an application in revision would lie if the action taken professedly under section 145 was one which did not fall within the jurisdiction granted by that section. In the present case, it can hardly be doubted that the order of the Court of first instance was wholly *ultra vires* and, therefore, without jurisdiction, and consequently, according to these authorities, an application against such an order would lie in revision. So far so good. The learned District Magistrate has, however, exceeded his powers and has gone beyond the jurisdiction vested in him by law inasmuch as he has set aside the order of the Court of first instance. Under section 435 of the Code of Criminal Procedure, he had power to call for and examine the record of any proceedings before any inferior Criminal Court situate within the local limits of his jurisdiction for the purpose of satisfying himself as to the correctness, legality or propriety of the order passed by such Court. Having done this, it was open to him either to reject the application altogether or to take action under section 438 of the Code. The scope of that section is defined by the provisions of the section itself. Under those provisions, his power is limited to report for orders to the High Court the result of an examination of the proceedings made under section 435 of the Code. After this step begins the jurisdiction of the High Court under section 439 of the Code of Criminal Procedure. Those provisions invest the High Court with the jurisdiction to exercise in its discretion any of the powers conferred on a Court of Appeal.

At the hearing of this application, the learned Advocate for the opposite side argued that the final order of the Court of first instance and the order of the learned District Magistrate, dated the 11th August 1923, were not passed in relation to the proceedings under section 145 of the Code of Criminal Procedure, and consequently those orders were not of a judicial character with regard to which the provisions of the Code of Criminal Procedure relating to revision would apply. He argued that these orders were of an

administrative character. With regard to this argument, all that I can say is that I admire the learned Advocate's zeal to support the case of his client. There is no doubt, in my mind, that the proceedings from beginning to end were taken ostensibly under section 145 of the Code of Criminal Procedure and all orders, to which I have referred in my judgment, were passed in the exercise of jurisdiction or supposed jurisdiction under that section. Indeed the last order of the learned District Magistrate, dated the 22nd September 1923, refers in express terms to section 145 under which his order of the 11th August 1923 was passed.

In these circumstances I have no alternative left but to quash the order of the learned District Magistrate, dated the 11th August 1923, and return the papers to him with this direction that the application in revision filed by *Musammat* Mahadei in his Court be dealt with according to law.

Revision accepted.

G. H.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 63 OF 1923.
(CRIMINAL REVISION PETITION NO. 53 OF 1923)

November 6, 1923.

Present:—Mr. Justice Odgers and Mr. Justice Wallace.

V. SESHA AIYAR—COMPLAINANT—PETITIONER

versus

VENKATASUBBA CHETTY AND OTHERS—ACCUSED NOS. 2 TO 5—RESPONDENTS.

Penal Code (Act XLV of 1860), ss. 40, 109, 171, applicability of—Madras District Municipalities Act (V Mad. of 1920), s. 55—Double voting, abetment of—Sanction, whether necessary.

An abetment of the offence of double voting under section 55 (1) of the Madras District Municipalities Act is an offence under section 109 of the Penal Code read with section 40 thereof and is chargeable and punishable thereunder. [p. 732, col. 2.]

The fact that section 171-D of the Indian Penal Code specifically provides for an abetment of the offence of double voting does not prevent the applicability of section 109 of the Indian Penal Code for abetment of an offence under section 55 (1) of the Madras Act V of 1920 and render it chargeable and punishable only under section 171-D. It is open to a complainant to proceed under section 55 of the Madras District Municipalities Act read with section 109 of the Indian Penal Code and in such a case no sanction is necessary under section 196 of the Criminal Procedure Code as amended by Act XXXIX of 1920.

Probodh Chandra v. *Corporation of Calcutta*, 54 Ind. Cas. 781; 24 C. W. N. 196; 47 C. 547; 21 Cr. L. J. 173, referred to.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise an order, dated the 4th January 1923, of the Court of the Sub-Divisional First Class Magistrate, Trichinopoly, in C. C. No. 103 of 1922.

Mr. *S. T. Srinivasagopalachariar*, for the Petitioner.—In this case five persons were prosecuted under section 55 (1) of the Madras District Municipalities Act. The prosecution case is that the complainant and fifth accused stood with the first accused as rival condidates at an election in one of the wards in the Trichinopoly Municipality and that the first accused voted a second time in the evening having already once voted in the morning. Accused Nos. 2 to 5 were charged under section 55 of the District Municipalities Act read with section 109, Indian Penal Code, with having abetted the said offence. The Deputy Magistrate has dismissed the complaint *in limine* as regards accused Nos. 2 to 5 on the ground (1) that abetment of an offence under section 55 of the District Municipalities Act is not itself an offence, (2) that sanction of the Local Government is necessary for the prosecution of the offence of abetting double voting.

It is submitted the order of the Magistrate is entirely wrong. The first point is whether abetment of the offence under section 55 is at all an offence. It is true section 109, Indian Penal Code, renders abetment of an offence itself, an offence only if no express provision is made by the Code.

Section 40 includes also offences under any special or local law. The offence under section 55 of the Madras District Municipalities Act is one under a local law. It is, therefore, clear that *prima*

facie abetment of an offence under section 55 is rendered an offence. The only question is if there is any express provision made for abetment of the offence in the Code.

The enactment of the new Act XXXIX of 1920 including a new Chapter of offences IX (*a*) for election offences is not such an express provision of law. The fact that under section 171-D abetment of offence of double voting is made an offence does not affect the present question. The expression "such abetment" in section 109 is abetment of such offence and the offence under section 171-D, Indian Penal Code, is not the same as that under section 55 of the District Municipalities Act. The offences are distinct in substance. A complaint of an offence under section 55 can only be made to Deputy Magistrate by particular persons within seven days and a deposit has to be made. An appeal lies to the District Judge. The punishment awardable is only six months.

There is no time limit or any other restrictions for preferring a complaint under section 171-D, Indian Penal Code, though the sanction of the Local Government is essential and the offence is punishable by imprisonment for a year.

It is true that it is open to a party to proceed either under section 55 of the District Municipalities Act or section 171-D, Indian Penal Code. It is optional.

[**Wallace, J.**—Has not section 55 of the District Municipalities Act been impliedly repealed by the Imperial Enactment Act XXXIX of 1920?]

Mr. S. T. S. Gopalachariar—There is no repeal, express or applied. See *Segu Baliah* v. *Ramasamiah* (1) *Probodh Chandra* v. *Corporation, of Calcutta* (2) and *Queen* v. *Kassim-uddin* (3) the latter two cases are cases where section 109, Indian Penal Code, was applied to offences under the Local Acts.

There can be no implied repeal in the manner of the provisions of an earlier enactment by a local Legislature.

(1) 42 Ind. Cas. 608; 6 L. W. 283; 18 Cr. L. J. 992.
(2) 54 Ind. Cas. 781; 24 C. W. N. 196; 47 C. 547; 21 Cr. L. J. 173.
(3) 8 W. R. 55 Cr.

[**Wallace, J.**—Does the old District Municipalies Act of 1884 contain any provisions containing provisions similar to section 55, District Municipalities Act.]

Mr. *S. T. S. Gopalachariar*.—There was no such provision. The case was then governed by the general law. It is not right to attribute to the Legislature an intention to abrogate provisions to which its attention was not even drawn. The two offences can exist side by side. The remedy is optional. If section 55 is applicable, no sanction is necessary under section 196, Criminal Procedure Code. The Magistrate erroneously refused to entertain the complaint as regards abetment.

Dr. *S. Swaminadhan*, for the Respondents.—The question is in short one as to the intention of the Legislature. The Madras Act was by a subordinate Legislature and Act XXXIX of 1920 was expressly enacted to embody the criminal law as to offences at all elections. The Legislature could hardly have contemplated two different enactments imposing different conditions for an identical offence.

Having regard to the policy of the law, I submit section 55 of the Madras District Municipalities Act is impliedly repealed by Act XXXIX of 1920.

There is, therefore, express provision made for the offence of abetting double voting. Section 109 of the Indian Penal Code is inapplicable and in law there is no abetment of an offence under section 55 of the Madras District Municipalities Act.

JUDGMENT.

Odgers, J.—This is a revision petition against the order of the Sub-Divisional Magistrate of Trichinopoly acquitting accused Nos. 2 to 5 who were charged before him under section 55 (1) of Madras Act V of 1920 and section 109, Indian Penal Code. The Magistrate was wrong in saying that he acquitted the accused under section 245, Criminal Procedure Code. What he really did was to refuse to entertain or to proceed with the complaint on a legal point raised by the defence. The Magistrate rightly held that as no sanction had been obtained under section 196, Criminal Procedure Code, as amended by section 3 of Act XXXIX of 1920, the new portion of the Penal Code, section 171 A-1, relating to election offences and enquiries,

was not applicable to this case. The accused Nos. 2 to 5 were charged with abetment of an election offence *i. e.*, an application for a second voting paper by a person who has already voted once at the same election, punishable under section 55 (1) of the Madras Act V of 1920. The argument is that though no doubt abetment of an election offence is punishable under Indian Penal Code as now amended, Act V of 1920 makes no provision for abetment of election offences and it is not permissible to borrow the provisions of the Indian Penal Code, where that Code itself makes provision for the offence in question. By section 107, Indian Penal Code, a person abets the "doing of thing" in three ways therein set out. If "the thing" in question is an offence, then the abetment of it becomes an offence (section 108) and the "offence of abetment" is constituted (section 108, Explanation 2) which is thus a separate and distinct offence. "Offence" by section 40 (paragraph 1) and section 108A means: (1) a thing made punishable by the Indian Penal Code, (2) a thing made punishable by the Indian Penal Code though it is committed without and beyond British India. Consequently, the abetment of an offence means the abetment in British India of thing made punishable by the Indian Penal Code. Section 40, Indian Penal Code, has, however, been extended by amendment. The limitation in paragraph 1, confining an offence, to a thing punishable by the Indian Penal Code, has been relaxed and "offence" in section 109 (*inter alia*) now denotes a thing punishable under the Code or any special or local law. There is no doubt that Madras Act V of 1920 is a local law and it, therefore, seem clear that section 109 can be applied to a thing punishable under it. As pointed out abetment is a separate and distinct offence provided the thing abetted is an offence; and the thing abetted here is made an offence by the second paragraph to section 40, Indian Penal Code. Section 26 of the General Clauses Act shows that an act may constitute an offence under two or more enactments. In *Probodh Chandra* v. *Corporation of Calcutta* (2), section 40, Indian Penal Code, was held applicable in order to constitute abetment of an offence under a local law—the Calcutta Municipal Act. I am of opinion that accused Nos. 2 to 5 could legally be charged under section 55 (1) of Madras Act V of 1920 and section 109, Indian Penal Code. This criminal revision case must be allowed.

Wallace, J.—I agree. Petitioner charged respondents in this case with abetment of an offence under section 55 (1) of Madras Act V of 1920, the substance of the charge being that they abetted a case of double voting by one Krishnaswamy Chetty at a Municipal election in Trichinopoly. The Sub-Divisional Magistrate has held that since section 171-D of the Indian Penal Code specifically provides for such an abetment, section 109 of that Code cannot be called in aid; and that such abetment is chargeable and punishable only under section 171-D and not under section 55 (1) of Madras Act V of 1920, read with section 40, Indian Penal Code and that since petitioner has not obtained the authority of Government requisite under section 196, Criminal Procedure Code, for a prosecution under section 171-D, Indian Penal Code, his charge cannot stand.

Petitioner re-joins that since section 40, Indian Penal Code, which makes section 109, Indian Penal Code, applicable to an offence under section 55 (1) of Madras Act V of 1920, has not been so far and to that extent repealed, there is nothing to prevent the Court taking cognizance of his complaint.

The decision of this petition turns on the meaning to be given to the words of section 109, Indian Penal Code. Section 109, Indian Penal Code, is concerned only with the punishment of abetments, and lays down nothing more, in my opinion, than that if the Indian Penal Code has not separately provided for the punishment of an abetment as such, then it is punishable with the punishment provided for the original offence. I cannot read it to mean that where the Code has set out separately the offence of an abetment and provided for its punishment, it has thereby, without saying so, abrogated another section of the same Code, presumably of equal validity and authority, unless respondents can go, so far as to contend that 171-D, Indian Penal Code,

had wholly abolished section 55 (1) of Madras Act V of 1920—and they do not go so far—nor does the lower Court itself, since it dealt with the principal offender himself under that very section. I do not see how the application of section 40, Indian Penal Code, to it can be affected.

I admit that the effect of the enactment of section 171-D, Indian Penal Code, creates difficulties, but I read section 109 to mean no more than this, that if the offence charged will, in the opinion of the Court, come within the four corners of it, then the punishment for it is the punishment provided for by that section. I cannot, as I have held, read it to mean that the offence of abetment of double voting can be charged only under section 171-D, Indian Penal Code.

It may be, no doubt, argued that section 196, Criminal Procedure Code, means that no one should be punished under section 171-D, Indian Penal Code, unless the previous authority of Government has been obtained for his prosecution. On the other hand the detailed procedure set out for putting in a charge under section 55 (1), Madras Act V of 1920, has not been repealed and still remains in force. Hence, no Court can refuse a complaint duly put in, regarding an offence under that section and that offence being still cognisable by a Court, the Court cannot refuse to apply section 40, Indian Penal Code, to an abetment thereof.

I agree with the order proposed by my learned brother.

V. N. V.

Revision allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION NO. 132 OF 1922.

December 7, 1922.

Present:—Mr. Daniels, A. J. C.

SARJU AND ANOther—ACCUSED

versus

Thakurain JAI RAJ KUAR

—COMPLAINANT.

Criminal Procedure Code (Act V of 1898), ss. 107, 514, 515—Bond to keep the peace, nature of—Private party, status of—Forfeiture of bond, without notice, effect of.

A bond under section 107 of the Criminal Procedure Code is not given to any particular person but to the Court, a private party, therefore, is not entitled to appeal against an order refusing to forfeit it, though it is open to the District Magistrate to take action in revision. [p. 734, col. 1.]

An order directing the forfeiture of a bond without notice to the party whose bond is forfeited, amounts to a failure of justice, even though an order of forfeiture would have been passed if that person had had an opportunity of being heard. [p. 734, col. 1.]

Application against an order of the Officiating District Magistrate, Gonda, dated the 4th October 1922, setting aside an order of the Magistrate, First Class, Gonda, dated 8th August 1922.

Mr. *Moti Lal Saksena*, for the Applicants.

Mr. *A. P. Sen*, for the Opposite Party.

JUDGMENT.—This is an application against an order directing the forfeiture of bonds executed by the applicants under section 107, Criminal Procedure Code. The accused had been ordered to execute bonds to keep the peace under section 107 for a period of one year. They were convicted of an offence under section 352, Indian Penal Code, committed shortly before the year expired. The Magistrate who tried the case issued notice to show cause why the bonds should not be forfeited on an application by Thakurain Jairaj Kuar complainant in the substantive complaint. On the case coming up for hearing his successor-in-office declined to forfeit the bonds and rejected the application. Thakurain Jairaj Kuar presented an appeal to the District Magistrate under section 515, Criminal Procedure Code and the Magistrate without issuing any notice to the accused ordered the bonds to be forfeited. The accused have come in revision to this Court. Thakurain Jairaj

Kuar appears by Counsel to opppose the application.

It is admitted on her behalf that the District Magistrate committed a grave error in forfeiting the bonds without giving the accused an opportunity to be heard. The question is whether this error is covered by section 537, Criminal Procedure Code. It is urged for the opposite party that every thing that could have been urged by the accused before the District Magistrate can be urged by their Counsel in support of this revi ion and that, therefore, no failure of justice has occurred. I am inclined to take the view that passing an order of forfeiture without notice to the party whose bond is forfeited amounts itself to a failure of justice even if th same order would eventually have been passed if the case had been heard.

The order is open to objection on another ground also. I am disposed to hold, indeed, that the language of section 515 is wide enough to cover an order refusing to forfeit a bond as well as an order forfeiting it. When a Court has issued notice under section 514, Criminal Procedure Code, to show cause why a bond should not be forfeited the order which it passes is equally an order under section 514 whether it holds that there is or is not good ground for forfeiture. Butaccepting this view of the section it does not appear to me that Thakurain Jairaj Kuar had any *locus standi* in the matter or any right to appeal to the District Magistrate against the order. A bond under section 107, Criminal Procedure Code, is not given to any particular person but to the Court and no private party is entitled to appeal against an order refusing to forfeit it, though it was open to the Magistrate to take action in revision.

For these reasons, I allow the application and set aside the order of the Court below. The penalty if recovered will be refunded.

Application allowed.

W. C. A.

PATNA HIGH COURT.

CRIMINAL REVISION NO. 246 OF 1923.

April 20, 1923.

Present:—Justice Sir B. K. Mullick, KT., and Mr. Justice Macpherson.

GULLI BHAGAT—PETITIONER

versus

NARAIN SINGH—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 439, 494—Withdrawal of case—Consent of Court—Discretion—Revision—High Court, interference by—Cognisable case—Prosecutor, private, position of.

Section 494 of the Criminal Procedure Code does not expressly require the Court to give any reasons for consenting to a withdrawal nor is there any provision which compels the Court to write a reasoned judgment establishing the propriety of the order. [p. 735, col. 1.]

Umesh Chandra Roy v. *Satis Chandra Roy*, 41 Ind. Cas. 998; 26 C. L. J. 208; 18 Cr. L. J. 886; 22 C. W. N. 69, *Rajani Kanta Shaha* v. *Idris Thakur*, 64 Ind. Cas. 280; 48 C. 1105; 25 C. W. N. 615; 34 C. L. J. 51; 22 Cr. L. J. 760, *Jagat Chandra Roy* v. *Kalimuddi Sardar*, 71 Ind. Cas. 693; 26 C. W. N. 880; 24 Cr. L. J. 229, dissented from.

Where a discretion has been exercised by a Court of competent jurisdiction which is not on the face of it arbitrary, the practice of the High Court is that as a Revisional Court it will neither enquire into the reasons for, nor interfere with, the exercise of the discretion. The power of interference in revision with orders of acquittal should be most sparingly exercised and only in cases where it is urgently demanded in the interests of public justice. [p. 735, col. 2.]

Faujdar Thakur v. *Kasi Choudhuri*, 27 Ind. Cas. 186; 42 C. 612; 19 C. W. N. 184; 21 C. L. J. 531; 16 Cr. L. J. 122, relied on.

In cognisable cases the Crown is the prosecutor and the custodian of the public peace and if it decides to let an offender go no other aggrieved party can be heard to object on the ground that he has not taken his full toll of private vengeance. [p. 735, col. 2; p. 736, col. 1.]

Mr. *Manohar Lall*, for the Petitioner.

JUDGMENT.—This application raises a somewhat important point, namely, whether an order of acquittal passed under section 494, Criminal Procedure Code, should be revised in this Court at the instance of a private party. It appears that after the case had been fully tried out a petition was filed by the Public Prosecutor on the 6th April 1923 for leave to withdraw the case. The Magistrate thereupon recorded the following order.

"A petition of protest is filed. I have heard the parties. Accused acquitted under section 494, Criminal Procedure

Code. Enter true sections 148, 325, 149 and 323, Indian Penal Code."

It is now contended before us that the learned Magistrate acted illegally in allowing the withdrawal without recording his reasons for doing so. It is also, though somewhat faintly, urged that there was in fact no grant of consent. Now it is clear from a perusal of the order that the Magistrate heard the parties and that he gave his consent after duly considering the matter; and the only question is whether he was required to draw up a judgment such as is prescribed by section 367 of the Criminal Procedure Code and to record his reasons for allowing the withdrawal. In our opinion there is no provision of law compelling a Magistrate to do this, and once he has given his consent to an acquittal its propriety ought not, in our opinion, to be questioned except upon appeal by the Local Government.

In this connection our attention has, however, been drawn to *Umesh Chandra Roy* v. *Satis Chandra Roy* (1), where Teunon and Shamsul Huda, JJ., held that the Court must give and record its reasons so that the High Court may be in a position to say whether the discretion vested in the Court has been properly exercised.

That view was followed by Teunon and Ghosh, JJ., in *Rajani Kanta Shaha* v. *Idris Thakur* (2) and also in *Jagat Chandra Roy* v. *Kalimuddi Sardar* (3). In my opinion these cases overstate the law. Section 494 does not expressly require the Court to give any reasons for consenting to the withdrawal nor is there any provision which compels a Court to write a reasoned judgment establishing the propriety of the order. There are many final orders known to the Code for which no reasoned judgment is required.

In the next place where a discretion has been exercised by a Court of competent jurisdiction, which is not on the face of it arbitrary, the practice of the High Court is that as a Revisional Court it will neither inquire into the reasons nor interfere.

But the most serious objection to the decisions cited above is that they offend against the principle laid down by the majority of the Court in *Faujdar Thakur* v. *Kasi Choudhuri* (4) where Jenkins, C. J., observed that the power of interference in revision, with orders of acquittal, should be most sparingly exercised and only in cases where it was urgently demanded in the interests of public justice. The application for revision in this case is an application to revise an order of acquittal, and as no question of public justice appears to be involved, I do not think that we should be right in interfering except upon a properly constituted appeal.

In this Court there is not much authority upon the point and the only case which has been brought to our notice is *Gopi Bari* v. *Emperor* (5). In that case which was decided by a Bench formed by a Single Judge of this Court, a Magistrate had decided to consider the petition of withdrawal filed by the Public Prosecutor on the ground that the private prosecutor objected to the withdrawal and it was held that his order was without jurisdiction and the learned Judge, instead of sending the case on remand to the Trial Court, proceeded to examine the facts himself and exercised the jurisdiction which the Trial Court should have exercised. This authority supports the view that section 494 gives the Trial Court full jurisdiction to give or refuse consent and that the High Court will only interefere in revision if some question of jurisdiction is involved.

Finally there is a deeper and indeed a fundamental reason for non-interference which turns upon the position of a private prosecutor in prosecutions for cognizable offences. In my opinion the private prosecutor has no position at all in the litigation. The Crown is the prosecutor and the custodian of the public peace and if it decides to let an offender

(1) 41 Ind. Cas. 998; 26 C. L. J. 208; 18 Cr. L. J. 886; 22 C. W. N. 69.
(2) 64 Ind. Cas. 280; 48 C. 1105; 25 C. W. N. 615; 34 C. L. J. 51; 22 Cr. L. J. 760.
(3) 71 Ind. Cas. 693; 26 C. W. N. 880; 24 Cr. L. J. 889.
(4) 27 Ind. Cas. 186; 42 C. 612; 19 C. W. N. 184; 21 C. L. J. 53; 16 Cr. L. J. 122.
(5) 57 Ind. Cas. 657; 1 P. L. T. 400; 21 Cr. L. J. 641.

go no other aggrieved party can be heard to object on the ground that he has not taken his full toll of private vengeance.

If, therefore, in the present case, the Court has allowed the Public Prosecutor to withraw the case upon insufficient or improper grounds, the Local Government is the only anthority who can take action for the correction of that error.

We accordingly reject the application.

Application rejected.

Z. K.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REPORT NO. 129 OF 1922.

December 18, 1923.

Present:—Mr. Kincaid, J. C., and Mr. Kennedy, A. J. C.

EMPEROR—PROSECUTOR

versus

MAHOMED PUNJAL—ACCUSED.

***Arms Act** (**XI of** 1878), **s. 19, cls.** (e) **and** (f)—*

*"**Armed**" **meaning of.***

According to the Vernaculur use of the word "armed" in Sind, a person is to be deemed "armed" within the meaning of section 19 (*e*) of the Arms Act, notwith-tanding the fact that he is equipped with an "arm" which is not capable of immediate use as an "arm."

Report by the District Magistrate, Upper Sind Frontier against an order of the Sub-Judge and First Class Magistrate, Jacobabad, dated the 9th July 1923.

Mr. *T. G. Elphinston*, Public Prosecutor, for the Crown.

JUDGMENT.—In this case, the Sub-Inspector found with the accused, who had been a Policeman but had subsequently resigned, a suspicious looking bundle. On opening the bundle, it was found to contain a muzzle loading gun. The accused was arrested in Jacobabad City. The accused was sent up to the First Class Magistrate and fined Rs. 50.

The District Magistrate has reported this matter to us on the ground that the prosecution should not have taken place without his sanction inasmuch as the offence is one punishable not under section 19 (*e*) of the Indian Arms Act but under section 19 (*f*).

We have heard the learned Public Prosecutor in support of the report. We are of the opinion that the action of the accused falls under section 19 (*e*) of the said Act and, therefore, no sanction of the District Magistrate was necessary for prosecution. It is said, and that statement apparently has some judicial authority, that a person who carries about a gun without any ammunition cannot be said to go 'armed'. But we are not prepared to say this is a proposition of universal application because to define "armed" as meaning "one who is equipped with an arm capable of immediate use as an arm" seems contrary to the Vernacular meaning of the word "armed". A gun whether or no there is ammunition for its use in the immediate control or actual possession of the holder of it is assuredly an arm and he who goes about with an arm is according to the Vernacular "armed". Nor can we find that there is any legal interpretation of the word "armed" in the Arms Act or elsewhere binding upon us contrary to the Vernacular use. And we can see much danger in cutting down the meaning of the word "armed". Few people are likely to detain or search a dacoit in possession of a gun to see whether or no he has ammunition with him, yet a band of dacoits possessed of guns would be far more formidable than a band equipped with *lathis* only. It seems inconvenient that the procedure under which a person improperly carrying about a gun is to be deprived of that gun and punished is to vary according to the lesser or greater dexterity with which he can dispose of his ammunition. As at present advised, we think a person in the position of the accused must be said to have gone armed and that, therefore, there is no reason for us to interfere with the finding of the Magistrate.

We, therefore, return these papers.

P. B. A. *Papers returned.*

GOMTI MISRA v. DEOTA DIN SINGH.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 169 OF 1922.

October 20, 1922.

Present:—Mr. Kanhaiya Lal, J.C.

GOMTI MISRA—DEFENDANT—APPELLANT

versus

DEOTA DIN SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage—Transfer by mortgagee of his rights—Transferee with notice, position of—Suit for redemption—Limitation Act (IX of 1908), Sch. I, Art. 134.

When a transfer is made by a possessory mortgagee of the mortgaged property as if it were his own and the transferee has notice that the transferor has no higher interest than that of a mortgagee he cannot by reason of any misrepresentation which had not the effect of misleading him or by dint of any collusive misdescription of the interest conveyed acquire higher right than that which the transferor actually possessed within his knowledge or curtail the period of limitation provided for a suit for redemption. [p. 737, col. 2; p. 738, col. 1.]

Muhammad Abbas v. *Nasiban*, 53 Ind. Cas. 168, 6 O. L. J. 384, *Dirgpal Singh* v. *Kallu*, 30 Ind. Cas. 956; 37 A. 660; 13 A. L. J. 915, *Mahbub Ali* v. *Muhammad Husain*, 57 Ind. Cas, 497; 23 O. C. 125; 7 O. L. J. 319, relied on.

Kannusami Thanjiroyan v. *Muthusami Pillai*, 38 Ind. Cas. 194; (1917) M. W. N. 5; 5 L. W. 250, *Baluswami Aiyar* v. *Venkataswamy Naicken*, 40 Ind. Cas. 531; 40 M. 745; 32 M. L. J. 24, distinguished.

Appeal against a decree of the Sub-Judge, Sultanpur, dated the 8th February 1922, upholding that of the Munsif, Musafirkhana, dated the 10th January 1921.

Mr. *Zahur Ahmad*, for the Appellant.

Messrs. *Nagendra Nath Ghosal* and *Haidar Husain*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for redemption and the main question for consideration is whether Art. 134 of the Indian Limitation Act bars the claim. A mortgage was effected by Seetla Bakhsh Singh in favour of Mohan Singh on the 23rd June 1861. Mohan Singh subsequently sub-mortgaged his right to Indar Shukul, who transferred the same to Debi Parsan, the predecessor-in-interest of the defendants Nos. 2 to 4. The defendant No. 1 is the son of Mohan Singh, the original mortgagee. He transferred his rights by a sale-deed of the 5th May 1907 to Gomti Misra, the present defendant-appellant. The plaintiffs are the successors-in-interest of the original mortgagor.

The Courts below found that the defendant-appellant must be considered to have had a notice of the fact that his transferor had no higher rights than those of a mortgagee and that Art. 134 of the Indian Limitation Act had, therefore, no application. The notice attributed to the defendent-appellant, was partly actual, in so far as it was inferable from circumstances established by the evidence, and partly constructive in so far as the possibility of the defendant-appellant getting such notice by the exercise of due diligence was established. Suraj Din Singh was not in possession of the mortgaged property. It was in the pessession of Debi Parsan, the grandfather of the defendant-appellant, but the defendant-appeliant, evidently took the sale of the remaining rights of the mortgagee from Suraj Din Singh, as the manager of the family had already acquired the sub-mortgagee rights by virtue of other transactions. As observed in *Muhammad Abbas* v. *Nasiban* (1) a transfer by a mortgagee does not stand on the same footing as a transfer by a trustee. Where the transfer is made by a trustee for a valuable consideration, the question of good faith becomes practically immaterial, for, if the transferee bad acquired the property from a trustee in good faith for a valuable consideration without having a notice of the trust, he acquires an immediate title to the property under section 64 of the Indian Trusts Act; but if he has not acted in good faith and has paid valuable consideration, he acquires a good title after the lapse of the period necessary for extinguishing the right of the beneficiary to follow the trust property in his hands. If the transfer is made by a possessory mortgagee of the mortgaged property, as if it were his own, and the transferee has notice that the transferor has no higher interest than that of a mortgagee, he cannot, by reason of any misrepresenta-

(1) 53 Ind. Cas. 168; 6 O. L. J. 384;

tion, which had not the effect of misleading him or by dint of any collusive misdescription of the interest conveyed, acquire a higher right than that which the transferor actually possessed within his knowledge or curtail the period of limitation provided for a suit for redemption. Indeed no secret compact between the possessory mortgagee and his transferee intended to defraud the mortgagor, can be allowed to affect or curtail the limitation to the prejudice of the mortgagor. Where the transferee purchases in good faith and for a valuable consideartion without having any notice that the transferor had no higher interest than that of a mortgagee, Art. 134 protects him from a claim by the mortgagor, unless the mortgagor enforces his right as against such transferee within twelve years from the date of the transfer. In *Dirgpal Singh* v. *Kallu* (2) and *Mahbub Ali* v. *Muhammad Husain* (3) a similar view has been taken. The decisions in *Kannusami Thanjiroyyn* v. *Muthusami Pillai* (4) and *Baluswami Aiyar* v. *Venkataswamy Naicken* (5) have no application because they relate to cases of trust.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

K. S. D.

(2) 30 Ind. Cas. 956; 37 A. 660; 13 A. L. J. 945.
(3) 57 Ind. Cas. 497; 23 O. C. 125; 7 O. L. J. 319.
(4) 38 Ind. Cas. 194; (1917) M. W. N. 5; 5 L. W. 20.
(5) 40 Ind. Cas. 531; 40 M. 745; 32 M. L. J. 24.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 32 OF 1921.
January 5, 1922.
Present—Mr. Hallifax, A. J. C.

GANIA—PLAINTIFF—APPELANT
versus
GANGA PRASAD—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s. 114—Hindu joint family—Sale of family property—Member not mentioned in sale-deed, whether party—Presumption.

The mere fact that the name of any particular member of a joint Hindu family is omitted from the sale-deed, by virtue of which the joint property is transferred to a third party, does not show that he was not a party to the transfer. [p. 740, col. 1.]

Second appeal against the decree of the District Judge, Bhandara, dated the 24th September 1920, confirming that of the Munsif, Bhandara, dated the 10th May 1920.

Mr. *A. N. Chorghade*, for the Appellant.

Mr. *S. C. Dutt*, for the Respondent.

JUDGMENT.—The lease of the *malik-makbuza* field in dispute which gives the plaintiff the right to sue for possession is obviously champertous and savours strongly of the undesirable kind of maintenance. The lease is executed by Jawanti for herself and also for the boy Gania, who is described as the son of her husband Rakhdu. The spirit in which the plaintiff conducted his suit is evident from the fact that after obtaining an adjournment of the case for the purpose of enquiring into the family affairs of Rakhdu he had the impudence to plead that he did not know that Gania, who is Rakhdu's brother and lived with him up to his death, was in any way related to Rakhdu. This plea, however, appears to have been allowed to drop quietly. The finding of the First Court that the boy Genia is not the adopted son of Rakhdu, a matter on which the lower Appellate Court was not asked to give a decision, is the only finding, of either Court which appears to me at all probable in accordance with existing facts with the possible exception of the decision that Jaiwanti has not married again after Rakhdu's death, which has been accepted by the appellant Gania.

The view taken by both the lower Courts of the document filed as Exhibit P—1 was superficial and wrong, but in

that view practically all their discussions and findings are waste of time. Both Courts have found that Jaiwanti's name was entered in the Record of Rights of the recent settlement as *malik makbuza* of the field in suit, after express consideration of the matter by the Settlement Offier. The *parcha*, Exhibit P—1, is dated 8th May 1919, so that presumably the assessment was offered to the proprietor on that day at the latest. No suit under section 80 of the Land Revenue Act (II of 1917) had been filed when the judgment of the First Court was delivered, which was on the 10th of May 1920. The entry of Jaiwanti's name as proprietor of this field was by that time conclusive in the circumstances supposed to exist in both the lower Courts, and the lease was perfectly valid whether the boy had been adopted by her husband or not and whether she had re-married or not and even whether Rakhdu and Gania had realy been joint owners of the field or not. The learned Munsif was apparently not unaware that section 80 of Act II of 1917 had some bearing on the case, but it is impossible to get any meaning out of his remarks on the subject. He says: "He (that is Gania, the fourth defendant) admits that *Musammat* Jaiwanti has been awarded the settlement *parcha* of the land in suit (*vide* Exhibit P—1). It will appear that defendant No. 4, if he was at all aggrieved, has not taken any action under the provisions of section 80 of Land Revenue Act for cancellation of the settlement entry within one year. Therefore, the settlement entry is conclusive and is of great evidentiary value so far as the title of *Musammat* Jaiwanti is concerned. Exhibit P—1 shows that after enquiry, defendant No. 4's name was ordered to be removed by the Settlement Officer."

But it cannot be said that the entry now appearing on the *parcha* was made by the Settlement Officer after express consideration and decision by him of Gania's rights, because we know nothing about how or why that entry was made. On the 31st of October 1916 the Settlemen Officer after enquiry passed the following order: "The boy Gania minor, guardian mother Jaiwanti, will be entered. Gania's name will be crossed off." (See Exhibit P—5). The entry in the *parcha* is that of Jaiwanti in her own right. It stood originally "Gania minor guardian mother Jaiwanti widow of Rakhdia *mahar* of Bissi," but all the words preceding the name of Jaiwanti have been cut out in red ink, why this was done it is impossible to say but the entry in 1919 of Jaiwanti in her own right was not made in consequence of the Settlement Officer's order of 1919, and apparently had no connection with it. The right considered and decided by the Settlement Officer before he passed that order was the right of Gania as against Gania. The order is not evidence that he considered Gania's right as against Jaiwanti. Indeed it is evidence that he did not, under sub-section (2) of section 80 of the Land Revenue Act, the entry is, therefore, not conclusive, though under sub-section (3), it must be presumed to be correct until the contrary is shown. But the plaintiff has himself gone a long way towards showing the contrary by proving that the boy's name and not the widow's was ordered to be entered, and by pleading the adoption and by his own deed of lease which is an assertion by Jaiwanti herself that the boy is the *malik makbuza* and she is not.

A curious feature of the case is the deposition of Jaiwanti. The plaintiff called her as his first witness and the whole of her recorded deposition is this: "I produce the sale-deed dated 29th March 1913 and order of Mr. Gordon dated 31st October 1916 and copy of judgment as filed her list." The failure of the plaintiff to ask her a single question about her alleged second marriage or the adoption of Gania or the relations between Rakhdu and Gania or any of the other matters about which she knew more than anybody in the world though he actually had her in the witnesss-box, damages his case more even than if he had never put her there. The circumstance must inevitably lead any reasonable person to the conclusion that his please on these points are untrue. The learned Pleader for Gania seems to have shown no better grasp of the situation. He raised an utterly untenable objection to the admission of the documents

produced by Jaiwanti, but never, apparently put a single question to her of any sort. If the plaintiff claimed for her the protection of section 139 of the Evidence Act his position would be even worse, that there is no record of anything of the sort having been done. In the somewhat unusual circumstances the only possible course is to draw the same inference as would have been drawn as if Jaiwanti had not been called as a witness at all.

As to the field being the separate property of Rakhdu in which Gania had no share, the admitted facts are these, Rakhdu and Gania were brothers, Rakhdu being the elder. They formed a joint Hindu family and lived and had messed together and were both concerned in the management of all the property belonging to both or either of them. Indeed Gania seems to have been more concerned in the management of the cultivation than Rakhdu, who looked after the business of buying and selling tobacoo though Gania had a hand in this also. The field in suit was purchased on the 9th of March 1913 for Rs. 100. In the sale-deed the name of Rakhdu alone appears as purchaser, In addition to these facts which are now admitted there is perfectly good, credible and uncontradicted evidence to show that the purchase was made by Rakhdu and Gania jointly. The reasons given in the judgments of both the lower Courts for disbelieving the *malguzar* and the seller are entirely insufficient but they need not be discussed as the fact of the field being the joint property of Rakhdu and Gania is conclusively established without that additional evidence.

There is only one single fact that has even a tendency to indicate the contrary: That is the fact that Rakhdu's name alone appears on the sale-deed. The utter tee bleness of this indication is apparent. It is within the knowledge of the common course of human affairs of every Judge in India that in a very large number, if not the majority, of documents to which a joint Hindu family is a party as a whole, the name of the senior member alone is entered as the representative of the family, more especially if all the members of the family are brothers. Therefore, from the solitary fact of Gania's name being omitted from the sale-deed we cannot be led to suppose that he was not a party to it. This is in accordance with the principle of ordinary common sense that is crystallised in section 114 of the Evidence Act. Apart from this solitary fact, which at the best from the plaintiff's point of view is natural, every fact in the case is an indication that the field belonged to Gania and Rakhdu jointly.

I set aside the finding of the Courts below that the field was the seperate property of Rakhdu and substitute for it a finding that it was the joint property of the joint Hindu family consisting of Rakhduand Gania. At Rakhdu's death Gania, therefore, became sole owner by survivorship and the plaintiff's deed of lease is entirely inoperative. The decree of the lower Appellate Court is, therefore, set aside. In lieu thereof a decree will issue dismissing the plaintiff's suit.

The plaintiff will further be ordered to pay all the costs of the litigation in all three costs.

Appeal accepted.

K. S. D.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 22 OF 1921.

August 22, 1923.

Present:—Sir Walter Salis Schwabe, KT., Chief Justice, and Mr. Justice Krishnan.

THE OFFICIAL ASSIGNEE OF MADRAS —PLAINTIFF—APPELLANT

versus

N. SUBRAMANIA AIYAR AND OTHERS —DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 19—Civil Procedure Code (Act V of 1903), O. VIII, r. 5—Mortgagee constituted executor of mortgagor's Will—Probate application—Reference to existing mortgage, if acknowledgment of liability—Plaint with recital of mortgage and amount due—Admission in written

statement as to execution of mortgage—No further reference—Admission or acknowledgment of subsisting liability.

Where a mortgagor by her Will appointed the mortgagee himself as her executor and the latter in applying for Probate included the mortgage-debt in the schedule of liabilities;

Held, that this amounted to an acknowledgment of liability so as to save the bar of limitation under section 19 in a suit by the successor-in-interest of the mortgagee to enforce the mortgage.

Where a plaint recited the execution of a mortgage by the defendant and stated a particular sum as due for principal and interest, and the defendant while admitting the execution of the mortgage made no reference to the allegation as to the amount due or to any discharge thereof:

Held, (1) that under O. VIII, r. 5, of the Civil Procedure Code the legal effect of the written statement amounted to an implied admission of the existence of the mortgage-debt and the liability thereon at the date of the written statement and that the amount due was that stated in the plaint and that it was immaterial that the admission of liability was not express but was implied under the rules by reason of the absence of any denial in the written statement; [p. 743, col. 2.]

(2) that in any case looking at what was pleaded and what was being denied in the defence, the intention of the defendant was to admit the continuance of the mortgage-debt at the date of the defence and that the written statement was, therefore, an acknowledgment of subsisting liability under section 19 of the Limitation Act.

Maniram v. *Sith Rupchand*, 33 C. 1047; 4 C. L. J. 94; 8 Bom L. R. 501; 10 C. W. N. 874; 1 M. L. T. 199; 3 A. L. J. 525; 16 M. L. J. 300; 2 N. L. R. 130 33 I. A. 165 (P. C.), *Ranganayakalu Aiyar* v. *Subbayam*, 2 Ind. Cas. 522; 5 M. L. T. 71, *Subramania Iyer* v. *Veerabadra Pillai*, 70 Ind. Cas. 593; 41 M. L. J. 217; (1921) M. W. N. 475; 14 L. W. 148, and *Kandasami Reddi* v. *Suppammal*, 70 Ind. Cas. 576; 45 M. 443; 15 L. W. 325; 42 M. L. J. 268; (1922) M. W. N. 168; (1922) A. P. R. (M.) 104; 32 M. L. T. 166, considered.

Per *Schwabe, C. J.*—An admission to prevent the running of time under section 19 of the Limitation Act need not be in the full sense of the word an admission of the existence of liability at the date of the admission if the proper inference to be drawn from the admission which is made is that it was intended to represent the debt as subsisting. [p. 742, col. 1.]

All the facts at the time of the statement, which is claimed to be an admission must be looked at and then decided whether the proper inference to draw is that it was the intention to make an admission of the then existence of the debt. [p. 742, col. 2.]

Per *Kirshnan, J.*—In construing a written statement, it is necessary to refer to the plaint in answer to which it was filed. [p. 744, col. 1.]

It is not a general rule that, whenever, a debt is said to have been incurred at an anterior date and no statement is made that it has been paid off, we must necessarily draw an inference that that debt is admitted to be still subsisting at the date of the acknowledgment. [p. 746, col. 1.]

A mere statement that a debt existed at one time without anything further is not sufficient to enable the Court to say that there is an acknowledgment of a subsisting liability even though the person who makes the statement does not go on to say that the liability has ceased. [p. 746, col. 2.]

Appeal from the judgment of Mr. Justice Coutts-Trotter, dated the 17th January 1921, in O. S. No 615 of 1918, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court.

Mr. *O. T. Govindan Nambiar*, for the Appellant.

Mr. *C. V. Anantakrishna Aiyar*, for the Respondent.

JUDGMENT.

Schwabe, C. J.—This is an appeal from a judgment of Coutts-Trotter, J. on what is undoubtedly a difficult point under the Limitation Act. The case has been very clearly argued before us by Mr. O. T Govindan Nambiar for the appellant and Mr. Anantakrishna Aiyar for the respondent. The facts appear clearly from the judgment of the Court below and it is sufficient to state them shortly for the purpose of this judgment.

The Official Assignee is suing here as the representative of the estate of an insolvent, one K. R. Narayana Aiyar, who is since deceased. He was a mortgagee having obtained a mortgage in October 1894 from one Narayani Ammal for Rs. 1,000. She was a dancing girl. She died in August 1900 and she made the mortgagee the executor of her Will. In that Will she referred to the debt due to him, and, in applying for Probate, he stated the amount of the mortgage encumbrance, due by the deceased lady, at Rs. 1,620. In November 1912 a suit was brought by one T. S. Kothandarama Chetty against, amongst others, the mortgagee. He claimed to be entitled to the mortgagee's interest in that mortgage having, as he alleged, purchased that interest by Court auction and he sued the mortgagee in his capacity of executor for the mortgagor, he being as such in possession of the mortgaged property, and in February

1913 he (the mortgagee) put in a written statement defending that suit. The Official Assignee who is representing the estate of the mortgagee, has now found it beneficial to the estate to claim on that mortgage, and he is met by a plea of limitation. According to the law of this country, it is necessary for him in bringing this suit to show that his claim is not barred by limitation, and in order to do so he relies on two acknowledgments of liability by Narayana Aiyar on behalf of the mortgagor. The first acknowledgment relied upon is contained in the affidavit by the mortgagee made by him in his capacity as executor under the Will in claiming Probate. He sets out in that affidavit a mortgage-debt of Rs. 1,620. I am quite satisfied that the mortgage debt referred to there was the mortgage-debt to himself as mortgagee. I have no doubt that this is a matter which can be proved by reason of the wording of Explanation (1) to section 19 of the Limitation Act. I am quite satisfied that strict proof of the fact was dispensed with in the Court below, because the defendants would have been totally unable to suggest that there was any other encumbrance which he could have been referring to. In my judgment the admission is an admission which keeps the debt alive down to that date.

The second alleged admission is contained in the written statement of February 1913, and the learned Trial Judge has held that that is not an admission sufficient for the purpose of section 19 of the Act. I do not agree with him. An admission to prevent the running of time under the Limitation Act need not be in the full sense of the word an admission of the existence of liability at the date of the admission if the proper inference to be drawn from the admission which is made is that it was intended to represent the debt as then subsisting. The law on the point is stated by the Privy Council in *Mantram* v. *Seth Rupchand* (1) where there was a statement of what was held to amount to an admission of a debt at a time antecedent to the date of the statement, that is to say, the statement relied upon referred to the debt as having existed at a previous date. It was held under the circumstances of the case that, as the statement did not, as it would naturally, if it had been a fact, do, go on to say that the position has altered since, it must be taken that the natural presumption was that the debt still continued down to the date of the statement, and that was held under those circumstances to be enough. That case has been discussed in subsequent cases by Miller, J., in *Ranganayakalu Alya* v. *Subbayan* (2) by the Division Bench of this Court, Napier and Odger, JJ., in *Subramania Iyer* v. *Veerabadra Pillai* (3) and finally in the present case in *Kandasami Reddi* v. *Suppammal* (4) by Ayling and Venkatasubba Rao. JJ. I think that the statement of the law as made by Ayling, J., and concurred in by Venkatasubba Rao J., in the latter case is certainly correct. My only doubt is whether it goes far enough, but in that case, he in effect states his interpretation of the Privy Council judgment to be that you have got to look at all the facts at the time of the statement, which is claimed to be an admission and then say whether the proper inference to draw is that it was the intention to make an admission of the then existence of the debt. Now in this case the plaint, in answer to which the written statement relied upon was put in, alleged definitely the execution of the mortgage in October 1894 and it further alleged that there was due in respect of the mortgage at the date a sum which was equal to the principal amount and a very large arrear of interest. In the written statement the mortgagee who was contesting the action in his capacity of executor of the mortgagor and in that capacity only, in terms admits the mortgage. He then

(1) 33 C. 1047; 4 C. L. J. 94; 8 Bom. L. R. 501; 10 C. W. N. 874; 1 M. L. T. 199; 3 A. L. J. 525; 16 M. L. J. 300; 2 N. L. R. 130; 33 I. A. 165 (P. C.).

(2) 2 Ind. Cas. 522; 5 M. L. T. 71.

(3) 70 Ind. Cas. 593; 41 M. L. J. 217; (1921) M. W. N. 475, 14 L. W. 148.

(4) 70 Ind. Cas. 576; 45 M. 443; 15 L. W. 325; 42 M. L. J. 268; (1922) M. W. N. 168; (1922) A. I. R. (M.) 104; 32 M. L. T. 166.

deals with the plaint paragraph by paragraph, but, when he comes to paragraph 19 in the plaint which was in these terms: "There will be now due for principal and interest in respect of the said mortgage a sum of Rs. 2,629-4-0," he passes it over in silence. He does not suggest in any part of his written statement that the amount was no longer due, that the mortgage had been discharged in any way or the debt repaid. Under the rules applicable to pleadings in this Court, *viz.*, r. 5, O. VIII of the Civil Procedure Code of 1908, every allegation of fact in a plaint not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant shall be taken to be admitted. The effect of that is that that written statement in law amounted to an express admission first of the existence of the mortgage-debt at the date of the written statement, and then that the amount due was Rs. 2,629-4-0. It is argued that the admission must be express and it is not sufficient for this purpose that it should be an admission which the law implies under the rules by reason of the absence of any denial in the written statement. Speaking for myself, I do not agree. I think that for the purpose of preventing the running of the Statute of Limitation it would be quite enough, if there was such a passing over of a certain allegation in silence in a written statement signed by the party making the admission which in law amounted to an admission; because he must be taken to know the law and, therefore, he would be making an admission at that time; and for the purpose of limitation, an admission made to some other person is sufficient. But, if I am wrong about that, I am quite clear that applying the test stated by Ayling, J., in the case referred to above, that one of the circumstances to look at is to see what was being pleaded and what was being denied in the defence, and it can hardly to my mind be open to doubt that the intention of the person who signed the written statement in February 1913 was to admit the continuance of the mortgage-debt at the date of that document. That being so, the case is taken out of the Statute of Limitation. In my judgment the judgment appealed against is wrong, and the plaintiff is entitled to succeed.

The question remains as to how much he is entitled to succeed, and I think the amount that he would be entitled to take is proved here as the amount shown in the first of the admissions *plus* interest since that date. As a result there will be the usual mortgage decree for the Official Assignee for Rs. 3,450 with costs here and in the Court below. Time for payment six months. Interest will be at 9 per cent. till then and 6 per cent. thereafter.

Krishnan, J.—The decision of this appeal turns purely upon a question of law, namely, one of limitation. The suit is brought to enforce a mortgage executed by one Narayani Ammal, to whom the suit property originally belonged, mortgaging the property in 1894 in favour of one Narayana Aiyar. In 1900 Narayana Aiyar became insolvent and whatever rights he had under this mortgage passed to the Official Assignee. This suit is brought by the Official Assignee to enforce the mortgage by sale of the property as against the representatives of the original mortgagor Narayani Ammal and others. *Prima facie*, as the learned Judge remarks in his judgment, the suit will be barred, and to save it from the bar of limitation, the Official Assignee relies upon two acknowledgments: and what we have to consider in this appeal is whether these acknowledgments are good acknowledgments or not, under section 19 of the Limitation Act to give fresh starting points for limitation to run. One is said to be contained in Exhibit IV, a petition which Narayana Aiyar, as the executor and trustee appointed under the Will by Narayani Ammal, filed in 1903 for the Probate of that Will. In the schedule of assets and liabilities attached to that petition there is an entry to the effect, "item No. 3—Amount of mortgage encumbrances Rs. 1,620." The other acknowledgment relied on is said to be contained in a written statement filed in 1913 by the same Narayana Aiyar in a suit brought in 1912 by one Kothandarama Chetti. The learned Judge who tried this case has considered only the question whether the second of these

acknowledgments is a good acknowledgment or not, for as he came to the conclusion that it was not, the suit failed. I take, therefore, that point for consideration first.

Before dealing with the argument adduced regarding the question whether it is a good acnowledgment or not, I shall briefly state under what circumstances this written statement came to be filed as in construing a written statement, it is necessary to refer to the plaint in answer to which it was filed, and for that purpose it is necessary that we should know how the plaint came to be filed. There was one Devaraja Mudali who had a money claim against Narayana Aiyar and he brought a suit in the Small Cause Court and obtained a decree against Narayana Aiyar, the mortgagee. He then got the decree transferred to the City Civil Court, and in execution of that decree sold the right, title, and interest of Narayana Aiyar in the mortgage and purchased it himself. Subsequently he brought a suit as mortgagee whose rights he claimed to have obtained by his auction-purchase in the City Civil Court, to enforce the mortgage against the mortgagor by sale of the property. This was in 1906. By that time Narayani Ammal was dead, she having died in 1900. In bringing the suit he made one Murugammal the legal representative of the said Narayani Ammal and conducted the suit. He obtained a decree in the City Civil Court which was confirmed in appeal, and in execution of that decree, this property was brought to sale by the Court. In that sale one Kothandarama Chetti became the purchaser in August 1911. He tried to obtain possession through Court but failed as he was obstructed by Narayana Aiyar, and thereupon he brought the suit, Origina Suit No. 425 of 1912 in November 1912 in which he claimed, first of all, to recover possession of the property from the obstructor after removing the obstruction, and, secondly, if the Court found that he had not obtained a proper title to the property, he claimed that he had at least become the owner of the mortgage interest and, therefore, he should be given a decree for the mortgage amount, which he stated to be Rs. 2,629 and odd on that date, as against the estate. He also made certain other claims against certain other persons with which we are not now concerned. In that suit Narayana Aiyar was one of the parties and the Official Assignee was also added as a party. Narayana Aiyar was then representing the estate of Narayani Ammal as the executor and trustee under her Will and the Official Assignee was representing the mortgagee's interest that passed to him by virtue of the insolvency of Narayana Aiyar. The written statement was filed in that suit by Narayana Aiyar as mortgagor and it is Exhibit III in this case. It is contended for the plaintiff that there is a sufficient acknowledgment in the written statement of the liability of the estate for the mortgage-debt. The clause relied upon as containing the acknowledgment is the first clause in the written statement which runs thus: "This defendant admits that Narayanamma referred to in paragraph 3 of the plaint, was the owner of the plaint property and that she mortgaged the same in favour of this defendant on or about the 6th October 1894 as alleged in the said parapraph." It is contended for the other side that this is not a sufficient acknowledgment to take the case out of the bar of limitation because it merely says that there was a mortgage in 1894 and that it makes no statement whatsoever admitting any existing liability to pay the mortgage-debt. It is also contended that this statement should not be taken as having been made by Narayana Aiyar as representing the estate of the mortgagor, at any rate that it is uncertain whether it was made by him in his capacity as the representative of the mortgagor or in his own capacity as mortgagee, and it is argued that this is also one reason for refusing to accept the statement as a sufficient acknowledgment of the liability under section 19 of the Limitation Act under which the acknowledgment must be made by the debtor or on behalf of the debtor by a person duly authorised to make the same. These two arguments have been supported by the learned Judge who tried the case; but after

hearing the arguments in appeal, I agree with the learned Chief Justice that there are not sufficient grounds for refusing to accept this statement in the written statement as constituting a proper acknowledgment under section 19.

As regards the objection, that it is not clear that this acknowledgment was made by Narayana Aiyar in his capacity as representing the mortgagor's interest and not in his own capacity as mortgagee, it must be remembered that he was made a party in that suit mainly as representing the mortgagor's interest, because the mortgagee's interest had already passed to the Official Assignee. No doubt there are certain statements in the written statement wherein he does refer to his interest as mortgagee also; nevertheless I think in the main he was in the suit as representing the estate of the mortgagor; and I think we are bound to give effect to any statements made by him apparently in his capacity as the mortgagor's representative and not say that it is doubtful whether he made it in one capacity or other and reject it. Where it is clear from the context, that any statement in the written statement is made by him in his capacity as mortgagor, of course we must take it that it refers to his capacity as such and not to his capacity as mortgagee though the written statement as a whole is a combined one. I have no doubt, therefore, that this argument fails, as I have come to the conclusion that the statement in paragraph (1) of the written statement may very reasonably be attributed to him as being made on behalf of the mortgagor of the estate which he was representing in that suit.

As regards the second argument, which is a little more difficult to deal with, there can be no doubt, as pointed out by the learned Chief Justice, that there is an implied admission if not an express admission in the written statement that the mortgage-debt on the date of the written statement was standing at the figure of Rs. 2,629 or thereabouts; it was expressly claimed in the plaint against the estate. There is no denial whatever of that in the written statement and that being so, it certainly can be inferred that the amount was admitted under O. VIII, r. 5 of the Civil Procedure Code. I think the same inference may be drawn in this case also in construing the written statement for the purpose of seeing whether the acknowledgment in the first paragraph was that of a dead mortgage or of a mortgage that was then subsisting, and that we are justified in holding that he was there referring to a subsisting mortgage. The learned Judge has referred to certain other paragraphs in the written statement as showing the contrary, namely, paragraphs 6, 8 and 15, but they do not seem to me to refer to the subsisting character of the mortgage at all. All that is said in these paragraphs is that the plaintiff was not entitled to claim anything under the mortgage because Kothandarama Chetti had not got a proper title as the person who was added as the legal representative in the suit by Devaraja Mudaliar had never occupied that position at all.

Our attention has been called to the case of *Maniram* v. *Seth Rupchand* (1). In that case an acknowledgment was made by a person as the representative of a deceased person called Motiram, that Motiram had an open and current account with the defendant at the time of his death. This was treated as a sufficient acknowledgment of a subsisting liability although the acknowledgment itself was made only about a year after he died. At page 1059 their Lordships say this, "The acknowledgment, to which attention has been directed, is followed in the same paragraph by the following sentence: 'The alleged indebtedness does not affect his' (the respondent's) 'right to apply for Probate.' Stress was laid by the Civil Judge upon the word 'alleged.' He was of opinion that the word 'had' in the sentence 'for the last five years he had open and current accounts with the deceased' and the word 'alleged' were fatal to the validity of the acknowledgment. Their Lordships cannot share this opinion. The first sentence shows that there were open accounts at the death of Motiram. If nothing further

is alleged the natural presumption is that they continued unsettled at the time the statement was made. The sentence which follows is perfectly consistent with this admission. The meaning is 'even if there is a balance against the respondent, that does not disqualify him from fulfilling the duties of an executor' and it has been pointed out that what is relied upon here is an acknowledgment subject to the condition that an adverse balance really exists, and the condition is fulfilled in fact." In this paragraph the sentence occurs, 'If nothing further is alleged the natural presumption is that they continued unsettled at the time the statement was made.' As at present advised, I am not prepared to go so far as Miller, J., in thinking that their Lordships have laid down a general rule that whenever a debt is said to have been incurred at an anterior date and no statement is made that it has been paid off, we must necessarily draw an inference that that debt is admitted to be still subsisting at the date of the acknowledgment. I am prepared to accept the interpretation put by the ruling of this Court of Ayling and Venkatasubba Rao, JJ. in *Kandasami Reddi* v. *Suppammal* (4), where Ayling, J., who delivered the judgment in which Venkatasubba Rao J., concurred, says: "I can see no ground whatever for holding that their Lordships were considering anything but the circumstances of that case or intended to lay down any rule of legal inference. The presumption in that case was very strong." Then he considers how the presumption arose from the facts of that case, and then His Lordship says, "That is the meaning of the paragraph quoted taken as a whole. If defendant had been in a position to say that the account had been settled between 6th October 1898 and 20th September 1899, he would certainly have said so; for this would have been a much better answer to plaintiff's objection. As he did not say so, the inference that the accounts still remained unsettled is natural and obvious." It follows then that in each case we have to consider the circumstances in which the statement was made that there was a debt and see whether it was really intended to convey an impression that that debt was subsisting at the date of the statement or not; and if we can from the circumstances infer that the intention of the person making the statement was to convey the impression that the debt was still subsisting we will be juctified in holding that it is an acknowledgment of a subsisting liability. I do not think that a mere statement that a debt existed at one time without anything further, as was the case in Second Appeal No. 52 of 1921 to which our attention has been drawn, a decision to which I am a party, is sufficient to enable the Court to say that there is an acknowledgment of a subsisting liability even though the person who makes the statement does not go on to say that the liability has ceased. In that second appeal a man was being examined as a witness and he had to answer questions put to him. He had no opportunity of saying anything further than that he had executed a mortgage bond for a prior debt and he, therefore, said nothing; and Spencer, J., and I held that there was no acknowledgment of a subsisting liability there. I adhere to that opinion. But in this case, as I have already pointed out, the circumstances are perfectly clear to show that, when Narayana Aiyar made his statement in paragraph 1 of his written statement, he really meant to say not only that there was a mortgage created in 1894 but also that that mortgage was subsisting on the date of the written statement. That being so I think it complies with the requirements of law contained in section 19 of the Limitation Act. One other case cited to us is *Subramania Iyer* v. *Veerabadra Pillai* (3). In that case and also in the case decided by Miller, J., there were circumstances from which the inference was drawn in those cases that the acknowledgments were of subsisting debts.

I shall now deal with the other acknowledgment pleaded. In order to show that the acknowledgment in the written statement is effective in saving limitation the plaintiff has to show that it was made at a time when the mortgage debt was sub-

sisting and for that purpose he has to rely on another acknowledgment because the second acknowledgment was made more than twelve years from the date of the mortgage itself. The first acknowledgment is in Exhibit IV. I have already stated its character, and there can be no doubt whatever that that acknowledgment refers to this mortgage debt. It is said by the learned Counsel for the Official Assignee before us that there was no other mortgage encumbrance which Narayani Ammal had created on any part of her property; and the amount of the mortgage encumbrance mentioned in Exhibit IV is certainly over the amount of the suit mortgage and probably represents the amount then due, of principal Rs. 1,000 and interest thereon; probably some interest had been paid off. Had the other side objected to our identifying this mortgage encumbrance as the plaint mortgage one, it would have been necessary to allow the plaintiff to adduce evidence to prove the identity of the two as he could be allowed to do under section 19, Explanation 1 of the Limitation Act; but apparently the point was not pressed in the lower Court and, therefore, I agree with the learned Chief Justice that it is not necessary to send the case down to have the matter cleared up.

In the view I take the plaintiff's suit must be held to be in time, and there being no other defence of any importance or value in the case and as the parties are not in dispute with regard to the amount of the mortgage, I agree with the learned Chief Justice that we should give a mortgage decree for the amount due with costs in both Courts.

S. D. *Appeal allowed.*
V. N. V.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 607 OF 1922.
September 12, 1923.
Present:—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Coyajee.

GHANSHAMDAS BALKRISHNADAS —DEFENDANT—APPELLANT
versus
MOTICHAND HARAKCHAND—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908) Sch. I, Art. 182, Expl. 1—Decree against several defendants—Insolvency and discharge of some—Execution application against discharged insolvents—Step-in-aid of execution.

A decree was passed on October 26, 1909, on the basis of a promissory note executed by defendant No. 1. The decretal amount was made recoverable from the defendants Nos. 1 and 2 personally and from the estate of all the defendants family. Defendants Nos. 1 and 2 were adjudged insolvents on September 6, 1910, and got their discharge on March 20, 1912. Plaintiff made his first application for execution against defendants Nos. 1 and 2 only in 1911 and then again in 1914, also against defendants Nos. 1 and 2 only. In 1917, he applied to have the decree transferred for execution to another Court. In 1920 he applied for execution against the property of defendants Nos. 2 to 5:

Held, that as the possibility of legal execution as regards defendants Nos. 1 and 2 had come to an end to the knowledge of the plaintiff, his application of 1914 could not be treated as being in accordance with law so as to keep the decree alive as against the other joint debtors. [p. 748, col. 2.]

Appeal from the decision of the District Judge, Sholapur, in Appeal No. 166 of 1921, confirming an order passed by the Second Class Subordinate Judge at Karmala, in Darkhast No. 188 of 1920.

Mr. *D. R. Patwardhan*, for the Appellant.

Mr. *Patwardhan*, (with him Mr. *V. D. Limaye*), for Respondent No. 1.

JUDGMENT.—This appeal arises out of an application to execute the decree passed in Suit No. 402 of 1908 on October 26, 1909. It was passed on a promissory note executed by defendant No. 1 in respect of dealings between the plaintiff and the defendants' shop for Rs. 970 and costs as claimed from the defendants, *i. e.*, from defendants Nos. 1 and 2 and from the estate of all the defendants' family and that of the shop. At that time defendants Nos. 1 and 2 were the

only adult members of the family and the other defendants Nos. 3 to 5 were minors.

Defendants Nos. 1 and 2 applied to the High Court to be adjudged insolvents. The adjudication order was made on September 6, 1910, and they got their discharge on March 20, 1912. The plaintiff had notice of these insolvency proceedings.

The plaintiff made his first application for execution against defendants Nos. 1 and 2 only in 1911. The second application (No. 674 of 1914) was made against them only in 1914. In 1917 the plaintiff applied to have the decree transferred for execution to another Court. The present application was made in 1920 for execution against the moveable property of defendants Nos. 3 to 5. It may be mentioned that the first two applications were not proceeded with at all.

The defendants contended that the application was time-barred. All the previous applications are within three years of each other: and the plea of limitation is based on the ground that the application of 1914 is not in accordance with law, as it was only against defendants Nos. 1 and 2, who had already got their discharge. Both the lower Courts have disallowed this plea, and ordered execution to proceed against the moveable property of defendants Nos. 3 to 5.

In support of the appeal on behalf of defendant No. 3 it is urged that under section 45, sub section (2) of the Presidency Towns Insolvency Act the defendants Nos. 1 and 2 were released from their liability in respect of this decree, that no execution against them was open to the plaintiff in 1914 according to law, and that an application directed against them cannot be treated as being in accordance with law so as to save limitation against others who were not touched by the application. On the other hand, it is urged that it was in form an application for execution, that it was made in accordance with the requirements of the Code of Civil Procedure and that it was sufficient to save limitation under Explanation I of Art. 182 of the Indian Limitation Act as regards the other joint debtors.

No case directly bearing on an application such as we have in this case has been cited to us. The point is not free from difficulty, but after a consideration of the arguments, we have come to the conclusion that no application for execution of the decree according to law against defendants Nos. 1 and 2 was possible after the order of discharge which must be taken to have been known to the plaintiff. Defendants Nos. 1 and 2, against whom only there was a personal decree, were released from their liability under the decree according to the provisions of section 45 (2) of the Presidency Towns Insolvency Act. The other defendants were not personally liable: and their interest in the joint family property was the only thing that continued to be liable, if at all, for the decretal amount. No execution was taken out against them until 1920. Explanation 1 to Art. 182 of the Indian Limitation Act, which is relied upon, is not sufficient, in our opinion, to save limitation under circumstances such as we have in this case.

We have considered the bearing of the decision in *Lalta Prashad* v. *Suraj Kunwar* (1) and *Bando Krishna* v. *Narsinha* (2) on the facts of this case. But where the possibility of legal execution as regards defendants Nos. 1 and 2 had come to an end to the knowledge of the plaintiff, as in this case, we do not see how his application of 1914 could be treated as being in accordance with law so as to keep alive the decree as against the other joint debtors.

In this view of the matter it is not necessary to consider whether under the circumstances any execution of the decree is permissible at all, apart from limitation. That point has not been argued before us, though it has been mentioned in the Memorandum of Appeal.

We allow the appeal, reverse the decree of the lower Appellate Court and dismiss the Darkhast with costs throughout.

K. S. D. *Appeal allowed.*

(1) 1 Ind. Cas. 339; 31 A. 309; 6 A. L. J. 359.
(2) 17 Ind. Cas, 210; 37 B. 421; 14 Bom. L. R. 861.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 30 OF 1922.
October 7, 1922.
Present:—Mr. Daniels A. J. C., and Mr. Dalal, A. J. C.

SIDH GOPAL AND ANOTHER—PLAINTIFFS—APPLICANTS
versus
BIHARI LAI AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Costs—Costs awarded jointly against co-plaintiffs—Suit for contribution, whether maintainable.

A suit for contribution lies in respect of costs awarded jointly against co-plaintiff and paid by some of them.

Bhagwan Das v. *Rajpal Singh*, 63 Ind. Cas. 276, 24 O. C. 148, followed.

Ram Sarup v. *Bai Nath*, 58 Ind, Cas. 324; 43 A. 77; 18 A. L. J. 872; 2 U. P. L. R. (A) 299, refered to.

Kaniz Fizza Bibi v. *Sheo Narain Misr*, 10 O. C. 108, *Jamshed Ali Khan* v. *Zahur-ul-Hasan Khan*, 33 Ind. Cas. 357; 18 O. C. 340, not followed.

Application against a decree of the Munsif, South Unao, dated the 12th December 1922.

Mr. *M. Arabi*, for the Applicant.

JUDGMENT.—The question which arises for decision in this revision has already been decided by a Bench of this Court to which one of us was a party in a reported judgment not referred to in the referring order. The question for decision is whether contribution lies in respect of costs awarded jointly against co-plaintiffs or co-defendants. In this case the suit of the plaintiffs was dismissed. A joint decree for costs was passed against them all. The costs were paid by the applicants and they seek contribution against the other unsuccessful plaintiffs. The Court below has dismissed their suit on the authority of two rulings reported as *Kaniz Fizza Bibi* v. *Sheo Narain Misr* (1) and *Jamshed Ali Khan* v. *Zahur-ul-Hasan Khan* (2). These rulings were considered and overruled in *Bhagwan Das* v. *Rajpal Singh* (3). Most of the previous cases have been cases between co-defendants but there is also a recent case of the Allahabad High Court, *Ram Sarup* v. *Baij Nath* (4) in which the question was discussed, and the right of contribution recognised, as between co-plaintiffs whose suit had been dismissed. In this case the applicants have failed to take steps to obtain service against respondents Nos. 2 and 3, Raghubar Dayal and Sheo Sewak. The application must fail against them. As against the other respondents we allow the application with costs and setting aside the decree of the Court below remand the case for decision on the merits. Costs in this Court will be on the *ex parte* scale as none of the respondents has appeared.

Application dismissed.

K. S. D.

(1) 10 O. C. 108.
(2) 33 Ind. Cas. 357; 18 O. C. 340.
(3) 63 Ind. Cas. 276; 24 O. C. 148.

(4) 58 Ind. Cas. 324; 43 A. 77, 18 A. L. J. 872; 2 U. P. L. R. (A.) 299.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 170 OF 1922.
September 19, 1923.
Present:—Sir Lallubhai Shah, KT., Acting Chief Justice, Mr. Justice Crump and Mr. Justice Coyajee.

KESHAVLAL PUNJALAL SHETH—APPELLANT
versus
THE COLLECTOR OF AHMEDABAD—RESPONDENT.

Court Fees Act (VII of 1870), s. 18, D, Sch; III—Hindu joint family—Father and sons—Death of father—Letters of Administration—Court-fees.

No Court-fees are payable in respect of an application for the grant of Letters of Administration to the family property made by sons on the death of the father in a Hindu joint family consisting of the father and sons.

Collector of Kaira v. *Chunilal*, 29 B. 161; 6 Bom. L. R. 652, followed.

Kashinath Parashram v. *Gouvabai*, 28 Ind. Cas. 473; 39 B. 245; 17 Bom. L. R. 109, dissented from.

KESHAVLAL PUNJALAL v. COLLECTOR OF AHMEDABAD.

Appeal from the decision of the Assistant Judge, Ahmedabad, in Application No. 228 of 1921.

Mr. *G. N. Thakor* (with him Mr. *R. J. Thakor*), for the Appellants.

Mr. *Kanga*, Advocate-General, (with him Mr. *S. S. Patkar*, Government Pleader), for the Respondent.

JUDGMENT.

Shah, Ag. C. J.—This appeal came on for hearing before my brother Coyajee and myself; but as we were invited to reconsider the decision in *Collector of Kaira* v. *Chunilal* (1) it was ordered to be heard by this Bench. We have now heard the appeal and the principal point argued is whether the said ruling is to be followed or not.

The appeal arises in this way :—

Sheth Punjalal Amritlal of Prantij died on May 15, 1916, leaving two sons, Keshavlal and Kodarlal. During his lifetime they formed a joint family. On his death the joint estate survived to his two sons. The estate included certain shares in various companies registered under the Indian Companies Act, which were in the name of Punjalal. The sons subsequently effected a partition of the whole estate in 1920, and as a result divided among other things the beneficial interest in the shares. They applied for limited Letters of Administration to the estate of their father relating to the said shares, as without such letters they could not be accepted as his legal representatives in respect of these shares. There was no dispute about the right to the Letters of Administration but there was a dispute as to their liability to pay the Court-fees on the value of the shares.

The petitioners relied upon the decision in *Collector of Kaira* v. *Chunilal* (1) as entitling them to exemption from payment under the Court Fees Act. On behalf of the Collector of Ahmedabad it was contended that the ruling did not apply as at the date of the application the property was not joint but divided and severally owned by the two petitioners. The learned Assistant Judge accepted the contention of the Government Pleader and while granting the limited Letters of Administration as prayed directed Court-fees to be paid on the valuation of the shares as made by the Government Pleader. The petitioners have appealed on the ground that the lower Court has erred in not applying the decision in *Collector of Kaira* v. *Chunilal* (1) as the material date is the date of Punjalal's death and not the date of application. On behalf of the respondent (the Collector of Ahmedabad), the learned Advocate-General has not seriously contested the correctness of the position thus taken up by the petitioners; but he has sought to support the order of the lower Court principally on the ground that section 19 D of the Court Fees Act has not been correctly interpreted by this Court in the said decision. In support of this contention, he has relied upon the observations in *Kashinath Parashram* v. *Gourabai* (2) and the words of section 19D and Schedule III of the Court-Fees Act.

As regards the ground upon which the lower Court has based its decision, it is clear that it cannot be supported and the learned Advocate-General has rightly refrained from pressing it. The Letters of Administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death. Section 14 of the Probate and Administration Act is clear on this point. The question is whether at the moment after his death the property was joint family property and not whether it was so at the date of the application. It was not contended in the lower Court, and it is not contended before us, that at the date of Punjalal's death it was not part of the joint family property. The allegation of the petitioners on this point was not challenged.

This brings me to the real point of importance raised on behalf the respondent. The point is two-fold: first, it is urged that Punjalal did not hold the shares wholly or partially on trust within the meaning of section 19 D and that he was beneficially interested therein in his

(1) 29 B. 161; 6 Bom. L. R. 632.

(2) 28 Ind. Cas. 473; 39 B. 245; 17 Bom. L. R. 169.

own right though other members of the joint family were equally interested and though on his death the whole beneficial interest survived to the two sons. Reliance is placed upon the words used in Schedule III of the Act: secondly, it is urged that even if Punjalal was not wholly interested in the shares at least to the extent of his share he was interested and the Court-fees ought to be payable in respect of one-third of the property for which the Letters of Administration are sought.

In support of the first branch of the argument the learned Advocate-General relies upon the observation in *Kashinath* v. *Gourbai* (2). In respect of the second branch of the argumen he relies upon the case of *In the goods of Brindabun Ghose* (3) and *In re Dasu Manavala Chetty* (4).

By way of answer to these contentions the learned Counsel for the appellants contends that the words of section 19D are comprehensive enough to include the case of a joint member of a family holding the property in his name who has a partial interest in the property during his lifetime, which (interest) ceases altogether on his death and survives to the survivors, that there is no conflict between the wording of the Schedule and the wording of the section and that the cases of *In the goods of Pokurmull Augurwallah* (5) and *Collector of Kaira* v. *Chunilal* (1) are rightly decided. Further, he relies upon the observations of Hayward, J., in *Kashinath Parashram* v. *Gourabai* (2) at page 254* of the report as really supporting his contention. Further, it is urged that as this section which was enacted in 1875 has been interpreted in favour of the subject in a particular manner, as the practice in this Court has been uniform as stated in *Collector of Kaira* v. *Chunilal* (1), and as the Legislature has not considered it right to amend the section in the sense now contended for, it is not right that a narrower interpretation should be placed upon the exemption and a departure made from the established practice extending over a number of years.

We have considered the arguments urged on both sides, and my view is that section 19D has been correctly interpreted by this Court in *Collector of Kaira* v. *Chunilal* (1) and that even if there be a doubt as to the true meaning of the expression "property whereof or whereto the deceased was possesssed or entitled either wholly or partially as a trustee" or the expression "property held in trust not beneficially or with a general power to confer a beneficial interest" the interpretation accepted in Calcutta so far back as 1896 and in Bombay so far back as 1904 and acquiesced in by the Legislature should now be accepted as representing the true scope of the said expressions. First as regards the meaning of the expression in its application to joint family property with the incident of survivorship governed by the Mitakshara and the Mayukha in this Presidency it must be remembered that while the holder, a member of the family, in one sense is beneficially interested in the whole, the other members of the co-parcenery are also beneficially interested in the whole and the beneficial interest of the holder is limited by the extent of the interest of other members. Further, that interest disappears altogether on his death: and the survivors become the sole beneficiaries in the estate which stands in the name of the deceased person. On his death what is called his estate is no estate of his; and the legal title which still continues in the dead man is really the title of a man, whose beneficial interest in the property on his death is nothing. As regards property of this character it could be properly said that the deceased died possessed of it or was entitled to it either wholly or partially as a trustee within the meaning of section 19D. I do not think that the words used in the Schedule, *viz.*, "property held in trust not beneficially or with general power to confer a beneficial interest" conflict with this view. I do not say that the point is free from difficulty. But if the rule of construction to be applied to an enactment of this nature is, as I think, it should be,

(3) 11 B. L. R. 39 App.; 19 W. R. 230.
(4) 4 Ind. Cas. 1064; 33 M. 93 at p. 98; 6 M. L. T. 286; 19 M. L. J. 591.
(5) 23 C. 980; 1 C. W. N. 31; 12 Ind. Dec. (N. S.) 651;

*Page of 39 B.—[Ed.]

that a liberal construction ought to be given to words of exception confining the operation of the duty, I think that the words have been rightly construed to cover a case of joint family property held by a co-parcener for the joint benefit of himself and others and in which his beneficial interest ceases on his death, so that at the date of his death his legal title or possession is without any beneficial interest therein. He would have no power on his death to confer a beneficial interest as he would have for instance in the case of his self-acquired property.

I have so far considered the point apart from authority. But when I turn to the decided cases, the weight of authority seems to be in support of this view. In Bengal the practice has been in accordance with the decision of *In the goods of Pokurmull Augurwallah* (5) at least since the date of that decision. In Bombay the question was fully examined by Jenkins, C. J., in 1904, and the conclusion with the reasons therefor has been stated in the case of *Collector of Kaira* v. *Chunilal* (1). The practice on the Original Side of this Court has been mentioned in that case as being of long standing, and in this Presidency there has been no contrary decision. The observations in *Kashinath Parsharam* v. *Gouravabai* (2) are no doubt against this view. I agree that Beaman, J.'s view is in conflict with the opinion expressed by Jenkins, C. J. But I doubt whether the observations of Hayward, J., can be read in that sense: for at page 254* of the report he observes as follows:—

"The case might, no doubt, have been different if the estate specified had been not the whole joint property but only a limited interest in the joint property—if, for instance, the estate specified had excluded the beneficial interests of the members of the family in the property and had strictly been limited to the legal right to parade as proprietor under such statutory provisions as sections 22 and 23 of the Presidency Banks Act, 1876, or sections 30 (2), 33 and clauses 21 and 22 of Table A of the First Schedule of the Companies Act, 1913. The possibility of such a case would appear from the remarks in the case of *Bank of Bombay* v. *Ambalal Sarabhai* (6). That would perhaps have been the appropriate manner of meeting the difficulties presented by such statutory provisions as those of the Presidency Barks and Companies Acts."

When the present application is looked at in its true legal bearing, in substance it is really an application of the nature referred to by Hayward, J., and it is not unlikely that the remarks in *Bank of Bombay* v. *Ambalal Sarabhai* (6), referred to by Hayward, J., were present to the mind of the learned Chief Justice when he decided the later case now under consideration. With great respect for the contrary opinion expressed in *Kashinath's case* (2). I think that the decision in *Collector of Kaira* v. *Chunilal* (1) is right.

The view of the Madras High Court proceeds on somewhat different lines, and the learned Advocate General has pressed for that view in the alternative. I have considered the *ratio decidendi* in that case. But I am unable to hold that the fact that a joint sharer has power to alienate his share for consideration in this Presidency could alter the character of the property. If a sharer simply alienates his share for consideration and dies the next day without effecting partition; the purchaser would not get his share, as it would cease to exist before it is seized. He cannot make a gift of his undivided share: and he cannot dispose of it by Will. I am unable to hold that such limited power of dealing with the property can make any difference in the character of the deceased's title to or possession of the property at the time of his death. With great respect for the learned Judges I am unable to accept the *ratio decidendi* in that case.

Lastly, even assuming that the scope of the expression used in section 19D and the Schedule is not clear, it cannot be said that it is so clear the other way that we should now decide to depart from the practice, which has been uniformly followed in this Presidency for so many years and which has the sanction of judicial interpretation put upon the Court Fees Act so far back as 1904.

*Page of 39 B.—[Ed.]

(6) 24 B. 350 at p. 359; 2 Bom. L. R. 467; 12 Ind. Dec. (N. S.) 767.

During the interval the Legislature has not indicated that that is not consistent with the true intention of the Legislature. Having regard to the history of the legislation on this point and its application for many years, I do not think that the view taken in *Collector of Kaira* v. *Chunilal* (1), can be held to be wrong.

I would, therefore, allow the appeal and modify the decree of the lower Court by deleting the directions as to payment of Court-fees. The appellants to have their costs throughout. The amount, if paid, to be refunded.

Crump, J.—I agree.

Coyajee, J.—I agree.

N. H.

Appeal allowed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 267 OF 1921.

July 17, 1923.

Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

CHHIDDU—PLAINTIFF—APPELLANT

versus

DESRAJ AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Plea that transaction was fictitious—Burden of proof—Evidence Act (I of 1872), s. 114 ill. (e)—Bundelkhund Encumbered Estates Act (I of 1903), s. 12, proceedings under—Presumption—Rebuttal.

Where the execution and registration of a mortgage-deed are admitted but it is alleged that the document was executed merely for show and was entirely fictitious, the burden of proving the fictitious nature of the deed lies on the party making the allegation. [p. 753, col. 2.]

The presumption that proceedings under the Bundelkhund Encumbered Estates Act were regularly taken may be rebutted by proof of facts which show that the proceedings were as a matter of fact irregular. [p. 754, col. 2.]

First appeal from a decree of the Subordinate Judge, Banda, dated the 29th April 1921.

Mr. *K. N. Laghate*, for the Appellant.

Mr. *P. L. Banerji*, for the Respondents.

JUDGMENT.—This was a suit for redemption, the appellant being the plaintiff. The principal defendant in the suit was one Desraj who was alleged to be the mortgagee.

According to the particulars set out in paragraph 2 of the plaint a mortgage was executed on the 3rd of June 1890 by one Atbal Singh, father of the plaintiff. The mortgage was in favour of the first defendant, Desraj, the mortgage money was Rs. 2,100, and the mortgage was with possession.

The principal defence which was set up in the suit and which was accepted by the learned Judge in the Court below was that the deed upon which the plaintiff claimed a right of redemption, although it had been duly executed and registered, yet did not operate as a mortgage at all, inasmuch as the transaction was entirely fictitious. It was pleaded that this mortgage had been executed by Atbal Singh in favour of Desraj merely in order to defeat the claim for pre-emption which had been brought in respect of the property by one Gopal. It seems that on the very day on which Gopal filed his suit for pre-emption against one Kamta who was the first purchaser, Kamta sold the property to Atbal Singh, and three or four days after Atbal Singh executed the mortgage upon which the present suit is based.

In the Court below there seems to have been a good deal of discussion regarding the burden of proof with respect to the plea that the document of the 3rd of June 1890 was a fictitious document.

The opinion of the Subordinate Judge was that the burden lay upon the plaintiff. In this matter we have no doubt that the Subordinate Judge was wrong. The execution and registration of the document having been admitted if the defendant made the allegation that the document had been executed merely for show and was purely fictitious, the burden of proof rested upon him.

The Pleaders of both parties declined to produce oral evidence in the case.

Certain facts were brought to notice and certain documents were before the Court which led the Subordinate Judge to the conclusion that on whichever of the par-

ties lay the burden, it was established to his satisfaction that the mortgage was in fact a fictitious transaction. He referred in particular to a pre-emption suit, Suit No. 544 of 1899 in which the question of the genuineness of this deed of mortgage had been gone into by the Court. That was a suit in which Gopal, the pre-emptor, was a plaintiff and in which both Atbal Singh, the mortgagor, and Desraj, the mortgagee, were impleaded as defendants. It was certainly held in that case that the mortgage was a sham and had been entered into for the purpose of defeating Gopal's claim for pre-emption.

The Judge however, was not right in saying that the judgment in this suit could be accepted as evidence of the facts stated therein. We do not mean to lay down that the judgment was altogether inadmissible, but we think it was not such a strong piece of evidence in favour of the defendant's case as the Subordinate Judge thought it to be.

And after all whatever importance we may attach to the finding in that suit regarding the fictitious character of this mortgage, we have the outstanding fact that subsequently Desraj himself professed to purchase the equity of redemption of this mortgage from one Khalaq Singh for a sum of Rs. 400. As a fact, however, Khalaq Singh was not the owner of the equity of redemption, nevertheless it is clear that Desraj had treated the mortgage as a genuine transaction.

It has been pointed out that Desraj did not go into the witness-box to sustain the plea which he raised by way of answer to the plaintiff's claim. The reason for this is apparent. There can be no doubt that in the pre-emption suit brought by Gopal Desraj had sworn to the genuine character of this mortgage. He was not, therefore, going to take the risk of prosecution for perjury by going into the witness-box in this case and swearing that the transaction was fictitious.

On the evidence as it stands we are satisfied that the plea raised by Desraj that this mortgage was a fictitious mortgage was not established.

We must, therefore, hold that the document is to be treated for the purposes of the suit as a genuine document of mortgage.

This brings us to another part of the case. In his plaint the plaintiff claimed that he was entitled to redemption without paying any sum. This plea was based upon the fact that certain proceedings had been taken on the plaintiff's behalf under the Bundelkhand Encumbered Estate's Act (I of 1903).

We have upon record the judgment and award of the Special Judge of Mohaba dealing apparently with the estate of the present plaintiff. This order is dated the 18th of December 1905 (See Exhibit 7, page 23 of the printed record).

It is pleaded, therefore, that because proceedings were taken under this present Act, and because the judgment and the award were made as already indicated, all the debts on estate of the plaintiff must be deemed to have been discharged, regard being had to the provisions of section 12 of the Encumbered Estates Act.

The difficulty which we feel about this argument is that we have not before us the full record of the proceedings in the Court of the Special Judge. We observe from the order of the Special Judge that the application which was made under the Act on behalf of the plaintiff Chhiddu (who was at that time a minor) was made by one Jujhar Singh who, strangely enough, was acting in those very proceedings on behalf of his own father, Gopal Singh, who was one of the persons who was pressing his claims against Chhiddu's estate. This fact attracted the notice of the learned Judge, but he appears to have thought it no harm to act upon the application, although it was made by a person apparently unauthorized.

We might, in the first instance, assume, that proceedings were regularly taken under the Special Act, but the presumption must be overturned when we find it clearly stated that the person who was acting for the minor Chhiddu as his next friend was also acting in the same proceedings as the agent of one of the opposite parties.

In the circumstances we hold that these proceedings were not regularly taken, and that consequently, we are not in a position

to conclude that this particular mortgage debt with which we are now concerned became duly discharged under the provisions of section 12 of the Special Act.

The result, therefore, is that the mortgage deed is held to be a genuine document and the mortgage debt is still outstanding.

We think the plaintiff is entitled to a decree for redemption, and we order accordingly. The appeal is allowed. The decree of the Court below is set aside, and it is ordered that a decree for redemption be drawn up in favour of the plaintiff. The plaintiff must pay Rs. 2,100. We give six months from the date of this decree for payment:

Having regard to all the circumstances, and in particular to the fact that the plaintiff has strongly pressed his case for redemption without payment of any sum, we think it proper to direct that the parties do bear their own costs both here and in the Court below,

The office will prepare a decree in terms of O. XXXIV, r. 7, Civil Procedure Code.

Z. K.

Appeal allowed.

PRIVY COUNCIL.

APPEAL FROM THE LOWER BURMA CHIEF COURT.

April 30, 1923.

Present:—Lord Buckmaster, Lord Sumner, Sir John Edge, Mr. Ameer Ali and Lord Salvesen.

MIRZA MAHOMED AND ANOTHER—APPELLANTS

versus

THE OFFICIAL ASSIGNEE—RESPONDENT.

Muhammadan Law—Will, construction of—Wakf—*Bequest whether of property or of value*—*Estate realised by administrator*—*Interest, whether payable.*

A Muhammadan testator by his Will left one-third of his property, of which he was competent to dispose, for charitable purposes. The whole of the property was after his death realised by his administrator:

Held, (1) that the charity was and had throughout been entitled to one-third of the estate of the deceased and not merely to a sum representing the value of one-third of the estate at the date of the testator's death; [p. 756, col. 1.]

(2) that the charity was, therefore, entitled to one-third of the total realizations of the estate *plus* interest from the date of realization till the date of payment. [p. 756, col. 1.]

Appeal from a judgment and decree of the Lower Burma Chief Court.

Messrs. *K. Michelin, K. C.*, and *Warwick Draper*, for the Appellants

Messrs. *A. M. Dunne, K. C.*, and *Gerald Lawrence*, for the Respondent.

JUDGMENT.

Lord Buckmaster.—The dispute that has given rise to these appeals is due to the manner in which the estate of one Yacoob Ali, has been administered by his representatives. He died on the 15th May 1865 having made a Will dated on the 3rd of the preceding January by which he left one-third of the portion of the property, of which he was competent to dispose, to be dealt with for charitable purposes. His executor was one Abdul Hussein, who, in 1870, bought out of the estate certain property known as the Puzandaung property, and then died on the 2nd April 1879. One Hajee Mahomed Hady became administrator *de bonis non* to the estate of Yacoob Ali in September of 1884, and he then sold all the remaining assets of the estate except the Puzandaung property, for a sum, one-third of which represented Rs. 1,64,500. There never appears to have been any appropriation of any part of the estate to the charity and no proper administration has ever taken place, but Hady having become insolvent, the Official Assignee, who is the respondent in the main appeal, instituted the suit out of which the appeals have arisen asking for, among other things, a declaration that the gift to the charity was bad and that a partition of the estate should take place

The Court of first instance decided that the gift to the charity was good and directed that the charity should be entitled to one-third of the estate of the

testator as it existed at the date of his death. In other words it assumed that the effect of the Will was to give to the charity, not one-third part of the estate, but a sum that would be measured by ascertaining what one-third part of the estate would be at the date when he died. Their Lordships think that the Will is incapable of bearing any such interpretation and that the charity is, and has been throughout, entitled to one-third of the whole of the estate.

That view appears to have been taken by the Appellate Side of the Chief Court, who reversed the judgment of the Court of first instance in this respect, but the Chief Court judgment only gave to the charity one-third of the Puzandaung property. That was an obvious mistake because they clearly were entitled also to one-third of the other property which had been all realised in 1884. How it was that that mistake arose is not clear. It may have been an oversight. At any rate it justified the appellants in coming before the Board and asking that their rights might be more exactly defined.

Their Lordships have heard what has to be said against this application by the respondent and they can find no answer to it. In their opinion the appellants, on account of the *wakfs* created by Aza Yacoob Ali and Abdul Hoosain, are entitled to the Rs. 1,64,600 representing one-third of the proceeds of the property which was realised in 1884, together with interest on that sum at 6 per cent. from that date down to now; and also to one-third of the Puzandaung property; and also to 21/256ths of the remaining two-thirds of the above mentioned proceeds, together with interest; and also to 21/256ths of the remaining two-thirds of the Puzandaung property; they are also entitled to have an account of the rents and profits received from the property by Hady from 1884, and his representative is entitled to have set against those rents and profits all moneys properly paid on account of the estate, the balance as to one-third and 21-256ths of the remaining two-thirds, after giving credit for any sums paid in respect of the two *wakfs*, to belong to the appellants on account of the *wakfs*, with interest at 6 per cent. on such sums running from the end of each year.

There will be a charge on the bankrupt's estate in respect of the total amount due to the appellants under this judgment for principal and interest.

With regard to the costs it appears that the Chief Court gave the costs out of the estate, and that order will not be interfered with, but the respondent will have to pay the costs of the main appeal.

There is a cross-appeal which involves nothing beyond the points already mentioned by the respondent and that appeal must be dismissed with costs.

Their Lordships will humbly advise His Majesty accordingly.

Z. K. *Appeal dismissed.*

Solicitors for the Appellants:—Messrs. *Waterhouse & Co.*

Solicitors for the Respondents:—Messrs. *Light* and *Fulton*.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1519 OF 1921.

March 23, 1923.

Present:—Mr. Justice Rafique.

KASHI RAI—PLAINTIFF—APPELLANT

versus

Musammat KALI KUERI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Declaration, suit for, dismissal of—Possession, suit for, on same grounds, whether barred,

KASHI RAI v. KALI KUERI.

Plaintiff brought a suit for a declaration that he was occupancy tenant of a certain holding. The Court went into the merits of the case and dismissed the suit. He then brought a suit for possession of the holding against the same defendants and on the same allegations which he had put forward in the declaratory suit, and contended that his previous suit should have been dismissed on the ground that he was not in possession of the holding and that the Court had erred in deciding the suit on the merits and the matter was not, therefore, *res judicata*:

***Held*, that the matters raised in the subsequent suit being the same as those raised in the former suit and having been decided in the former suit, they operated as *res judicata*.** [p. 758, col. 1.]

Appeal against a decree of the Officiating Sub-Judge, Azamgarh, dated the 24th August 1921.

Mr. *Haribans Sahai*, for the Appellant.
Mr. *Hamid Hasan*, for the Respondents.

JUDGMENT.—One Lachhmi Rai was the owner of an occupancy holding and diedsome time ago leaving him surviving a widow of the name of Kali Kuari. She executed a deed of relinquishment in respect of the said holding on the 21st March 1918, in favour of the *zemindars*. On the 11th December 1918 the *zemindars* brought a suit in the Revenue Court under section 58 of the Rent Act for the ejectment of one Kashi Rai describing him as a sub-tenant. The latter pleaded that he was the principal tenant and that *Musammat* Kali had no right to execute a deed of relinquishment in respect of the holding in question, nor could such a deed convey any interest to the *zemindars*. The Revenue Court tried the case *ex parte* as Kashi Rai did not defend the suit and the claim of the *zemindars* was decreed and Kashi Rai was ejected. On the 21st March 1919 Kashi Rai brought a suit in the Court of the Munsif of Azamgarh for a declaration that he was the chief tenant of the occupancy holding in question, that *Musammat* Kali had no right or interest in the said holding and could not execute a deed of relinquishment in respect of the holding in question. He based his claim on the allegation that he was a cousin of the deceased husband of *Musammat* Kali and was joint with him in cultivation. Theclaim was brought against *Musammat* Kali and the *zemindars*. The defendants denied the allegations of Kashi Rai and the suit was tried on the merits. Both parties gave evidence in support of their respective statements. The Court of first instance dismissed the claim holding that none of the allegations made in the plaint had been made out. On appeal the judgment of the First Court was upheld. On the 9th September 1920 the suit out of which this appeal has arisen was brought by the same Kashi Rai against the same defendants, namely, *Musammat* Kali and the *zemindars* for the possession of the occupancy holding on the allegations made in the former suit. The defendants resisted the claim on the pleas urged by them in the former suit and added that the present suit was barred by the principles of *res judicata*. This present suit came on for hearing before the same presiding officer who had tried the first suit. He again recorded the evidence for the parties and gave his opinion on all the issues raised in the case. He came to the conclusion that the plaintiff Kashi Rai had failed to prove his allegation that he was joint in cultivation with the deceased husband of *Musammat* Kali or that he was the chief tenant of the occupancy holding in question. The learned Munsif further held that the present suit was barred under section 11 of the Code of Civil Procedure. On appeal by Kashi Rai the learned Subordinate Judge agreed with all the findings of the First Court both with regard to fact and law, and dismissed the appeal. Kashi Rai in second appeal to this Court contends that his suit is not barred under section 11 of the Code of Civil Procedure. The argument for him is that the former suit was one for declaration while the present suit is for possession. In the former suit it was not necessary for the Court to express any opinion on the merits of the case as the claim of the plaintiff-appellant would have failed on the ground that he could not sue for a mere declaration only while he was out of possession.

I do not think that the contention for the plaintiff-appellant is sound. The learned Munsif received evidence on all

the issues raised in the former suit and gave his opinion upon them. Even if the former case could have been disposed of merely on the ground that a suit for a declaration was not maintainable inasmuch as the plaintiff was out of possession, the Court could and did decide all the issues raised in the case. The fact that the issues raised in the case were decided would have to be taken into consideration in discussing the question whether the present suit is barred by *res judicata*. I am of opinion that as the matters raised now in the present suit are the same as those raised in the former suit and were decided between the parties, the decision in the former suit operates as *res judicata* against the plaintiff. But apart from the plea of *res judicata*, the fact remains that both the lower Courts have pronounced an opinion on the merits of the case against the plaintiff. Even were he to succeed on his objection that his claim is not barred by *res judicata*, his appeal would still fail inasmuch as the findings of the Courts below on the merits are against him and he cannot challenge them in second appeal. The appeal fails and is dismissed with costs including fees in this Court on the higher scale.

Appeal dismissed.

Z. K.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 2125 AND 2126 OF 1920.

March 23, 1923.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Odgers.

PEDDI VEERAYYA AND OTHERS—DEFENDANTS NOS. 4 TO 6—APPELLANTS

versus

KOKUMANU TIRUPATIRAYUDU—PLAINTIFF—RESPONDENT.

Hindu Law—Widow—Surrender—Device to share estate between widow and reversioners, validity of—Estoppel.

By an arrangement between the widow and reversioners of a deceased Hindu, the latter's estate was divided up between one of the reversioners and a relative of the widow, the plaintiff, another reversioner being compensated by the execution in his favour of a promissory-note to be met out of the income of the estate:

Held, (1) that the arrangement between the reversioners and the widow was not a *bona fide* surrender with the assent of the reversioners to which effect could be given; [p. 759, col. 1.]

Rangasami Gounden v. *Nachiappa Gounden*, 50 Ind. Cas. 498; (1919) M. W. N. 262; 42 M. 523; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; 26 M. L. T. 5; 10 L. W. 105; 46 I. A. 72 (P. C.), followed.

(2) that the plaintiff was not estopped from questioning the arrangement. [p. 759, col. 2.]

Second appeals against a decree of the District Court, Guntur, in Appeal Suit Nos. 168 and 201 of 1920, preferred against a decree of the Court of the Third Temporary Subordinate Judge, Guntur, in Original Suit No. 18 of 1919.

Messrs. *T. V. Venkatarama Ayyar* and *T. V. Ramanatha Iyer*, for the Appellant.

Mr. *P. Narayanamurthy*, for the Respondent.

JUDGMENT.—We have had the benefit of a long argument by the Bar, but when the facts are properly appreciated we think the case presents no difficulty at all. The facts are these. The plaint property is the estate of one Ankamma. He died leaving a son, who also died shortly after, and a widow, named Mangamma. He also left two divided brothers, plaintiff and Appayya; since deceased. The third defendant is the son of Appayya: the first defendant is the son of Mangamma's sister and the second defendant is the son

of the first defendant. In 1903, the members of this family entered into an agreement which is set forth in two documents, Exhibits I and V. In Exhibit V Mangamma made a gift of all the immoveable property left by her husband in equal shares to her own sister's son, the first defendant, and to the third defendant, the son of her husband's brother. Out of the properties so gifted, it was provided that a small portion should be kept and enjoyed by her for her maintenance during her life. At the same time, plaintiff and Appayya executed a deed of release of their reversionary right in favour of the first and third defendants. This is Exhibit I. One day earlier than this, Mangamma executed a promissory-note in favour of the plaintiff for Rs. 1,200. Under Exhibit I, plaintiff and Appayya were to receive a payment of Rs. 300, between them. Whether this was actually paid or not was not found by the lower Courts; but it has been found, and we must accept the finding, that the consideration for the plaintiff's executing the deed of release by Exhibit I, was the sum of Rs. 1,200, payment of which Mangamma undertook by the promissory-note, to which we have referred. A little consideration will show the nature of these transactions. Ankamma's estate was divided up. Half of it went to the son of one of his surviving brothers the third defendant and the other half went to Mangamma's nephew who had no right to it at all. The plaintiff, his other brother was to receive compensation by payment of Rs. 1,200 which was to be met, as the lower Courts found, out of the income of the estate. In other words, it was clearly a device to divide the estate between the reversioners and widow and as such it is an arrangement which cannot be held to be a *bona fide* surrender with the assent of the reversioners, to which effect can be given. [*Vide* the remarks of their Lordships of the Privy Council in *Rangasami Gounden* v. *Nachiappa Gounden* (1).] That is to say, the gift by Exhibit V is absolutely invalid and can be given no effect at all. It has been argued before us that although Exhibit V is void and has no effect, yet the plaintiff who has consented to it in Exhibit I should be held to be estopped from preferring the present claim. We do not think this is so. Estoppel is an equitable relief and in the present case it is clear that the defendants are not entitled to it. As we have already said under this scheme, the plaintiff was to receive compensation in the shape of the payment of Rs. 1,200 guaranteed by the promissory-note. But, as a matter of fact, when the plaintiff sued on that promissory note and got a decree, he was prevented from recovering anything under his decree by the action of the defendants who promptly laid claim to the property which he attached in execution, alleging that it was theirs and not that of the widow, the promisor under the note. That is to say, the plaintiff was, by the action of the defendants, practically cheated out of his share of the spoil and in these circumstances, it would be most inequitable to allow the plea of estoppel which they now seek to set up against him. We think that the decree of the lower Court is correct and the present second appeal is dismissed with costs.

Second Appeal No. 2126 of 1920 follows the decision of Second Appeal No. 2125 and this is also dismissed with costs.

Z. K. *Appeals dismissed.*

(1) 50 Ind. Cas. 498; (1919) M. W. N. 262; 42 M. 523; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; 26 M. L. T. 5; 10 L. W. 105; 46 I. A. 72 (P. C.).

JOKHU RAI *v.* BHABHUTI RAI.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1594 OF 1921.

April 13, 1923.

Present:—Mr. Justice Daniels.

JOKHU RAI AND OTHERS—PLAINTIFFS —APPELLANTS

versus

BHABHUTI RAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 194—Co-sharers—Death of tenant without heirs—Co-sharer, right of, to eject persons in occupation—Partition informal—Phatbandi, *effect of.*

Where there are a large number of co-sharers in a village an informal partition between the co-sharers is the only means by which the rent can be realised and the revenue paid. Where such a partition or *phatbandi* has been in existence and recognised in a village for a long time, it is quite sufficient to entitle a co-sharer in whose share particular plots fall to collect the rent and eject the tenants of those plots, and the land is not removed from his share merely because a particular tenant happens to die without heirs.

Second appeal against a decree of the District Judge, Ghazipur, dated the 20th July 1921.

Mr. *U. S. Bajpai*, for the Appellants.

Mr. *M. L. Agarwala*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for ejectment of non-occupancy tenants under sections 58 and 63 of the Tenancy Act. The suit was decreed by the Trial Court but has been dismissed by the lower Appellate Court. It is common ground that the plots in suit were held by one *Musammat* Sugandhia an occupancy-tenant and that the entire rent of the plot was realised by the plaintiffs. On Sugandhia's death the defendants took possession of the plot claiming to have succeeded to *Musammat* Sugandhia's occupancy tenancy. There was a dispute in the Revenue Courts regarding the entry to be made in the papers with the result that the defendants were recorded as non-occupancy tenants. On the plaintiffs subsequently suing to eject them they changed their ground and alleged that they were in possession as co-sharers. That they have a proprietary share in the village is not in dispute.

The learned District Judge has dismissed the suit mainly on the ground that in his opinion the plaintiffs alone were not entitled to sue under section 194 of the Tenancy Act. He also holds, however, that the defendants took possession of the land as co-sharers. If this latter finding is one of fact it concludes the appeal. It appears to me, however, that in this case the conclusion at which the learned District Judge has arrived is really a conclusion of law from facts which are practically undisputed. The learned District Judge considers that when *Musammat* Sugandhia died her holding escheated to the entire proprietary body consisting of no less than 148 co-sharers and that unless a contract of tenancy between the defendants and these 148 co-sharers could be established the defendants could not be treated as tenants of the plot. This reasoning goes in the teeth of the admitted actions of the defendants themselves. When they took possession of the land the character in which they took possession was that of successors to *Musammat* Sugandhia who was tenant of the land, and the only question in dispute between them and the plaintiffs was whether the tenancy was an occupancy or a non-occupancy one.

The finding as to the right of the plaintiff to sue is also, in my opinion, legally unsound. Indeed if the view taken by learned Judge were correct it would be impossible for all the *zemindars* to arrange for cultivation at all in the eastern districts were the number of co-sharers sometimes amounts to hundreds. In this case it is stated by the learned District Judge in his judgment that there are 148 co-sharers. In this state of things an informal partition between the co-sharers is the only means by which the rent can be realised and the revenue paid. Such a partition or *phatbanai* is in existence in this village and as stated by the Trial Court is formally recorded in the *wajib-ul-arz* which says:

"Each co-sharer by a verbal *phatbandi* which is in force for a long time collects rent of his own share separately from the tenants." When the learned Judge says that there has been no partition he means that there has been no formal partition carried out under the provisions of Chapter VII of the Land Revenue Act; but a *phatbandi* of this kind which has been in force for over forty years (the

wajib-ul-arz is dated 1881) is quite sufficient to entitle the co-sharer in whose share particular plots fall to collect the rents and eject the tenants of those plots, and the land is not removed from his share merely because a particular tenant happens to die without heirs.

The learned Judge's decree is clearly erroneous and I set it aside and restore the decree of the Trial Court with costs in all Courts.

I have not thought it necessary to discuss the preliminary plea that no appeal lay to the Court below because there is no substance in it. A question of proprietary right was clearly raised within the meaning of section 177 (*b*).

Appeal allowed.

Z. K.

LOWER BURMA CHIEF COURT.

CIVIL REVISION NO. 79 OF 1922.

May 26, 1922.

Present:—Mr. Justice Pratt.

KADER NATH SINGH—APPLICANT

versus

W. C. GARRAD—RESPONDENT.

Negotiable Instruments Act (*XXVI of* 1881), *s.* 87—*Promissory-note—Alteration of date of execution, whether material alteration.*

The alteration of the date of execution of a promissory-note is a material alteration within the meaning of section 87 of the Negotiable Instruments Act.

Civil revision of the judgment passed by the First Additional Judge of the Court of Small Causes, Rangoon.

Mr. *N. N. Sen*, for the Applicant.

JUDGMENT.—The Trial Court has held that the promissory-note has been materially altered by converting the year of execution into 1920 instead of 1921, the last figure "1" being converted into a "0".

I am asked to hold that this is not a material alteration within the meaning of section 87 of the Negotiable Instruments Act.

The effect of the alteration of the date would be to make the executant liable for an additional year's interest if the altered date were accepted as the real date of execution.

I have no hesitation in holding that this amounts to a material alteration of the note.

The application is dismissed.

Application dismissed.

Z. K.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 219 OF 1922.

December 9, 1922.

Present:—Mr. Batten, J. C.

Pandit LAXMI NARAYAN—APPLICANT

versus

RAMRATAN—NON-APPLICANT.

Civil Procedure Code (*Act V of* 1908), *O. I, rr.* 3, 5—*Suit for recovery of single plot of land—Several defendants claiming different portions—Misjoinder of parties and causes of action.*

A plaintiff can bring one suit for recovery of possession of a single plot of land against several defendants setting up titles to different portions of the same. Such a suit is not bad for misjoinder of defendants or causes of action.

Ishan Chunder Hazra v. *Rameswar Mandol*, 24 C. 831; 12 Ind. Dec. (N. S.) 1221, *Nando Kumar Nasker* v. *Banomuli Gayan*, 29 C. 871, followed.

Afzal Shah v. *Lachmi Narain*, 42 Ind. Cas. 856; 40 A. 7; 15 A. L. J. 809, not followed.

Umabai v. *Bhavu Balvant*, 3 Ind. Cas. 165; 34 B. 358; 11 Bom. L. R. 499, distinguished.

Civil revision against an order of the Munsif, Harda, dated the 10th of August 1922.

Mr. *J. Sen*, for the Applicant.

Mr. *Fida Ali*, for the Non-Applicant.

JUDGMENT.—In this case the plaintiff, the *malguzar*, sues for possession of single plot of land, on which each of the three defendants has con-

structed *khalas*. He also asked for some subsidiary reliefs. The plaintiff alleged conspiracy and collusion between the three defendants, but this he has failed to prove. The learned Munsif has held the suit to be bad for multifariousness of defendants and causes of action and has called upon the plaintiff to elect as to which defendant he shall proceed against. The learned Munsif has held that O. I, r. 3, does not permit of the suit having been brought as it is, and that O. II, r. 3, is not applicable. The plaintiff seeks revision, and does not rely upon O. II, r. 3, but on O. I, r. 3, read with O. I, r. 5. In *Ishan Chunder Hazra* v. *Rameswar Mondal* (1), a case like the present, it was held that there was one common cause of action not separate and distinct causes of action. In *Nundo Kumar Nasker* v. *Banomali Gayan* (2), where the claim was of the same kind as in the present case, it was held that the suit was not bad for misjoinder of causes of action. It was observed: "What he is entitled to claim is the recovery of possession of his land as a whole and not in fragments," and "it is a matter of indifference to him upon what grounds the different persons in possession may seek to justify the wrongful dispossession of what is his." A different view was taken in *Afzal Shah* v. *Lachmi Narain* (3), but after careful consideration it appears to me that the Calcutta view is the more correct. In *Umabai* v. *Bhavu Balvant* (4) the facts were quite different and do not help us in the present case, and it may be noted that the view of the law there taken was dissented from in *Ramendra Nath Roy* v. *Brojendra Nath Dass* (5). I do not think it necessary to repeat all the arguments for the view taken in *Nundo Kumar Nasker* v. *Banomali Gayan* (2); it is sufficient for me to say that I respectfully agree with them. In the present case all the land of which possession is claimed is situated in one plot, and the reasoning in the Calcutta case is peculiarly applicable.

I set aside the order of the Munsif dated 10th August 1922 and direct him to proceed with the suit against all the defendants. The non-applicant will bear his own and the applicant's costs in this Court. I fix the Pleader's fee at Rs. 15.

N. H. *Revision allowed.*

(1) 24 C. 831; 12 Ind. Dec. (N.S.) 1221.
(2) 29 C. 871.
(3) 42 Ind. Cas. 856; 40 A. 7; 15 A. L. J. 809.
(4) 3 Ind. Cas. 165; 34 B. 358; 11 Bom. L. R. 499.
(5) 41 Ind. Cas. 944; 45 C. 111; 27 C. L. J. 158; 21 C. W. 794.

LAHORE HIGH COURT.

MISCELLANEOUS CIVIL APPLICATION No. 672 OF 1922.

January 29, 1923.

Present:—Mr. Justice Broadway.

Khwaja AHAD SHAH—DEFENDANT—PETITIONER

versus

Musammat AYSHAN BEGUM—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 24—Transfer of suit—Apprehension of party.

In dealing with an application for the transfer of a suit it is the apprehension on the part of the applicant that he will not get a fair and impartial trial of the suit in the Court in which it is pending that should receive consideration, but the apprehension must be such as a reasonable man might reasonably be expected to entertain.

Miscellaneous Civil Application for transfer of the case from the Court of the Senior Sub-Judge, Ludhiana, to some other competent Court.

Mr. *Barkat Ali*, for the Petitioner.

Mr. *Abdul Hai*, for the Respondent.

ORDER.—This is an application under section 24 of the Code of Civil Procedure for the transfer of a case from the Court of the Senior Subordinate Judge at Ludhiana. It appears that on the 20th July 1922, one *Musammat* Aishan Begum, wife of Mahmud Shah, instituted a suit for the recovery of certain property impleading *Khwaja* Ahad Shah and his wife *Musammat* Taj Bibi as defendants. *Musammat* Aishan Begum is the daughter

of *Khwaja* Ahad Shah by his first wife *Musammat* Jannat Bibi. Before issues were settled on the 29th October 1922, *Khwaja* Ahad Shah filed an application before the Senior Subordinate Judge in which he suggested to the said officer that as he, the said officer, was connected with the family of the parties in the case he should not try it. Upon this application the presiding officer recorded an order in which he stated that his connection with the family of the parties was not such as precluded him from dealing with the case but that he had no special desire to keep the case on his file and that *Khwaja* Ahad Shah should move the District Judge under section 24, Civil Procedure Code, if he saw fit.

Instead of adopting the suggestion, on the 1st November 1922, *Khwaja* Ahad Shah asked for an adjournment in order to enable him to move the High Court. This adjournment was disallowed on the ground, admittedly, that there was no provision in the Civil Procedure Code under which it could be granted. On the 13th November 1922 this application was filed in the High Court on behalf of *Khwaja* Ahad Shah, supported by an affidavit sworn to by that gentleman, and is now before me for disposal. The grounds alleged for the transfer are that the Senior Subordinate Judge, Mir Ibad Ullah, is related to *Khwaja* Shamas-ud-din of Ludhiana and that the said *Khwaja* Shamas-ud Din is also related to *Khwaja* Ahad Shah. It is alleged that *Khwaja* Shamas-ud-din and his other relatives are at enmity with *Khwaja* Ahad Shah because in 1916 *Khwaja* Ahad Shah was asked to support the candidature of *Khan Bahadur Sheikh* Ghulam Sadiq at a Council Election but instead of doing so, *Khwaja* Ahad Shah supported the rival candidate Raizada Bhagat Ram. This action of the petitioner's, he said, has caused bitter hostility to spring up against him, so much so that in 1920 when the petitioner was a candidate for Election to the Council of State in opposition to Sir *Nawab* Zulfikar Ali Khan, *Shaikh* Ghulam Sadiq and *Khwaja* Shamas-ud-din actively supported the latter candidate, a brother-in-law of Mir Ibad Ullah actually voting for the said candidate.

Mr. Barkat Ali for the petitioner has contended that in the above circumstances the petitioner has reasonable apprehension that he will not receive impartial justice at the hands of the Senior Subordinate Judge. No actual bias on the part of Mir Ibad Ullah was alleged, but it was stated that in the circumstances the petitioner felt that he could not place that implicit reliance on the impartiality of the Tribunal that was necessary. The usual authorities were cited in order to emphasize the fact that it is the reasonable apprehension on the part of the litigant that should receive consideration in such matters. With this view I agree, but the same authorities have also pointed out that the apprehension must be such as a reasonable man might reasonably be expected to have. *Khwaja* Ahad Shah is a man of position and education and it is a little difficult to understand why he should have any reasonable apprehension that Mir Ibad Ullah will not deal fairly with the case before him.

On the other hand the Senior Subordinate Judge has admitted the relationship with *Khwaja* Shamas-ud-din that was alleged in the affidavit. After a careful consideration of the entire matter, it seems to me, however, that it would be better for Mir Ibad Ullah himself not to be forced to try this particular case. His relationship with the parties has been frankly admitted by him and he himself is not anxious to proceed with the case.

In these circumstances, although I am inclined to think that the position taken by the petitioner is perhaps a little unnecessary, in consideration for the Senior Subordinate Judge himself I transfer this case to Jullundur. The learned District Judge of that District will decide which of the Subordinate Judges under him is to deal with the case.

Z. K. *Case transferred.*

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 16 OF 1923.
October 5, 1923.
Present:—Sir Walter Salis Schwabe, KT., Chief Justice, and Mr. Justice Waller.
Syed AFAGAN SAHIB—PLAINTIFF—APPELLANT
versus
ABDUL MAJID KHAN SAHIB—DEFENDANT—RESPONDENT.

Execution of decree—Money-decree—Power of Court to stay execution against person of judgment-debtor on terms—Right of decree-holder to elect his remedies.

There is no power in a Court to stay execution of a money-decree against the person of the judgment-debtor on terms of his making part payment until the judgment-creditor proceeds in execution and sells the judgment-debtor's immoveable property.

It is for the judgment-creditor to elect his remedies in execution subject to such rules as may govern a particular case.

Appeal from the order of Mr. Justice Kumaraswami Sastri, dated the 22nd December 1922, passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court, in Civil Suit No. 303 of 1920, (Original Side Appeal No. 37 of 1921).

Mr. *N. Rama Rao*, for the Appellant.

Mr. *C. Venkatasubbaramiah*, for the Respondent.

JUDGMENT.

Schwabe, C. J.—This is an appeal from an order of Kumaraswami Sastri, J., who has stayed execution of a decree for Rs. 4,000 against the person of the judgment-debtor, on terms of his paying Rs. 200 within 14 days, until the judgment-creditor proceeds in execution and sells the judgment-debtor's immoveable property. The judgment-creditor says that the immoveable property is worth nothing, it being mortgaged for more than its full value. The judgment-debtor says that he cannot find a purchaser for it, but that he does not want to risk himself going to prison.

I can find no power in the Judge to make such an order. It is for the judgment-creditor to elect his remedies in execution subject, of course, to such rules as there may be governing a particular case, but our attention has been called to no rule at all which would justify such an order as this. In my view, the order was wrong, and the appeal must be allowed with costs and the petition dismissed with costs.

Waller, J.—I agree.

V. N. V. *Appeal allowed.*

LAHORE HIGH COURT.

CIVIL REVISION NO. 925 OF 1922.
March 10, 1923.
Present:—Mr. Justice Moti Sagar.
THE FIRM SITA RAM-RAM DHAN—DEFENDANTS—PETITIONERS
versus
THE FIRM BENARSI DAS-PURAN CHAND—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 20, 115—Place of suing—Jurisdiction, order deciding—Revision—Interference by High Court.

No hard and fast rule can be laid down as to whether a revision is competent against an erroneous order deciding that a Court has jurisdiction to try a suit, and each case must be decided on its own merits. Ordinarily, however, interference in revision is inadvisable in such cases and should only be exercised in exceptional cases to remedy an injustice. [p. 765, col. 1.]

Jagan Nath-Dewan Chand v. *Jagan Nath-Moti Chand*, 71 Ind. Cas. 38, relied on.

Where a defendant is by law entitled to have the case tried in his own Province it is a grave injustice to him to insist on its trial in another Province which will put him to very great expense, merely because the Trial Court has erroneously held that it has jurisdiction to try the case. [p. 765, col. 1.]

Civil revision of an order of the Munsif, First Class, Jagraon, District Ludhiana, dated the 22nd November 1922.

Mr. *Fakir Chand*, for the Petitioners.

Mr. *J. G. Sethi*, for the Respondents.

JUDGMENT.—This was a suit for the recovery of Rs. 406-2-3 on the allegations that the plaintiff's firm purchased certain goods at Patna and handed them over to the defendant's firm at Patna for transmission to Jagraon, that the defendant's firm, instead of transmitting the goods which had been deposited with them by the plaintiff's firm, sent other goods of an inferior quality to the plaintiffs and that

the latter were, therefore, entitled to recover the amount sued upon by way of damages. The suit was instituted in the Court of the Munsif at Jagraon in the Ludhiana District. The defendants raised a preliminary objection that the suit was not triable at Jagraon but should be instituted at Patna where the cause of action arose and where the defendants were residing and carrying on business. The Trial Court held that it was the inferior delivery of the goods at Jagraon which gave the plaintiffs a cause of action, and that, therefore, the suit was maintainable at Jagraon. It is against this order that the present petition for revision is directed, and it is contended that the order of the Court below on the question of jurisdiction is erroneous.

The first question for consideration is whether a revision is competent. A large number of authorities have been cited on this point by the learned Counsel on both sides which it is difficult to reconcile; but after carefully going over all these authorities I have arrived at the conclusion that no hard and fast rule can be laid down in such cases and that each case must be decided on its own merits. Ordinarily, as held in *Jagan Nath-Dewan Chand* v. *Jagan Nath-Moti Chand* (1), interference in revision is inadvisable in such cases and should only be exercised in exceptional cases to remedy an injustice. Now, if the defendant is by law entitled to have this case tried at Patna, it will be a grave injustice to him to insist on its trial in Jagraon which will put him to a very great expense merely because the learned Munsif has erroneously held that the Jagraon Court has jurisdiction. It will, therefore, be necessary to dispose of this application on the merits. No evidence was recorded in this case and it is impossible to come to a satisfactory conclusion in this state of affairs. After framing an issue on the question of jurisdiction the learned Munsif postponed the case for arguments upon this point and did not call upon the parties to produce evidence upon the various points relating to the question of jurisdiction. It is alleged by the plaintiffs' Counsel before me that the delivery of goods at Jagraon was an essential part of the contract and that the payment of the price was also to be made at Jagraon where the Railway receipt was to be handed over to the plaintiffs through the Punjab National Bank. There is no evidence on the record in support of these allegations and it will, therefore, be necessary to send the case back for further inquiry. The learned Munsif should have taken evidence as to whether the place of delivery was an essential part of the contract or not, and whether the payment of the price at Jagraon was or was also not one of the terms agreed upon at the time when the goods had been handed over to the defendants at Patna.

I accordingly accept the revision, set aside the order of the Court below and direct that the learned Judge should take evidence upon these points and then proceed with the case or otherwise as may be decided upon after the evidence for the parties has been recorded. Costs will abide the event.

Z. K.

Revision accepted.

(1) 71 Ind. Cas. 38.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 251 OF 1922

AND

APPEAL AGAINST APPELLATE ORDER NO. 25 OF 1922.

September 5, 1923.

Present:—Mr. Justice Spencer and Mr. Justice Kumaraswami Sastri.

THIMMARAZU VENKATAKUTTUMBA RAO—APPELLANT—PETITIONER

versus

THIMMARAZU VENTAPPAYYA AND ANOTHER—PETITIONERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Payment of deposit money by Vakil's clerk—Application, if incompetent.

SITHAMALLI SUBBAYYER *v.* RAMANATHAN CHETTIAR.

An application under O. XXI, r. 89, Civil Procedure Code, made by the authorised Vakil of a person entitled to apply is not rendered incompetent merely because the actual payment of the deposit money into the Treasury was by a clerk who was neither a Pleader nor a recognised agent within the meaning of O. III, r. 1, Civil Procedure Code.

Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act, and Appeal against Appellate Order praying the High Court to revise an order of the Court of the Subordinate Judge, Bezwada, in Miscellaneous Appeal No. 4 of 1921, preferred against an order of the Court of the District Munsif, Nuzvid, at Bezwada, in Civil Miscellaneous Petition No. 2150 of 1920, in Original Suit No. 243 of 1919.

Mr. *B. Somayya*, for the Petitioner.

Messrs. *P. Narayana Murthi* and *Kamineni*, for the Respondents.

JUDGMENT.—The application under O. XXI, r. 89, Civil Procedure Code, was made by the authorised Vakil of a person entitled to apply. We are not prepared to hold that the words "on his depositing in Court" make the application incompetent if the person who actually pays the money into the Treasury is not a Pleader or recognised agent within the meaning of O. III, r. 1. The decision in *Sirvoi Begam* v. *Haider Shah* (1) is distinguishable by the fact that there the application under the section of the Code was not a competent one. The lower Court has found that the payer in this case was the Vakil's clerk.

Rule 131 of the Civil Rules of Practice only requires that the lodgment schedule should be signed by the payer. It is not questioned that the money paid into Court was that of the respondents. The applicant is the guardian of the persons entitled to apply, the money is their money; the mere fact that the Vakil sent the money by the hand of his clerk instead of taking it to the Court himself will not invalidate the application.

The civil revision petition is dismissed with costs. The Civil Miscellaneous second appeal is also dismissed but without costs.

V. N. V. *Petition dismissed.*

(1) 13 Ind. Cas. 404; 9 A. L. J. 12.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 213 OF 1923.

December 12, 1923.

Present:—Mr. Justice Krishnan and Mr. Justice Waller.

SITHAMALLI SUBBAYYER—DEFENDANT—APPELLANT

versus

M. L. M. RAMANATHAN CHETTIAR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XI, r. 21, scope of—Applicability of rule to orders for production—Production, order for, whether implies discovery or inspection.

Under the Code of Civil Procedure an order for production of documents is quite different from an order for discovery or an order for inspection and cannot be said to imply either. [p. 767, col. 2.]

Order XI, r. 21 of the Code of Civil Procedure does not apply to cases of non-compliance with an order for production and refers only to orders for interrogatories, discovery or inspection. [p. 767, col. 1.]

Ram Nath v. *Parabhu Dyal*, 65 Ind. Cas. 661, dissented from.

Lyalpur Sugar Mills & Co. v. *Ram Chandra Gur Sahai Cotton Mills & Co.*, 67 Ind. Cas. 73; 44 A. 565; 20 A.L.J. 422; (1922) A. I. R. (A.) 235, followed.

There are several ways of making a party produce a document shown to be in his possession and for which privilege is not established; and the presumption that arises against a party who is called upon and does not produce a document in his possession or power is in itself of serious consequence to him. [p. 767, col. 2.]

Appeal against an order of the Court of the Second Additional Subordinate Judge, Madura, dated the 10th April 1923, in Interlocutory Application No. 100 of 1923, in Original Suit No. 5 of 1922.

Messrs. *K. V. Krishnaswami Iyer* and *C. A. Seshagiri Sastriar*, for the Appellant.

Mr. *C. Rama Rao*, for the Respondent.

JUDGMENT.

Krishnan, J.—In this case the defendant had applied to the Subordinate Judge for an order of discovery of documents against the plaintiff under O. XI, r. 12, Civil Procedure Code. The learned Judge refused to give such an order but directed the defendant to file a list of documents which he alleged were with the plaintiff, and on his doing so, passed an order under rule 14 directing production of such documents upon oath. The plaintiff produced certain documents in Court and prayed the Court to keep them under lock and key. He also filed an affidavit.

Under the Subordinate Judge's orders the documents were kept under lock and key. The defendant then applied for inspection and by a separate order after hearing parties inspection was ordered of the documents filed in Court by the plaintiff. On defendant inspecting those documents, he found that some of the documents included in his list were not produced, in particular the rough *chitta* books he had asked for. Thereupon, the defendant applied to the Court to take action under O. XI, r. 21 and to dismiss the suit. The Subordinate Judge dismissed the application holding that that rule did not apply to cases of non-compliance with an order for production and that the order for inspection which referred only to documents filed in Court was fully complied with. The appeal to us is by the defendant against that order of the Subordinate Judge.

Rule 21 in terms does not apply to an order for production, it speaks only of interrogatories or discovery or inspection. In the repealed Code the words, "or production" were in the corresponding section but they have been omitted in the new Code. It is argued that the omission is due to a desire to avoid redundancy, as an order for production implied discovery and inspection. The opinion of Braodway, J., of the Lahore High Court in the case reported as *Ram Nath* v. *Parabhu Dyal* (1) is cited in support of the argument that the object of the omission was to avoid redundancy. The learned Judge does not give a very decided opinion on the point nor has he discussed the question. On the other hand a Bench of the Allahabad High Court* has held that rule 21 does not apply to cases of "production" orders. With all respect to the opinion of the learned Judge of the Lahore Court, I am unable to follow his view. In the corresponding English Rule, O. XXXI, r. 21 of the English Rules of Practice, the words "or production" do not occur and it was apparently to bring the practice here into conformity with the English Practice on the point that the omission was made. An order for production is quite different from an order for discovery or an order for inspection and cannot be said to imply either. In the present case the order for discovery was refused and the order for inspection was passed as a subsequent order. It is impossible to hold, therefore, that in the present case the order of production was anything more than for bare production in Court of specified documents. In the case, *Joy* v. *Hadley* (2), the order was for production and inspection; it was in reality an order for inspection in Court of documents to be produced in Court for the purpose. That case is thus not an authority on the point before us. Some support was sought to be drawn from the wording of the Form No. 6 under O. II, r. 14, First Schedule, Appendix C of the Code. That form can be properly used only where the order is "to produce for inspection" as the title of the form shows. Rule 14 contemplates further orders being passed on the documents being produced. An order for inspection of documents may, I think, therefore, be passed under that rule itself after hearing parties. Rule 18 also enables a party to obtain an order for inspection. The Form No. 6 cannot be relied on as showing that an order under rule 14 involves an order for inspection, for documents may be directed to be produced in Court for various other reasons, for example, for preventing tampering with them.

It was suggested that if we do not apply the provisions of rule 21 in cases of orders for production there will not be a sufficiently effective method to make the party obey the order of the Court. There is no basis for this argument, for there are several ways of making a party produce a document shown to be in his possession and for which privilege is not established; and the presumption that arises against a party who is called upon and does not produce a document in his possession or power is in itself of serious consequence to him.

(1) 65 Ind. Cas. 661.

* See *Lyalpur Sugar Mills & Co.* v. *Ram Chandra Gur Sahai Cotton Mills & Co.*, 67 Ind. Cas. 731; 44 A. 565; 20 A.L. J. 422; (1922) A. I. R. (A.) 235; 4 U. P. L. R. (A.) 139.—[*Ed.*].

(2) (1883) 22 Ch. D. 571; 52 L. J. Ch. 471; 47 L. T. 615; 13 W. R. 519.

KANDHI v. HUSSAIN BIBI.

In the view that I take rule 21 does not apply to orders for production; and the appeal fails. It is true that plaintiff has not definitely stated in his affidavit whether he has the *chitta* books with him or not. Defendant may apply to the lower Court to call for a further affidavit from him. Defendant can always take any further steps, he may be advised to, under the rules for inspection. This appeal fails and is dismissed with costs.

Waller, J.—I agree.

Appeal dismissed.

V. N. V.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 44 OF 1922.

January 26, 1923.

Present:—Mr. Kanhaiya Lal, J. C.

KANDHI—PLAINTIFF—APPELLANT

versus

HUSSAIN BIBI AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 74—Penalty—Mortgage-deed—Covenant to pay enhanced interest whether penal—Compound interest—Construction of deed—Interest, enhanced, on default—Date from which enhanced rate payable.

Where a mortgage-deed provides for the payment of an enhanced rate of interest in case of default, the parties must, in the absence of a specific provision to the contrary, be deemed to have intended that the enhanced rate would be chargeable from the date of default and not from the date of the deed. [p. 768, col. 2.]

Under section 74 of the Contract Act a stipulation for increased interest from the date of default may be a stipulation by way of penalty, but the circumstances of each case must be taken into consideration, for determining whether a particular covenant for payment of enhanced interest is excessive or unconscionable. If the covenant imposes a penalty which can be regarded as a reasonable compensation for the default there is no reason for granting any relief in mitigation of it. [p. 768, col. 2.]

An agreement to pay interest at an enhanced rate for the breach of a contract may not be extravagant or unconscionable, if the original rate of interest was fixed low in order to enable the debtor to pay interest regularly at the stipulated time. [p. 769, col. 1.]

Munna v. *Ram Prasad*, 11 O. C. 307, *Clydebank Engineering and Shipbuilding Company Limited* v. *Don Jose Ramos Yzquierdo y Castaneda*, (1905) A. C. 6; 91 L. T. 666; 21 T. L. R. 58; 74 L. J. P. C. 14 relied on.

A covenant to pay compound interest is not by itself penal. [p. 769, col. 1.]

Abbakke Heggadthi v. *Kinhiamma Shetty*, 29 M. 491, relied on.

Appeal against a decree of the Sub-Judge, Rae Bareli, dated the 5th July 1922.

Messrs. *Ram Bharose Lal* and *Raj Narain Shukla*, for the Appellant.

Mr. *Zahur Ahmed*, for Respondent No. 1.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff for the recovery of money due on a mortgage effected by *Musammat* Husaini Bibi and Muhammad Idris in favour of the plaintiff on the 14th September 1909. The mortgage-deed provided for the payment of interest at 8 annas per cent. per mensem payable half-yearly and further stipulated that if a default was made in making such payment the interest due was to be added to the principal and the whole sum was to bear interest thereon at 12 annas per cent. per mensem.

The question for consideration in this appeal is whether the enhanced rate of interest payable on default is penal and excessive. The Court below has allowed compound interest at the original rate and refused to award interest at the higher rate. The bond does not clearly say whether the enhanced rate of interest would be payable from the date of default or from the date of the bond. In the absence of a specific provision to the contrary, the parties must be deemed to have intended that the enhanced rate of interest would be chargeable from the date of default. Under section 74 of the Indian Contract Act (IX of 1872) as amended by the Act VI of 1899 a stipulation for increased interest from the date of default may be a stipulation by way of penalty. The circumstances of each case have to be taken into consideration for determining whether the particular covenant for payment of enhanced interest is excessive or unconscionable. If the covenant imposes a penalty, which can be regarded as a reasonable compensation for the default there would be no reason for granting any relief in mitigation of the same; for as pointed out in *Munna*

v. *Ram Prasad* (1) if no unfair advantage has been taken by the creditor the debtor is not entitled to relief merely because in case of default the terms accepted by him are markedly less favourable. As Lord Halsbury stated in *Clydebank Engineering and Shipbuilding Company Limited* v. *Don Jose Ramos Yzquierdo y Castaneda* (2) "it is impossible to lay down any abstract rule as to what it may or may not be extravagant or unconscionable to insist upon without reference to the particular facts and circumstances, which are established in the individual case." An agreement to pay interest at an enhanced rate for the breach of a contract may not be extravagant or unconscionable, if the original rate of interest was fixed low in order to enable the debtor to pay interest regularly at the stipulated time. The rate of interest here originally payable was low and liable to be enhanced to 9 per cent. per annum compoundable half-yearly. The creditor was entitled to claim reasonable compensation for the default. The penalty here imposed is not excessive nor unreasonable. A covenant to pay compound interest is by itself not penal and as observed in *Abbakke Hoggadthi* v. *Kinhiamma Shetty* (3) it was the intention of the Legislature in appending the explanation to section 74 of the Indian Contract Act IX of 1872 to enact that the stipulation for the payment of enhanced interests from the date of default ought not always to be considered penal. In *Chhannu Lal* v. *Raj Kuar* (4), a rate of 12 per cent. per annum was regarded as normal rate of interest even in cases where the security was abundant. The covenant to pay an enhanced rate at 9 per cent. per annum cannot, therefore, be treated a excessive or unreasonable.

The appeal is accordingly allowed and the claim of the plaintiff decreed with costs here and hitherto and interest as stipulated up to the date fixed for payment which will be six months, from this date. The decree will thereafter carry interest at 6 per cent. per annum and will be framed in terms of O. XXXIV, r. 4 of the Code of Civil Procedure. The defendants will in the circumstances bear their own costs throughout.

Appeal allowed.

Z. K.

(1) 11 O. C. 307.
(2) (1905) A. C. 6; 1 L. T. 666; 21 T. L. R. 58; 74 L. J. P. C. 1.
(3) 29 M. 491.
(4) 43 Ind. Cas. 295; 20 O. C. 318.

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION.

July 23, 1921.

Present:—Mr. Justice Greaves.

SEWDUTRAI NARSARIA

versus

TATA SONS LTD.

Arbitration Act (IX of 1899), s. 10—Special case, stating of—Discretion of arbitrator—Refusal to state special case—Remedy—Interest after date of award—Power of arbitrator.

It is within the discretion of an arbitrator to refuse to state a special case for the opinion of the Court, and his refusal to do so does not amount to misconduct. [p. 770, col. 2.]

Where a party to an arbitration asks the arbitrator to state a special case and is refused, he should on such refusal apply to the Court forthwith to revoke the submission. [p. 770, col. 2.]

An arbitrator is not entitled to award interest after the date of his award. [p. 771, col. 1.]

Messrs. *B. L. Mitter* and *S. N. Banerjee*, for Sewdutrai Narsaria.

Messrs. *N. N. Sarkar* and *S. M. Bose*, for Tata Sons, Ld.

JUDGMENT.—This is an application on behalf of Sewdutrai Narsaria to set aside an award of an umpire, dated the 11th June 1921, awarding that Messrs. Sewdutrai Narsaria should pay to Messrs. Tata Sons a sum of Rs. 16,320 together with interest at 8 per cent. per annum from the 13th November 1920 until date of payment.

Various grounds are set out in the notice of motion but the following only were urged before me, namely, (1) that the umpire was guilty of misconduct in acting as he did and in refusing to hear evidence and in refusing to state a case

for the opinion of the Court, (2) in awarding interest on damages.

So far as (1) is concerned, the real question turns on whether the umpire was bound at the request of Sewdutrai Narsaria to state a case for the opinion of the Court on the construction of clause 3 of the contract between the parties. If he was not so bound then it was open to him to construe the clause for himself and in the view he took of the clause the evidence which the applicants desired to adduce was inadmissible. The submission to arbitration is contained in clause 17 of the contract and thereby any dispute was to be settled by arbitration as therein mentioned. The power of an umpire under the Indian Arbitration Act to state a special case is contained in section 10 of the Act, whereby it is provided that an umpire shall, unless a different intention is expressed, have power to state a specia case for the opinion of the Court on any question of law involved. Section 7 of the English Act is practically the same and in Russell on Arbitration and Award, 10th Edition, page 175 it is stated that this power is merely permissive and enabling and not compulsory, and reference is made to two cases—*Holloway* v. *Francis* (1) and *Gibbon* v. *Parker* (2), decided under section 4 of the Common Law Procedure Act, 1854. In *Wood* v. *Hotham* (3), it was held that a clause giving an arbitrator liberty, at the request of the parties, to raise any point of law for the opinion of the Court was merely enabling and not compulsory and that it did not involve the obligation to state a case. *Miller* v. *Shuttleworth* (4) is to the same effect as also *Baguly* v. *Markwick* (5). The English Act contains a section (section 19) which is not in the Indian Act empowering an arbitrator or umpire at any stage of the proceeding to state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference and the section further provides that he shall do so if directed by the Court. Under this section if the umpire when asked by a party to the reference to state a special case, refuses, he is bound at the request of the party asking for the special case to be stated to save time to enable the party to apply to the Court and if he refuses to do so, he is guilty of misconduct. In the absence of such a clause as clause 19, the party who asks the umpire to state a special case and is refused, should on such refusal apply to the Court forthwith to revoke the submission. If he does not do this, it is, I think, too late to come to the Court when the reference is concluded and an award has been made against him.

In the result I think under the circumstances it was in the discretion of the umpire to refuse to state a special case and to decide the point of law himself, and his refusal does not amount to misconduct.

So far as the award is concerned, there is, I think, on this point no error of law on the face of the award which would justify the interference of the Court.

So far as the second point is concerned, it is stated in Russell *ut supra*, page 450, that interest may be allowed by an arbitrator in cases where the Court would not give it and reference is made to *In re Badger* (6), but in *In re Morpett* (7) it was held that an arbitrator cannot award the payment of interest subsequent to the date of the award unless the submission expressly gave him power to do so. In the present case the arbitrator has awarded Rs. 16,320 as damages together with interest at 8 per cent. from the 13th November 1920 (the date of the breach) until payment. He could of course, have awarded as part of the damages an additional sum representing according to computation the interest from 13th November 1920 to the date of his award, treating this as part of the damages although it is not usual to award interest on damages; but this he

(1) (1861) 9 C. B. (N. S.) 559; 142 E. R. 219; 127 R. R. 782.
(2) (1862) 5 L. T. 584.
(3) (1839) 5 M. & W. 674; 9 L. J. (N. S.) Ex. 3; 52 R. R. 876; 151 E. R. 286.
(4) (1849) 7 C. B. 105; 137 E. R. 43.
(5) (1861) 30 L. J. C. P. 342; 4 L. T. 245; 9 W. R. 537.
(6) (1819) 2 B. & Ald. 691; 21 R. R. 455; 106 E. R. 517.
(7) (1845) 14 L. J. Q. B. 259; 2 D. & L. 967; 10 Jur. 546; 69 R. R. 888.

has not done and in any case I do not think that he was entitled to award interest after the date of his award, so I remit the matter to the arbitrator in order that he may re-consider his award in the light of these remarks.

No order as to the costs of the motion.

Order accordingly.

W C. A.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 45 OF 1922.

March 9, 1923.

Present:—Mr. Dalal, A. J. C.

RAM ADHIN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GAYA PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Oudh Laws Act (*XVIII of* 1876), *s.* 9—*Pre-emption*—Khattas, *separate, in village*—*Relationship, whether ground for preference.*

Where there are independent *Khattas* in a village and each *khata* is separately assessed to revenue there being no joint right and no joint obligation along with other *khattas*, each *khata* is a *mahal* by itself and co-sharers in other *Khattas* have no right of pre-emption under paragraphs 1 and 2 of section 9 of the Oudh Laws Act in respect of property situate in one particular *khatta*. In such a case co-sharers in other *khattas* are members of the village community so far as the right of pre-emption is concerned, and among them no preference is given by paragraph 3 of section 9 of the Oudh Laws Act on account of relationship.

Appeal against a decree of the Sub-Judge, Partabgarh, dated the 7th November 1921.

Mr. *Zahur Ahmad*, for the Appellants.

Mr. *Ali Mohammad*, for the Respondents.

JUDGMENT.—This suit for pre-emption in the Trial Court of the Munsif of Kunda was brought in pursuance of a foreclosure decree obtained by respondents Nos. 1 to 3. Both the lower Courts have disallowed the plaintiffs' claim on the grounds that they are neither the co-sharers of the sub-division of the tenures, nor of the whole *mahal* in which the property in suit is comprised, that they can only be treated as members of the village community and that as such may have no preferential right over the respondents Nos. 1 to 3 who foreclosed the property. In this Court it was argued that the appellants, the respondents No. 1 to 3, who foreclosed and the former owners of the property in suit were all co sharers in the whole under-proprietary *mahal*. In that case the appellants would have preference over the respondents Nos. 1 to 3 because they are admittedly relations of the original owners while respondents Nos. 1 to 3 are not.

The question whether there was one *mahal* in which the property of the appellants, and that in suit, were situated or whether the property in suit was situated in a separate *khata* quite independent of the appellanss' *khata* was one of fact. In this Court it was argued that there cannot be any independent divisions of an under-proprietary *mahal*. Reference was made to various provisions of the Land Revenue Act. As against this there is the positive testimony of Ali Husain Patwari (P. W. No. 1) that there were 22 independent *khatas* in villege Mowai Kalan and that each *khata* was separately assessed to revenue. In that case every separate *khata* would be a *mahal* by itself and the co-sharers of the other *khatas* would have no right of pre-emption under paragraphs 1 and 2 of section 9 as regards property situated in one particular *khata*. It is admitted that the property in suit is situated in *khata* No. 2 while the appellants hold property in *khata* No. 8.

The appellants' learned Counsel Mr. Zahur Ahmad argued that where in a *mahal* there are several *khatas* a relation and a cosharer in the same *khata* in which the property in suit is situated will have preference over a relation and a co-sharer of any other *khata*, but that where the competition is between co-sharers of *khatas* other than the one in which the property in suit is situated the co-sharer who is related to the vendor will have preference. He quoted the ruling reported as *Mohammad Sarfaraz*

COMMISSIONER OF INCOME-TAX, MADRAS *v.* ARUNACHELLIAM CHETTIAR.

Husain v. *Mohammad Shahin Khan* (1) in support. I am not called upon to discuss this interpretation on the provisions of section 9 of the Oudh Laws Act. The facts in the present case are that every *khata* is a distinct entity with liability to pay rent separately. The learned Counsel argued that all the under-proprietors of village Mowai are liable for the entire amount of rent payable by the villages. Whether this is so or not can be decided by this Court only on the papers and evidence produced before it. There is the specific evidence of the Patwari that such is not the case, and the copies of *khewat*, Exhibits 4 and 5, do not prove otherwise. If every *khata* is distinct without any joint right or joint obligation with the other *khatas* every *khata* would be in the position of a separate *mahal* and the co-sharers of every *khata* would be separate and independent. Under these circumstances the appellants and the contesting respondents are members of the village community so far as the right of pre-emption is concerned and among them no preference is given on account of relationship. Both parties had an equal chance of pre-emptioning by the drawing of lots and the appellants were unlucky when lots were drawn in the Court of Trial.

The appeal fails and I dismiss it with costs.

Z. K. *Appeal dismissed.*

(1) 52 Ind. Cas. 69; 22 O. C. 97; 6 O. L. J. 420.

MADRAS HIGH COURT.

REFERRED CASE NO. 6 OF 1923.

October 12, 1923.

Present:—Sir Walter Salis Schwabe, KT., Chief Justice, and Mr. Justice Waller.

THE COMMISSIONER OF INCOME-TAX, MADRAS—REFERRING OFFICER

versus

M. AR. AR. ARUNACHELLAM CHETTIAR—RESPONDENT.

Income Tax Act (VI of 1922), s. 10—Assessee doing dual business—Adjustment of profits and losses.

Under the Income-Tax Act when a person carries on two different trades one individually and the other as a member of an unregistered firm, he is entitled to set off the loss incurred by him in respect of the partnership trade against the profits made by him in his individual trade. [p. 773, col. 1.]

The word "any" in the words "any business" in section 10 of the Act means not "each" but "each and every." [p. 773, col. 2.]

Case stated under section 56 (2) of the Income Tax Act, VI of 1922, for the decision of the High Court, the following question of law which has arisen in assessing the respondent herein, *viz.*, M. Ar. Ar. Arunachellam Chettiar for the year 1922-1923.

"When a person carries on two different trades one individually and the other as a member of an unregistered firm, is he entitled to set off the loss incurred by him in respect of the partnership trade against the profits made by him in his individual trade."

The Government Pleader (Mr. *C. V. Ananthakrishna Aiyar*), for the Referring Officer.

Messrs. *A. Krishnaswamy Aiyar* and *V. Rajagopala Aiyar*, for the Respondent.

JUDGMENT.

Schwabe, C. J.— The question referred is, "where a person carries on two different trades one individually and the other as a member of an unregistered firm, is he entitled to set off (that is, for income-tax purposes) the loss incurred by him in respect of the partnership trade against the profits made by him in his individual trade?"

The facts are that the assessee has an income from trade profits in two distinct and separate businesses of his own and from other property, has made losses in other businesses of his own, and also has incurred losses in two distinct businesses in which he is a partner and which businesses are not registered.

The question for decision is a difficult one, the difficulty arising from the wording of the Income Tax Act. If our decision is not in accordance with the real intention of the Legislature, it is for the Legislature to make that intention clear hereafter. The relevant sections for consideration are 6, 10 and 24, and the difficulty is to ascertain the proper interpretation of the

two latter. Section 6 is merely a division into heads of different sources of income, one being "business," Concluding with a general head of "other sources": Section 10 defines and elaborates the profits and gains covered by heading "business". The tax is payable by an assessee under the head "business" in respect of the profits or gains of any business carried on by him. 'Assessee' is defined in section 2 as 'a person by whom income-tax is payable.' No mention is made in section 10 of partnerships registered or unregistered, and, although it is the practice to assess firms as such, I can find nothing to justify the argument that each partner in a firm is not an assessee, for he is a person by whom the income-tax is payable, nor can I find anything to justify the argument that this assessee being a partner, is not a person carrying on the business in question. I am, therefore, prepared to hold that the present assessee is an assessee in respect of the profits and gains of the business which he carried on in partnership.

The next question that arises is, where an assessee, carries on two distinct businesses, is he entitled to set off the loss on one against the profits of the other? The Crown has argued before us to the contrary, but it is to be observed that this is not the view taken by the Comissioner. Indeed, he states that such set-off has been allowed in respect of the separate businesses of the assessee which he carried on alone, namely, his money-lending business, and his Bell metal factory, and it would from the reference seem to be his view that, if the partnerships had been registered, such set-off would be allowable also in respect of the losses of the partnership businesses.

The Crown's argument is based on the words of section 10 which refers to "the profits of any business" and would have us construe 'any' as 'each' and not as 'each and every.' Counsel points to the English Income Tax Act which under Schedule D makes chargeable to income-tax the profits and gains from any trade, and then by special rule, namely, Rule 15 of the rules applicable to cases I and II (Case I being tax in respect of trade) provides that the losses of one business can be set off against the profits of another. This re-enacts section 101 of the Income Tax Act of 1842. It is argued that, if such a section was necessary in England it follows that its omission here shows that it was not intended to allow such set-off here. I have already pointed out that it is not the view of the Commissioner, and if it were the intention of the Statute it would indeed be anomalous; for by section 24 (1) set off is allowed between the different heads of income, so that a trade loss can be set off against a professional gain or interest on securities, a privelege not allowed in England, while an adjustment of profit and loss between different businesses incurred by the same person would be allowable in England and not here, although the arguments in favour of such allowance are at least as strong as those in favour of those governed by section 24. What is desired to tax is a man's total net income, and it would be most unjust to tax him on a profit on one business when, in fact, owing to losses on the other, he has a loss or even no income at all. I do not believe that this was the intention of the Act, and I doubt whether Rule 15 in the English Act was necessary, except to make clear the intention of the Legislature; and, in my judgment, looking at the Indian Act, the words "any business" being open to either construction, I must take that construction which looking at the whole Act, I think, is the more rational and must construe "any" to mean 'each and every'. It follows that an assessee is entitled to set off profits in one business against losses in another. And for this purpose I can find no distinction between what an assessee earns alone and what he earns in partnership. It is argued by the Commissioner that a partnership is, for income-tax purposes, an entity; but it is not an entity known to the law; it is not a separate entity like a company limited by shares; its name is merely a convenient method of describing its partners each of whom is jointly and severally liable for its debts, and, for income tax purposes, it is a convenient body to assess as the partners carry on the trade together and keep books in which the partnership transactions are entered, and earn together profits or make losses. It is

to be observed that, for this purpose no distinction can be made between registered and unregistered firms for whether a firm is a legal entity or not does not depend on registration.

It is then argued that section 24 shows an intention that such set-off is not to be allowed in the case of unregistered firms. But section 24 (1) is dealing with something quite different namely, the allowance of set-off between different heads mentioned in section 6 and not the allowance of set-off between different businesses coming under one head. Section 24 (2) again dealing with set-off between different heads allows the partners of a registered firm, where that firm has made a loss under one head, and has not sufficient income under another head to avail themselves of this set-off to use the loss set off against their own individual incomes arising under other heads. Whether this must be taken by implication to prevent such set-off in the case of partners of an unregistered firm is a difficult question which does not arise here, as the present assessee desires to set off his partnership loss against a loss of his own under the same head, that is, 'business' and not under a different head. I do not think that we should be justified in inferring from this section the intention of the Legislature to prevent any set-off by a partner of an unregistered firm against his own trade losses.

It follows that the answer to the question is in the affirmative. The assessee is entitled to his costs.

Waller, J.—I agree and I have nothing to add.

V. N. V. *Question answered in the affirmative.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL JURISDICTION

No. 96 OF 1922.

August 24, 1922.

Present:—Justice Sir John Woodroffe, KT., and Mr. Justice Suhrawardy.

NIRODE NATH BANNERJEE AND ANOTHER—DEFENDANTS—APPELLANTS

versus

AMULLYA DHONE BANNERJEE AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 89, applicability of—Partition suit—Arbitration—Decree on award—Execution sale, setting aside of.

A suit for partition was, with the consent of the parties, referred to arbitration. The arbitrators made an award by which they directed, *inter alia*, that a certain property should be sold by private treaty, and if not so sold within a year, by the Court, and that the sale-proceeds should be disposed of in a particular manner. The award was confirmed by a decree of the Court, and the property was sold by the Registrar thereof. The defendant applied for the sale to be set aside on depositing a certain sum which the plaintiff had agreed to accept in full acquittance of his claim, and the question was, whether r. 89 of O. XXI of the Civil Procedure Code applied to the case:

Held, that the sale by the Registrar was a sale in execution of a decree, and that the provisions of r. 89 of O. XXI of the Civil Procedure Code were applicable to the case [p. 775, col. 1]

Appeal against the order of Mr. Justice Greaves, dated the 19th June 1922.

Sir *Binode Mitter* and Mr. *B. C. Ghose*, for the Appellants.

Messrs. *N. N. Sarkar* and *S. M. Bose*, for the Respondents.

JUDGMENT.

Woodroffe, J.—The point before us is whether the application to set aside the sale falls within the terms of O. XXI, r. 89. Mr. Justice Greaves was of opinion that this was not a sale in execution of a decree because it was a sale by consent and the mere fact that the Court was invited to carry out the sale did not make it a sale in execution of a decree. The decision is, however, not sought to be supported on this ground. As a matter of fact there could be no consent because infants were concerned in the orders of 26th January 1912 and 11th August 1920. In the first mentioned order it is recited that the defendants did not appear either in persons or by Counsel and on the second occasion the attorney for the defendants stated that he had received no instructions

from his clients. Further, the award was not, in my opinion, by consent. The award recited a consent to the sale of the dwelling-house which was one of the motives or reasons actuating the arbitrators in making the award in the terms in which it was given.

The objection before us is that there cannot be said to be a decree-holder and judgment-debtor within the meaning of the section and that the amount must be specified in the proclamation of sale as that for the recovery of which the sale was ordered. This, it is said, is not the case here. The case of *Virjibun Dass Moolji* v. *Bissesswar Lal* (1) supports, it is claimed, the appellants so far as it goes. That is true so far as it holds that a decree is executed where the order for sale is contained in the judgment itself where there is no attachment as also that r. 89 applies in a case where there has been no proclamation of sale but a notification at a Registrar's sale. There is here a decree and in a partition suit after decree all share-holders are decree-holders and judgment-debtors as against one another. It must, I think, be taken that the sale was ordered for the recovery of the sums payable by the award to the plaintiff and the making over to each of the parties of their share of the sale proceeds in terms of the award. It is conceded that the section would apply in the case of a sale in execution of a partition decree awarding compensation to one sharer and enforcing payment of such compensation against the share of another sharer. Does it then make any difference that in the present case that the money payable to the plaintiff is to come out of the whole estate in which both the plaintiff and the Defendants are interested. I think not, and that we ought not to take a narrow view of the section. Though the plaintiff's money is to be recovered from the total sale-preceeds in which he has a share, in substance the transaction is one in which the plaintiff's rights under the award are enforced—for execution means that. I am of opinion then that O. XXI, r. 89 applies to the present case.

But then the objection is taken that if that be so, an application under this section is only maintainable on the applicant first depositing in Court the amount payable to the purchaser. The facts upon this point are contested and have not been dealt with in the judgment under appeal, possibly because having regard to the view that the learned Judge took of the law, *viz.*, that the section was not applicable it was not necessary to decide whether its conditions had been carried out.

Therefore, the case must be remanded for the determination of the issue whether the provisions of O. XXI, r. 89 as regards the deposit of the money payable to the purchaser have been complied with.

As the appellant has succeeded on the question whether the Order and rule were or were not applicable, I think, he is entitled to costs of this appeal. As regards the costs in the Original Court I think that the order which we should make is that they do follow the result of the hearing on remand.

Suhrawardy, J.—I should like to proceed on the facts of this particular case for it is conceivable that there may be a sale by or through the agency of Court to which the provisions of r. 89, O. XXI, Civil Procedure Code may not apply. In this case the facts are that in 1909 the plaintiff brought a suit for partition which was with the consent of the parties referred to arbitration. The arbitrators made an award in 1912 by which they directed, *inter alia*, that the family dwelling-house of parties, premises No. 127 Boitakhana Road, should be sold by private treaty, and if not sold privately within a year, by the Court and that out of the sale-proceeds a sum of Rs. 100 was to be paid to plaintiff for his share in the moveables and Rs. 200 by way of mesne profits and the balance should be divided into four parts one of which should go to the plaintiff and the remaining three to the defendants-appellants. That award was confirmed by a decree of the Court, dated the 26th January 1912. In 1920, the plaintiff took out a master's summons and an order was passed by Greaves, J., in the following terms:—

"It is ordered that the premises No. 127, Boitakhana Road be sold by the Register of this Court by public auction to the

(1) 60 Ind. Cas. 406; 48 C. 69; 24 C. W. N. 1032.

best purchaser or purchasers that can be got for the same and the money to arise by such sale be paid to the said Registrar. And it is further ordered that the said Registrar do after deducting from the said sale-proceeds his own commission, pay the balance to the Controller of Currency for the time being of the Government of India and the Secretary and Treasurer for the time being of the Bank of Bengal with the privity of the Accountant-General of this Court to be by them placed to the credit of this suit subject to the further order of this Court."

The property was accordingly sold by the Registrar and knocked down to the respondent Hem Chandra Mullick. Subsequently, and within the statutory period, the appellants applied to have the sale set aside on their depositing a certain sum which the plaintiff had agreed to take in full acquittance of his claim. That application was made under r. 89 of O. XXI, Civil Procedure Code. The learned Judge from whose judgment this appeal is made was of opinion that as the sale was "by consent" or "which had been agreed to by the consent of the parties," r. 89 did not apply. That point of view has not been placed before us by the learned Counsel for the respondent and for obvious reasons.

The only ground on which the order of the lower Court is defended is that the sale was not held "in execution of a decree" and hence rule 89 is not applicable, and I propose to examine that question on the facts of this case as above set forth and which are not disputed.

The decree passed by Fletcher, J., on 26th January 1912 is described as a decree in Suit No. 183 of 1909 and I am of opinion that it is a decree of Court for all intents and purposes giving effect to the award of the arbitrators and it is the final decree in the suit. It was on the application of one of the parties that this decree was enforced or in other words executed. If this view is correct, it follows that r. 89, O. XXI, is applicable to this case. But it is argued that as the execution is not sought on the forms prescribed by the Civil Procedure Code, or as there was no sale-proclamation with reference to which the amount to be deposited is to be calculated it was not a sale under the Code. Apart from the authority referred to by my learned brother, it seems to me that any defect or irregularity in the procedure or the act of the Court in not issuing proper processes should to destroy the right of any party to adopt any of the courses provided by the Civil Procedure Code for setting aside a sale held by Court. To hold otherwise would be to defeat the right of a party to set aside a sale even on the ground of fraud or irregularity by omitting to observe the procedure laid down by the Code. The crux of the matter is whether the property is sold in execution of a decree. From the statement of facts as above, I have no doubt that the property was sold "in execution of a decree" and that r. 89, O. XXI is applicable. The result is that the order of the learned Judge so far as it holds that the appellants are not entitled to apply under r. 89, O. XXI, Civil Procedure Code for setting aside the sale must, therefore, be set aside.

I agree with my learned brother in his reasonings and conclusions and in the order he has proposed to pass remanding the case and as to costs.

Case remanded.

S. D.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL NO. 32 OF 1922.

November 9, 1922.

Present:—Mr. Kanhaiya Lal, J. C.

JHANDA SINGH—DECREE-HOLDER—OPPOSITE PARTY—APPELLANT

versus

MUHAMMAD ANWAR KHAN—JUDGMENTT-DEBTOR—APPLICANT—RESPONDENT.

Specific Relief Act (I of 1877), s. 41—Construction of decree—Reciprocal reliefs—Execution of decree—Propriety of decree, whether can be questioned.

PIR PACHA SAHEB *v.* MOHAMMAD RUHIMUDDIN.

The decree passed in a suit for cancellation of a bond provided as follows:—"that the plaintiff's claim be and is hereby decreed for cancellation of the bond in suit but the defendant shall have the right to recover Rs. 500 from the plaintiff's property."

Held, (1) that the decree awarded reciprocal reliefs in terms of section 41 of the Specific Relief Act and while the plaintiff was awarded a decree for cancellation of the bond in suit the defendant was given the right to recover Rs 500 from the plaintiff's property;

(2) that there was nothing in the decree to indicate that the intention was to relegate the defendant to a separate suit and the decree was virtually a decree awarding Rs. 500 to the defendant to be recovered from the plaintiff's property which was capable of execution.

The propriety of a decree cannot be questioned in execution.

Appeal against an order of the Sub-Judge, Lucknow, dated the 26th July 1922.

Mr. *Ram Bharoselal*, *Hakim Uddin* and *Raj Narain Shukla*, for the Appellant.

Messrs. *Bisheshar Nath Srivastava* and *Niamat Ullah*, for the Respondent.

JUDGMENT.—The question for consideration in this case is whether the defendant was granted a relief capable of execution by the decree given to the plaintiff for the cancellation of the bond executed by him in favour of the former. The decree provided "that the plaintiff's claim be and is hereby decreed for cancellation of the bond in suit but the defendant shall have the right to recover Rs. 500 from the plaintiff's property." The decree clearly awarded reciprocal reliefs in terms of section 41 of the Specific Relief Act, to which a reference is made in the judgment of this Court by which that decree was affirmed. The cancellation was not, however, subject to the payment of the aforesaid money. While the plaintiff was awarded a decree for cancellation of the bond in suits the defendant was given the right to recover Rs. 500 by way of compensation from the plaintiff's property. The Court below treated the latter portion of the decree as a declaratory decree incapable of execution but there is nothing in the decree to indicate that the intention was to relegate the defendant to a separate suit.

The propriety of the decree cannot be questioned in execution. The decree is virtually a decree awarding Rs. 500 to the defendant to be recovered from the property of the plaintiff.

The appeal is, therefore, allowed and the order of the Court below set aside with a direction that the application for execution filed by the defendant should be restored to its original number and proceeded with in accordance with law. The costs of this appeal will be charged against the respondent who will bear his own costs of this appeal.

Appeal allowed.

Z. K.

MADRAS HIGH COURT.

CIVIL APPEAL NO. 282 OF 1920.

October 10, 1923.

Present:—Mr. Justice Phillips and Mr. Justice Venkatasubba Rao.

PIR PACHA SAHEB AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MOHAMMAD RUHIMUDDIN SAHIB AND OTHERS—DEFENDANTS—RESPONDENTS

Inam *Register—Title-deed—Grant of* inam—Devadayam—"*For the support of the mosque*"—*Public endowment.*

An *inam* statement is only a statement made by a party to the *inam* inquiry and is merely an assertion of his alleged title before a Tribunal which has to decide it. But the Inam Register embodies the result of the finding of the Inam Commissioner based partly on the statements put in by the parties and partly on other evidence and is entitled to greater importance. [p. 778, col. 1.]

Where the Inam Register described an *inam* as Devadayam and the purpose of the *inam* grant was given as for the support of the mosque and there was no other document of title:

Held, that *prima facie*, the endowment was a public endowment for the mosque. [p. 778, col. 2.]

Mulammad Jafar v. *Muhammad Ibrahim*, 24 M. 243, referred to.

Appeal against a decree of the Court of the Additional Subordinate Judge, Ellore, in Original Suit No. 41 of 1919 (Original Suit No. 45 of 1918, Subordinate Judge's Court, Ellore).

Mr. *V. Suryanarayana*, for the Appellant.

Messrs. *T. S. Raghunatha Rao* and *T. S. Srinivasa Rao*, for the Respondents.

PIR PACHA SAHEB *v.* MOHAMMAD RUHIMUDDIN.

JUDGMENT.—The plaintiffs appeal against the decree dismissing their suit for framing a scheme for a mosque in Palacole and for the removal of the defendants from their trusteeship. At first a decree was given in favour of the plaintiffs owing to the failure of the defendants to prosecute their defence, but subsequently this order was set aside as being an *ex parte* decree and now the Subordinate Judge has dismissed the plaintiffs' suit.

An objection has been taken by the appellants that the Subordinate Judge had no jurisdiction to revise his original order and that on that ground the appeal should be allowed. We have, however, heard the appeal on its merits and as we are in favour of the appellants' contention on the merits, it is unnecessary to decide the other point.

The earliest evidence in regard to the mosque is the proceeding before the Inam Commissioner. We have the *inam* statement put in by defendants' ancestor Exhibit VI, and the Inam Register, Exhibit A. The learned Subordinate Judge appears to have considered that the statement was, if anything, of more importance than the register and therefore, has not considered that the recitals in the register are as important as they really are because he says that they must be explained by the entries in the *inam* statement. It has, however, to be remembered that an *inam* statement is only a statement made by a party to the enquiry and is merely an assertion of his alleged title before a Tribunal which has to decide it. The Inam Register embodies the result of the finding of the Inam Commissioner based partly on the statements put in by the parties and partly on other evidence and, as appears from Exhibit A in this case, the other evidence consisted of documents going back to 1812. There is practically no other document of title in this case and we must look to this Inam register to see what the facts are. It is contended for the defendants that there is no mosque at all in Palacole but only a Peerlapanja and that this Peerlapanja has been loosely called Peerla Musjid and that is the reason why we find the word mosque used with reference to the plaint institution. This theory has been accepted by the learned subordinate Judge and he has held that there is no mosque but only this *Peerlapanja* which apparently he considers to be a private institution. If we look at Exhibit A, we find in the first place, that the *inam* is described as "Devadayam" and there is the authority of this Court in *Muhammad Jafar* v. *Muhammad Ibrahim* (1), that the word Devadayam implies a public endowment; and whether this is correct or not, there is no doubt that the use of the word Devadayam is a very strong piece of evidence in favour of holding that the suit endowment is a public endowment. There is nothing to contradict this evidence. The defendants have not even produced the *inam* title deed and in 1859 they alleged that their *sannad* had been lost in a Cyclone. We start then with the assumption that it is an *inam* granted for a public charity. The purpose is given as "for the support of the mosque." There is no question here of the meaning of the word *Maseethu* which appears to be a Telugu form of the Hindustani Masjid. The Inam Register is in English and it may fairly be taken that when the word "Mosque" is written the word mosque is intended and not the word "*panja*" as is suggested for the defendants. Even in the defendants' *inam* statement there is no mention of *panja*, but in the first column he uses the word *Maseethu*; he does not even use the words which we find in later documents *Peerla Masjidu*, although he says that the purpose for the grant was for holding "*Peerla Usavam* and other things." This statement possibly explains the introduction of the subsequent word *Peerla Maseethu* which seems from the evidence to be a contradiction in terms, for it is admitted that the Peerlu are never kept in a Masjid. Then we have also a report of the Tahsildar, Exhibit XIII, and this is a report in reference to a claim by the defendant to a portion of the site surrounding the plaint institution. It is a report of a Muhammadan Tahsildar and he also uses the word "Mosque" to describe the owner of the site. He does mention the words "*Peerla Mollalu*" in his report, but that is clearly a quotation from the house-tax register. In view of

(1) 24 M. 243.

this evidence and the fact that there is no documentary evidence at all to show that the institution was a *panja*, we think that it must be deemed to be a mosque as is distinctly recited in the Inam Register. The subsequent confusion in the language, chiefly used by Hindus, when it was called *Peerla Maseethu* may be due to the fact that not only was there a mosque but also that a *Peerla Utsavam* was performed in the same compound and when as is alleged by the plaintiffs the mosque became demolished the idea of the Peerla remained more strongly in the minds of the neighbours. Otherwise, it is difficult to account for this curious term. The oral evidenee cannot be said to be very satisfactory on either side, but there is one point which is in favour of the plaintiffs and that is that they have examined srveral Muhammadan witnesses living at Palacole who support their case that there used to be a mosque in the suit compound, that it has been now demolished and that there is only a *panja* or *Muzavarkhana* existing. There are three Muhammadans examined on the defendants' side but none of them resides in Palacole and it is not very easy to believe their statements when they say that they know all the details about the Palacole village in which they do not seem to have spent very much time. The other witnesses are Hindus, mostly of the Telugu caste, and it is suggested for the plaintiffs that they are all connected with a certain gentleman of their caste named Annamalaswami who certainly took a considerable interest in the hearing of this case. Whether that is or is not the reason for their giving evidence it is clear from a perusal of their depositions that not very much weight can be attached to evidence that a mosque never existed in Palacole. Relying on the oral evidence for the plaintiffs in support of their case and the Inam Register we come to the conclusion that the original endowment was undoubtedly made for the mosque. That being so, the defendants have no beneficial interest in the *inam* unless they can prove the same and that they have entirely failed to do. The only document they have produced is a partition deed under which they divided their other property and agreed that out of the proceeds of the suit *inam* Rs. 50 should be set aside for the *Peerla Utsavam* and that the balance of the income should be divided annually amongst themselves. This is, no doubt, a claim to a beneficial interest, but it is not supported by any title-deed or any other evidence of any weight.

As the defendants have not applied the *inam* in the proper manner and have denied the title of the mosque to the *inam*, it is imposible to allow them to continue to manage in the same way as before and it will be necessary to frame a scheme for the management of the trust. Although the endowment is undoubtedly made to the mosque, the claim put forward by the defendants' ancestor in 1859 and subsequent events show that it is quite possible that the institution also included the *Peerla-panja*, which admittedly has been in existence for a considerable time past and is alleged by the defendants to have been in existence even prior to the *inam* enquiry. Therefore, in framing the scheme it will be necssary to provide also for the upkeep of this *panja* out of the income of the *Inam*.

As regards the item of 25 cents of site near the mosque, it was held after an enquiry in 1905 that this piece of land belonged to the defendants and not to the mosque. There is really no evidence for the plaintiffs to show that this decision is wrong, and as the defendants have been in possession of it for over twelve years before suit, we are not prepared to disturb that possession now.

As regards the scheme the parties will be asked to submit a scheme and one of the conditions will that there shall be three trustees one of whom shall be a member of the defendants' family and the other two appointed by the Subordinate Judge's Court. The case will be adjourned for a week in order to have the scheme submitted for orders.

JUDGMENT.—A Scheme has now been submitted which, with slight modifications, we have accepted. In allowance of the appeal there will, therefore, be a decree in favour of plaintiffs for the recovery of possession of the suit lands, except the 25 cents referred to, for the removal of defendants ro n trusteeship and or framing of a scheme as already approved.

Plaintiffs will get their costs in both Courts out o the estate, and defendants will bear their own costs.

Appeal allowed.

V. N. V.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1226 OF 1916.

March 2, 1920.

Present:—Mr. Justice Le-Rossignol and Mr. Justice Broadway.

MOTI RAM—DEFENDANT—APPELLANT

versus

KANHYA MAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Partition suit—Property situate outside British India—Court, whether can take property into accouni.

In a suit for partition of joint property the Court cannot take into consideration joint property belonging to the parties which is situate outside British India.

Pnnchanun Mullick v. *Shib Chunder Mullick*, 14 C. 835; 7 Ind. Dec. (N. S.) 552, relied on.

Second appeal from a decree of the District Judge, Ferozepore, dated the 17th January 1916, affirming that of the Subordinate Judge, First Class, Ferozepore, dated the 30th January 1914.

Lala *Moti Sagar*, R. S., for the Appellant.

Pandit *Sheo Narain*, R. B., for the Plaintiffs Respondents.

JUDGMENT.—The facts of the case giving rise to this second appeal are given in detail in the judgments of the Courts below and need not be recapitulated here. Khazana (?) Mal and Ratti Mal plaintiffs sued for possession of certain joint property, possession which clearly involved partition. The property in suit was situated in British territory. Moti Ram, one of the defendants, pleaded, *inter alia*, that as there was other property, in the possession of the plaintiffs, which was joint and which was situated in the Patiala territory, a suit for partial partition was not maintainable. The Courts below having held that the property in suit was joint and that the suit as laid was competent, granted the plaintiffs a decree as prayed.

Moti Ram has preferred this second appeal through Rai Sahib Moti Sagar, and the only point for determination is whether the Courts below are right in holding that he suit was competent without bringing the Patiala lands into partition or taking the said lands into consideration. Admittedly the lands in Patiala, though in possession of the plaintiffs-respondents, are joint. Mr. Moti Sagar contended that although the British Courts had no jurisdiction to direct the partition of the lands situated in the Patiala State, nevertheless the fact that the plaintiffs were in actual possession of those lands should have been taken into consideration or into account in allotting the shares. Mr. Sheo Narain for the respondents referred to *Punchanun Mullick* v. *Shib Chunder Mullick* (1) in which the Calcutta High Court, on its Original Side, held that in a suit for partition of land it could deal with so much of the land as was within its jurisdiction although other joint lands existed which were outside that High Court's jurisdiction. We are in accord with the principles enunciated therein and are unable to see that the Courts below were entitled to take into consideration or into account the joint lands in Patiala. In our opinion, the view taken by the Courts below is correct, and we accordingly dismiss this appeal with costs.

Appeal dismissed.

Z. K.

(1) 14 C, 835; 7 Ind. Dec. (N. S.) 552;

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 822 OF 1922.

December 6, 1923.

Present:—Mr. Justice Krishnan.

KANDASWAMY GOUNDAN AND ANOTHER—DEFENDANTS—PETITIONERS

versus

SUBBAI GOUNDAN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Court-Fees Act (VII of 1870), s. 7 (v) (a), (d)—Suit by ryot against another ryot for possession of land, valuation of—Court-fee payable—Procedure—Civil Procedure Code (Act V of 1908), O. VII, r. 10—Order directing return of plaint when to be made.

Sub-clause (*a*) of clause (v) of section 7 of the Court-Fees Act applies only to a suit for a definite fractional share of an estate and not to a suit for a piece of land which forms a plot defined by metes and bounds and is included in an estate. [p. 782, col. 2.]

A suit by one *ryot* against another *ryot* for possession of a plot of land forming part of a *Zemindari* estate is governed by sub-clause (*d*) of clause (v) of section 7 of the Court-Fees Act. [p. 782, col. 2.]

A *Paimaish* Register is not the Collector's Register referred to in sub-clause (*a*) of clause (v) of section 7 of the Court-Fees Act. [p 782, col. 2]

Godavarthy Sundaramma v. *Godavarthy Mangamma*, 47 Ind. Cas. 543; 8 L. W. 88; 34 M. L. J. 558, *Chandan* v. *Bishen Singh*, 11 Ind. Cas. 816; 33 A. 630, 8 A. L. J. 798, followed.

Where a Court finds that a suit valued under clause (*a*) falls under clause (*d*) of section 7 (v) of the Court-Fees Act, it should call upon the plaintiff to state what the market value of the land is and after determining the market value should direct the plaintiff to pay the proper Court-fee on that valuation, and if he fails to make the payment within the time fixed, the Court must reject the plaint but if he makes the payment and if it is found that the valuation of the suit goes beyond the Court's jurisdiction, the Court should return the plaint for presentation to the proper Court. [p. 782, col. 2.]

Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise an order of the District Court, Coimbatore, in Civil Miscellaneous Appeal No. 34 of 1922, preferred against an order of the Court of the Additional District Munsif, Coimbatore, dated the 30th March 1922, in Original Suit No. 13 of 1921 (Original Suit No. 709 of 1921, Principal District Munsif's Court, Coimbatore.)

Mr. *S. Subramania Aiyar*, for the Petitioner.—This arises out of a suit for the recovery of a specific piece of land within a permanently settled *Zemindari* in the Coimbatore District. Objection was taken by my client, the defendant, that the suit had not been properly valued for purposes of Court-fees.

The Court of first instance decided that the suit fell under section 7 (v) (*d*) of the Court-Fees Act and the plaintiff not having paid the Court-fee on the market value of the land the plaint was ordered to be returned for presentation to the proper Court. On appeal by the plaintiffs, the District Judge held wrongly that the suit fell under clause (*a*) of section 7 (v) and that, therefore, it was properly valued. He remanded the suit for disposal on the other issues. Against that order I come up in revision.

The land sued for is, of course, definite in extent and covered by a *pattah* issued by the Collector. But that does not satisfy the requirements of the section. The words "definite share" indicate a fractional share in the whole estate and not a share in the estate defined by boundaries. See *Godavarthy Sundaramma* v. *Godavarthy Mangamma* (1) followed in Second Appeal No. 886 of 1917, and Second Appeal No. 711 of 1915 by this Court. The lower Appellate Court was wrong in construing the words in section 7 (v) (*a*). Not one of the conditions mentioned there is satisfied. The land here though it bears a separate assessment in the *pattah*, is not "separately assessed in the Collector's register" within the meaning of the section. The *Paimaish* Register is not the Collector's Register for purposes of section 7 (v) (*a*). The order of the First Court ought to be upheld.

Mr. *C. S. Venkatachariar*, for the Respondents.—There is no need to give the words "definite share" in the section the meaning of a definite fractional share of the whole estate. The whole area being known and the area of the piece also being known, we can in fact arrive at the "definite fraction" by arithmetical computation. There is no force in the meaning given.

In any case the order of the First Court returning the plaint for presentation to the proper Court is wrong. The defend-

(1) 47 Ind. Cas. 543; 8 L. W. 88; 34 M. L. J. 558.

ants in the written statement only contended that the case fell under clause (*c*) of section 7 (v). No valuation was arrived at definitely. The proper procedure is to take evidence if any, on the valuation, fix it, call the plaintiff to pay the additional fee if any, within a time and after that date pass proper orders.

Mr. *S. Subramania Iyer*, in reply.—The argument of the other side on the construction of section 7 (v) (*a*) have been answered in *Godavarthy Sundaramma* v. *Godavarthy Mangamma* (1).

JUDGMENT.—The question that has been raised in this civil revision petition is one of jurisdiction. The suit is brought for possession of a plot of land which forms part of a *zemindari* estate, by one *ryot* against another and the question which arose and which was tried as a preliminary point by the First Court was 'Is the suit properly valued for purposes of Court-fee and jurisdiction.' The District Munsif held that section 7 (v) (*d*) of the Court-Fees Act applied, as the land formed part of an estate paying revenue to Government but was not a definite share of such an estate and was not separately assessed as mentioned in clauses (*a*) to (*c*), and that, therefore, Court-fee should be paid on the market value of the land. But, without fixing the market value, he directed the plaint to be amended and the *ad velorem* Court-fee to be paid on such value. That order was not obeyed and, instead of rejecting the plaint, what he did was this. He considered that the market value of the land *plus* the value of the other reliefs claimed made the subject matter of the suit exceed his jurisdiction and directed the return of the plaint to be presented to the proper Court. On appeal, the District Judge held that the suit fell within clause 7 (*v*) (*a*) of the Court-Fees Act as the land was in his opinion a definite share of an estate paying annual revenue to Government under clause (*a*).

The construction of section 7 clauses (*v*) (*a*) to (*d*) has been the subject of consideration both in this Court and in the Allahabad High Court. In *Godavarthy Sundaramma* v. *Godavarthy Mangamma* (1) it was held that sub-clause (*a*) referred only to a definite fractional share of an estate and not to any piece of land which formed a plot defined by metes and bounds included in a estate in other words that the clause would apply only when the suit was for a half, one-third or any other fractional share of the entire estate. That view was followed in two unreported cases of this Court, Second Appeals Nos. 886 of 1917 and 711 of 1915 and also in *Chandan* v. *Bishen Singh* (2). It seems to me that that view is correct and I respectfully follow it. If that is correct, this suit should have been valued under sub-clause (*d*) and not under sub-clause (*a*) of section 7 of the Court-Fees Act. It is clearly excluded from the second part of sub-clause (*a*) because it is not recorded in the Collector's Register as separately assessed with annual revenue, the *Paimaish* Register being not such a register as the Collector's register referred to. In these circumstances the suit should have been valued, as held by the District Munsif under sub-clause (*d*) of 7 (v) of the Court-Fees Act.

But the District Munsif should not have returned the plaint to be presented to the proper Court at the stage he did as that was not a proper order there. He should have first called upon the plaintiff to state what the market value of the land was and after taking evidence as to that value, if disputed, which may be adduced on either side, he should have himself determined what the market value was, and then he should have called upon the plaintiff to pay the proper Court-fee on that valuation, giving him a reasonable time to make the payment, and, if he then failed to make the payment, he should have rejected the plaint but if he made the payment and if it was found that the valuation of the suit went beyond his jurisdiction, then returned the plaint for presentation to the proper Court. The Munsif was not justified in returning a plaint which was not properly stamped.

I must, therefore, set aside the orders of both the lower Courts and remand the case to the Court of first instance direct that Court to decide what the market

(2) 11 Ind. Cas. 816; 33 A. 630; 8 A. L. J. 798.

value of the land is and then dispose of the case in the light of the observations above made.

As regards costs, if the District Munsif rejects the plaint or finds finally that he has no jurisdiction to try the suit, the petitioner will have his costs of this revision petition and of the appeal in the lower Court and the costs before the District Munsif will be disposed of by the District Munsif himself. If, on the other hand, the District Munsif finds that he has jurisdiction to try the suit and tries it, all costs here and below will abide and follow the final result of the suit.

V. N. V.
Z. K.

Order set aside.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 305 OF 1923.

August 29, 1923.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Chotzner.

BHUPENDRA NATH MUKHERJEE—
PLAINTIFF—APPELLANT
versus
MONOHAR MUKHERJEE—
DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XL, r. 1—Receiver, appointment or removal of—Discretion, mode of exercising—"Just and convenient," meaning of—Receiver, who should be appointed.

The appointment as well as the removal of a Receiver is a matter which rests in the sound discretion of the Court. In exercising its discretion, the Court should proceed with caution and be governed by a view of the whole circumstances of the case. A Receiver should not be appointed in supersession of a *bona fide* possessor of the property in controversy, unless there is some substantial ground for interference. [p. 785, cols. 1 & 2.]

The words "just and convenient" in O. XL, r. 1 of the Civil Procedure Code, mean that the Court should appoint a Receiver for the protection of the property or the prevention of injury according to legal principles, and not that the Court can make such appointment because it thinks convenient to do so. They confer no arbitrary and non-regulated discretion on the Court. [p. 785, col. 2.]

The Receiver appointed in an action should as a general rule be a person wholly disinterested in the subject-matter. But it is competent to the Court upon the consent of the parties, and in a proper case, without such consent, to appoint as Receiver a person who is mixed up in the subject-matter of the litigation if it is satisfied that the appointment will be attended with benefit to the estate. [p. 786, col. 2.]

Appeal against the order of the Sub-Judge, Hoogly, dated the 15th August 1923.

Babus *Dwarkanath Chakraberty, Narendra Kumar Bose, Haradhan Chatterjee* and *Rama Prosad Mukherjee*, for the Appellant.

Babus *Sarat Chandra Roy Chowdhury* and *Hiralal Chakrabarty*, for the Respondent.

JUDGMENT.—This is an appeal under O. XLIII, r. 1 cl. (s) from an order rejecting an application for the appointment of a Receiver under O. XL, r. 1, Civil Procedure Code in a suit for construction of a Will for establishment of title to *shebaitship* of a *debuttar* estate and for incidental reliefs.

The history of this endowment is set out in the judgment of this Court in *Manohar Mookerjee* v. *Raja Peary Mohan Mookerjee* (1), which was confirmed on appeal by the Judicial Committee [*Peary Mohan Mukerji* v. *Monohar Mukerji* (2).] It is sufficient to state that the endowment was created by Jagomohan Mukherjee, the common ancestor of the parties to this suit, who made a testamentary disposition of his properties on the 11th September 1840. A suit was instituted by the first defendant Monohar Mukherjee for construction of the Will, for the administration of the trust created thereby, for the removal of Raja [Peary Mohon Mukherjee from the *shebaitship*, for the appointment of a new *shebait* or a Receiver, and other incidental declarations. The suit was dismissed by the Trial Court on the 23rd December 1915. That judgment was reversed by this Court on appeal on the 24th July 1919. The effect of this judgment was to remove Raja Peary Mohon Mukherjee from the *shebaitship* and to place the *debuttar*

(1) 54 Ind. Cas. 6; 24 C. W. N. 478; 30 C. L. J. 177.

(2) 62 Ind. Cas. 761 48 I. A. 258; 26 C. W. N. 133; 34 C. L. J. 86; 41 M. L. J. 681 14 L. W. 1041 23 Bom. L. R. 913; (1921) M. W. N. 554; 19 A. L. J. 773; 2 P. L. T. 725; 30 M. L. T. 24; 48 C. 1019; (1922) A. I. R. (P. C.) 235 (P. C.).

estate in the hands of a Receiver appointed by this Court. Since then, the Receiver has continued in occupation and has discharged his duties under the direction of this Court. Raja Peary Mohon Mukherjee died on the 16th January 1923 and the succession to the *shebaitship* opened out on his death. In the normal course of events, the Receiver would have been discharged on the death of Raja Peary Mohon Mukherjee. Disputes, however, broke out between Monohar Mukherjee and the representatives-in-interest of Raja Peary Mohon Mukherjee, and at the desire of all parties, this Court directed the Receiver to continue to hold the estate until further orders. On the 9th February 1923, an application was made to this Court on behalf of Monohar Mukherjee to the effect that the Receiver might be directed to make over possession of the *debuttar* estate, and all the papers in relation thereto, to him as the next person entitled to hold the *shebaitship* under the terms of the Will of the founder. The application was opposed by a representative of Raja Peary Mohon Mukherjee who was a party to the original suit also in his own right. On that occasion, the Court made the following order:—

Before possession can be taken by the *sheabit*, or, in the event of a dispute, before a Receiver can be appointed by a competent Court to take charge of the *debuttar* estate, it is necessary that the Receiver appointed by this Court should continue. We accordingly authorise the Reeeiver to continue in occupation till the first day of the new Bengali year. If, in the meanwhile, the parties can agree upon a person to take possession of the estate as the new *shebait* and the matter is reported to us, the Receiver will be authorised to withdraw forthwith. If, on the other hand, the dispute is not ended and the Receiver is appointed by a competent Court where the suit has been instituted, the Receiver will be directed to make over possession to the new Receiver."

We directed the Receiver to continue in occupation till the first day of the new Bengali year, because it was pointed to us by both sides that if the Receiver were to withdraw from the management at an earlier date, considerable difficulties might arise in the way of institution of rent suits, as the period of limitation would expire in ordinary course on the last day of the then current Bengali year. Thereafter, both parties awaited further developments, each anxiously expectant as to what action might be taken by his opponent. At length, on the 14th April 1923, that is, just after the expiry of the date fixed by this Court, Bhupendra Nath Mukherjee, the son of Raja Peary Mohon Mukherjee, instiuted a suit in the Court of the Subordinate Judge of Hoogly for construction of the Will of the founder and for determination of a variety of questions in relation to the *debuttar* estate. Thirty-eight persons—all of them, except one, members of the Mukherjee family of Uttarparah—were brought on the record as defendants. The list included the Receiver appointed by this Court. Four other persons were subsequently brought on the record as additional defendants seventeen of these forty-two defendants entered appearance. The plaint contained a prayer for the appointment of a Receiver, and five days later, an application was made by the plaintiff in that behalf. The only defendant who contested the application for the appointment of a Receiver was the first defendant Monohar Mukherjee. On the 15th August 1923, the Subordinate Judge dismissed the application for the appointment of a Receiver. Five days later the present appeal was lodged in this Court by the plaintiff. The only person brought on the record as respondent in the appeal is the first defendant, Monohar Mukherjee. We have now to consider whether the order of the Subordinate Judge can be supported on the merits.

A preliminary objection has been taken that the appeal should not be heard, until notice has been served upon all the other defendants, at any rate, upon the defendants who had entered appearance in the Trial Court. We are of opinion that there is no substance in this contention. The object of the appointment of a Receiver in the present case is to secure the properties during the pendency of the

litigation. If a Receiver is appointed, the only person materially prejudiced thereby would be the person entitled to present possession as *shebait*. In this category may be included the plaintiff as also the first defendant, as they are rival claimants to the possession of the *debuttar* estate. There is no allegation that there is a third person amongst the defendants who is entitled to present possession or has even advanced a claim to that effect. They are necessary parties to the suit, which has been instituted for construction of the Will and for other reliefs, which may affect the endowment wherein they are or their successors-in-interest may become interested either in the present or in the future. But there is no suggestion that any of these defendants is entitled to present possession, and consequently it is not necessary to have them on the record of this appeal.

We shall now proceed to consider the merits of the order under appeal. We observe that the Subordinate Judge has not only narrated the previous history of the endowment but has also expressed a decisive opinion as to the rights of the parties. The danger of such a course was pointed out by this Court in *Ram Sunder Dass* v. *Kamal Jha* (3). The Subordinate Judge has also referred to the decisions in *Sidheswari Dabi* v. *Abhoyeswari Dabi* (4) and *Chandilal Jha* v. *Padmanand Singh* (5). In these cases, the Court considered the principles which should regulate the appointment of Receivers, where the effect of the appointment is to oust a person who is in possession of the property in dispute. The principles applicable in cases of that character were clearly stated by Sir John Woodroffe in his work on Receivers. The appointment as well as the removal of a Receiver is a matter which rests in the sound discretion of the Court. In exercising its discretion, the Court should proceed with caution and be governed by a view of the whole circumstances of the case. A Receiver should not be appointed in supersession of a *bona fide* possessor of the property in controversy, unless there is some substantial ground for interference: *Mathuria Debya* v. *Shibdayal Singh* (6). The power conferred by the Code of Civil Procedure to appoint a Receiver is not to be exercised as a matter of course, and it is not a reason for allowing an application for the appointment of a Receiver, that it can do no harm to appoint one: *Prosonomoyi Devi* v. *Beni Madhab Rai* (7). The words "just and convenient" in O. XL, r. 1 of the Code mean that the Court should appoint a Receiver for the protection of property or the prevention of injury according to legal principles and not that the Court can make such appointment because it thinks convenient to do so. They confer no arbitrary and non-regulated discretion on the Court.

These are well-settled principles, but the case before us possesses special features which have been overlooked by the Subordinate Judge. Here, as in *Khubsurat Singh* v. *Sarada Charan Guha* (8) and *Madheshwar* v. *Mohamaya Prasad Singh* (9), the subject-matter of litigation is not in the occupation of either the plaintiff or the contesting defendant. The property is in the custody of this Court, in the hands of the Receiver appointed by us in connection with the suit previously mentioned. Such a contingency was foreseen by Lord Cranworth in the case of *Owen* v. *Homan* (10), when he made the following observations:—

"The Receiver..must be appointed on the principle on which the Court of Chancery acts, of preserving property pending the litigation which is to decide the right of the litigant parties. In such cases the Court must of necessity exercise a discretion as to whether it will or will not take possession of the property by its officer. No positive unvarying rule can be laid down as to whether the Court will or will not interfere by this kind of

(3) 32 C. 741.
(4) 15 C. 818; 13 Ind. Jur. 258; 7 Ind. Dec. (N. S.) 1128.
(5) 22 C. 459; 11 Ind. Dec. (N. S.) 307.
(6) 5 Ind. Cas. 27; 14 C. W. N. 252.
(7) 5 A. 556; A. W. N. (1883) 136; 3 Ind. Dec. (N. S.) 511.
(8) 12 Ind. Cas. 165; 14 C. L. J. 526; 16 C. W. N. 126.
(9) 9 Ind. Cas. 1027; 15 C. W. N. 672; 13 C. L. J. 487.
(10) (1853) 4 H. L. C. 997 at p. 1032; 94 R. R. 516 at p. 527; 17 Jur. 861; 1 Eq. R. 370; 10 E.R. 752.

interim protection of the property. Where, indeed, the property is as it were *in medio*, in the enjoyment of no one, the Court can hardly do wrong in taking possession. It is the common interest of all parties that the Court should prevent a scramble. Such is the case when a Receiver of a property of a deceased person is appointed pending a litigation in the Ecclesiastical Court as to the right of Probate or Administration. No one is in the actual lawful enjoyment of property so circumstanced, and no wrong can be done to any one by taking and preserving it for the benefit of the successful litigant. But where the object of the plaintiff is to assert a right to property of which the defendant is in the enjoyment, the case is necessarily involved in further questions. The Court by taking possession at the instance of the plaintiff may be doing a wrong to the defendant; in some cases an irreparable wrong. If the plaintiff should eventually fail in establishing his right against the defendant, the Court may by its *interim* interference have caused mischief to the defendant for which the subsequent restoration of the property may afford no adequate compensation. In all cases, therefore, where the Court interferes by appointing a Receiver of property in the possession of the defendant before the title of the plaintiff is established by decree, it exercises a discretion to be governed by all the circumstances of the case."

In the case before us, the property is in the hands of a Receiver appointed by this Court. The defendant urges not only that a Receiver should not be appointed by the Subordinate Judge but that the Receiver previously appointed by this Court should be discharged and the properties made over to him, because, in the opinion of this Court, he is the person entitled to the *shebaitship* on the death of the last incumbent. In our judgment, it would not be right for this Court to adopt this suggestion. If we were to express an opinion that the first defendant is entitled to the *shebaitship* in the events which have happened, we should only prejudge the matter in controversy in the litigation before the Subordinate Judge. We are consequently of opinion that a Receiver should have been appointed in this case by the Subordinate Judge and we proceed to make the order which should have been passed by him.

The view has been pressed on us as well by the plaintiff as by the first defendant that if a Receiver is appointed, the plaintiff or the defendant should be such Receiver. Each has offered to find funds, if necessary, for the management of the endowment. Each has pointed out that inestimable benefit would accrue if he were appointed Receiver. Each has urged that he will make no charge for management. Each has explained that he has an efficient machinery at his disposal for management of *zemindaris* and that the *debuttar* estate would be effectively and economically managed if the estate were placed in his hands. Neither of the litigants, however, has the remotest confidence in the other and neither is prepared to see his opponent appointed as Receiver, notwithstanding the high estimate formed by each of his own capacity for management. In such circumstances, we cannot overlook the principles which have been applied when an application has been made by one of the party litigants for arpointment of himself as Receiver; *Kali Kumari* v. *Bachan Singh* (11) and *Surasanna Roy* v. *Upendra Narayan Roy* (12). The Receiver appointed in an action should as a general rule be a person wholly disinterested in the subject-matter; *In re Lloyd, Allan* v. *Lloyd* (13). But it is competent to the Court upon the consent of the parties, and in a proper case, without such consent, to appoint as Receiver a person who is mixed up in the subject-matter of the litigation, if it is satisfied that the appointment will be attended with benefit to the estate: *Taylor* v. *Eckersley* (14), *Hyde* v. *Warden* (15), *Fuggle* v. *Bland* (16), *Boyle* v. *Bettws* (17), *Blakeway* v.

(11) 19 Ind. Cas. 873: 17 C. W. N. 974.
(12) 22 Ind. Cas. 601; 18 C. W. N. 533; 18 C. L. J. 638.
(13) (1879) 12 Ch. D. 447 at p. 451; 41 L. T. 171; 28 W. R 8.
(14) (1876) 2 Ch. D. 302; 45 L. J. Ch. 527; 34 L. T. 637; 24 W. R. 450.
(15) (1876) 1 Ex. D. 399; 25 W. R. 65.
(16) (1883) 11 Q. B. D. 711.
(17) (1876) 2 Ch. D. 726; 45 L. J. Ch. 748; 34 L. T. 844.

Blakeway (18) and *Cookes* v. *Cookes* (19). We regret that we have not been able to satisfy ourselves that benefft would accrue to the *debuttar* estate if either of the rival claimants were appointed Receiver. We are of opinion that the Receiver previously appointed should be appointed Receiver in this suit. The fact that he has been able to manage the estate efficiently notwithstanding the conflicting interests of powerful litigants justifies the expectation that he will continue to be successful in the discharge of his difficult and responsible duties as Receiver. We accordingly appoint Babu Ramtaran Chatterjee, a Vakil of this Court and one of its officers on the Appellate Side, to be the Receiver in the suit. He will continue to perform his duties under the orders of this Court. This arrangement possesses the manifest advantage that there will be no change in the management. We are convinced that a change of management or policy at this stage would be detrimental to the interest of the endowment.

The appellant will have costs both of this Court and of the Court below. We assess the hearing fee in this Court at ten gold *mohurs*.

We direct the Subordinate Judge to take up the suit for final disposal in accordance with law as early as practicable.

Appeal allowed.

W. C. A.

(18) (1824) 2 L. J. (N. S.) Ch. 75.
(19) (1865) 2 De G. J. & S. 526 at p. 531; 46 E. R. 479; 139 R. R. 216.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 78 OF 1921.

December 5, 1923.

Present:—Sir Walter Salis Schwabe, KT., Chief Justice, and Mr. Justice Ramesam.

W. H. NURSE—DEFENDANT NO. 2—APPELLANT

versus

RUSTOMJI DORABJI—PLAINTIFF—RESPONDENT.

Malicious prosecution—Damages, suit for—Malice—Good faith, requisites of—Appeal—Damages, quantum of.

Where in a suit for damages for malicious prosecution the defendant pleads protection by reason of having acted in launching the prosecution on the advice of Counsel, it is necessary for him to prove that all the facts of the case were fairly laid before Counsel and that he acted *bona fide* upon the advice given by that Counsel. [p. 788, col. 2.]

Revenga v. *Mackintosh*, (1824) 2 B. & C. 693; 4 D. & R. 187; 2 L. J. (O. S.) K. B. 137; 107 E. R. 541, relied on.

In considering the question of damages on an appeal from a decree in a suit for damages for malicious prosecution the proper question for the Appellate Court to consider is whether the Trial Court was wrong in awarding the damages it did and not what would have been the amount which the Appellate Court itself would have awarded: [p. 789, col. 2.]

Appeal from the judgment of Mr. Justice Coutts-Trotter, dated the 15th March 1921, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 527 of 1919.

Messrs. *V. V. Srinivasa Aiyengar*, *A. Krishnaswamy Aiyar* and *N. S. Rangaswamy Aiyangar*, for the Appellant.

Messrs. *Short Bewes & Co.*, for the Respondent.

JUDGMENT.

Schwabe, C. J.—This is an appeal from a judgment of Coutts-Trotter, J. in an action for malicious prosecution. He found for the plaintiff with Rs. 35,000 damages. The defences set up were that there was no malice and that there was reasonable and probable cause for the prosecution. As regards the latter point I entirely agree with what was said by the learned Judge that there was no reasonable and probable cause for this prosecution. In considering that, I consider what the position was of the plaintiff in respect of the charge made against him in the Criminal Court and I am quite satisfied that there was no ground at all for even suggesting

that he had been guilty of any criminal offence. No criminal offence, in fact, had been committed, and I can see no reason at all for suggesting that Mr. Nurse, the defendant, really had any reasonable ground for thinking that a criminal offence had been committed.

On the other point of the case, namely, whether there was malice, there are two matters to be considered. The first is whether the defendant acted with an indirect motive. The learned Judge found that he did, and I have no doubt that he was right. There was a dispute going on between the plaintiff and the defendant. The plaintiff had entered into a contract with the defendant under which the defendant was to build for him a cinema and then let it out to him. A point arrived in the relationship between them in relation to that cinema when things were at a deadlock. The defendant was, no doubt, contending that there would have to be some alteration in the terms upto that time existing between the parties, and I think it is fairly clear that the plaintiff recognised that there would have to be some modification or alteration. The defendant put forward a draft lease on terms which he thought reasonable, the plaintiff rejected those terms and put forward an alternative which in turn the defendant rejected and the plaintiff claimed to fall back or stand upon the written agreement. He said that there had been and was an agreement between the parties, binding and effective. Whether that agreement was binding and effective or not at that date is a matter with which we are not concerned and it is a matter on which I think it desirable to say nothing in view of the fact that it is the subject-matter of litigation between the parties. But that was the position when the defendant chose to apply for the arrest of the plaintiff on what, as I have already said, are wholly frivolous grounds, and I think the learned Judge was amply justified in coming to the conclusion he did that he did so with the indirect motive of hoping to be in a better position to negotiate with his opponent with a criminal charge hanging over his head than he would be in negotiating as between two persons on equal terms. I think it right to say that, in my view, I do not think that, on this evidence, Mr. Nurse had, or could have had, any honest belief in the guilt of Mr. Rustomji. Either of those views is quite enough to justify the finding of my brother Coutts Trotter, J.

A further point arose on this point which is really a subsidiary part of this point, namely, the defendant contends that he acted in launching this prosecution on the advice of Counsel and that he claims to be protected by reason of that fact. It is, no doubt, the law that that protection is given where Counsel's opinion has been obtained and where it is believed to be correct and acted upon. I think the law is correctly stated in the judgment of Bayley, J., in *Revenga* v. *Mackintosh* (1) in which he said:

"I accede to the proposition, that if a party lays all the facts of his case fairly before Counsel, and acts *bona fide* upon the opinion given by that Counsel, (however erroneous that opinion may be) he is not liable to an action of this description."

It may be observed that, in order to escape by reason of the opinion of Counsel the first condition is that all the facts of the case are laid fairly before Counsel, and the second condition is that he acts *bona fide* upon the opinion given by that Counsel. I think it is quite clear in this case that all the facts were not laid fairly before Counsel. The main ground of the prosecution was that a certain agreement between the parties, contained on four sheets of paper bearing a certain original date and giving a time limit for the building of the cinema, was from time to time altered by a fresh front sheet on a stamp paper with a new date being prepared by the solicitor to both parties and signed or initialled by the parties, and it was alleged that because the plaintiff took the new front sheet attached it to the remaining sheets of the original agreement and tried to have the document so composed registered he was committing the crime of cheating and of forgery. The greater part of the evidence in this

(1) (1824) 2 B. & C. 693: 4 D. & R. 187; 2 L. T. (o. s.) K. B. 137; 107 E. R. 541.

case ranged round the question of what was the intention of the parties in having these front sheets prepared. The prosecution story was that they were prepared in order to become the front sheet to some subsequent agreement to be executed. The defence story was that it was the intention of everybody throughout that the new front sheet should be substituted for the old. The defendant went before his Counsel and told him that it was the intention of both parties when the new front sheets were made at different times that they were not to be attached to the remaining sheets of the original agreement and on that basis apparently Counsel advised. It is quite clear, to my mind, on the evidence that so far from it being the intention of both parties that the new front sheet should not be attached to the original back sheets, it was the intention of both parties that they should be so attached and, indeed, that they were brought into existence for the purpose of being so attached. I do not think it is a very creditable story to any one concerned. They desired to extend the time under an existing agreement. They did it by substituting a new front sheet with a different date treating the execution of the original contract, witnessed as it was by several witnesses as still being the execution of the final contract with a new date. I think also there was a desire on the part, at any rate, of some of the parties concerned that, as the stamp for the agreement for lease was an inadequate stamp, it might be possible to get a reduction of the penalty which was being incurred by reason of the stamp not being the right stamp, by putting before the registration authorities that the document was of recent date, whereas the chance of getting a reduction of penalty would be very much less if the authorities had been aware that the contract had been in existence for a very considerable time and acted upon, and was, in fact, renewed from time to time by this addition of a front sheet. However that may be, I am quite satisfied that it was the intention of both parties that it should be so used. In fact, the solicitor, who was the solicitor for both parties and who gave evidence at the Police Court and at the Sessions Court, although he at first, particularly in the Police Court, tried to make out that it was contrary to the agreement that the front sheet should be attached to the others when he got before the Sessions Court and was fully cross-examined, ultimately said in the plainest terms that the whole intention of the parties was that the new front-sheet, in his words, was to form part of and take the place of the front sheet of the old agreement.

That being so, it cannot, in my judgment, be said that the true facts were placed fairly by the defendant before Counsel, when Counsel advised, if he did so advise that this prosecution should take place. Under these circumstances I think that in this case there was ample evidence both of absence of reasonable and probable cause and of malice in fact.

There remains only the question of damages. In countries where these questions of tort are tried before a Jury, damages are eminently in the province of the Jury. Where, however, a case is tried before a Judge he has a very wide discretion, on the facts of the case before him, to say what, in his view, the damages should be; but it is no doubt easier to get the damages reduced on a judgment from a Judge than, as in England, in the case of a verdict by a Jury, because a Judge in his judgment states his reasons when he gives damages and states what influences him or what is in his mind when he gives those damages, whereas in England, where the Jury gives no reasons, it is almost impossible for the Court of Appeal to know what operated on the mind of the Jury and it is difficult to establish that the damages are so excessive that no reasonable body of twelve men could have come to that measure of damages. I have had some little doubt in this case whether the learned Judge, who quite fully states his reasons for taking rather a strong view of the case as to damages, was not inclined to severity but, on the whole, I think not. I am not certain as to whether I should not have awarded a lesser amount, but that is not what I have to consider. What I have to consider is whether the learned Judge was wrong in awarding the damages that he did. As has been pointed out, it is

a serious thing, indeed, for a business man of position, more especialiy when he carries on business in another place, to be brought before the Criminal Court of of Madras and kept here for some months with the anxiety of prosecution hanging over his head, having to incur very heavy costs here, which are separately provided for in the judgment, and having to incur expenditure by reason of his being away from home, and being subjected to the injury which must necessarily accrue to the man's business, when he must be away from his business for a considerable time, and under a suspicion of having been guilty of serious offence. Under these circumstances I do not think it right to interfere with the judgment here, and this appeal must be dismissed with costs. Certified for two Counsel.

Ramesam, J.—I agree and have nothing to add.

Appeal dismissed.

V. N. V.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 74 OF 1920,

August 30, 1922.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Cuming.

RAJENDRA KUMAR BOSE—
DEFENDANT—APPELLANT
versus
BROJENDRA KUMAR BOSE—
PLAINTIFF—RESPONDENT.

Partition—Partial partition, suit for, maintainability of—Principles applicable.

A suit for partition should include all the lands of the co-tenancy, and if it does not, any party interested may insist that the omitted land or lands be included in the suit. [p. 791, col. 2; p. 792, col. 1.]

Exceptions to the general rule that a suit cannot lie for partition of a portion of the family property have been recognised when different portions of the family property are situated in different jurisdictions, and separate suits for separate portions have sometimes been allowed, where different rules of substantive or adjective law prevail in the different Courts. Again, a suit for partial partition has been allowed when the portion excluded is not in the possession of co-parceners and may consequently be deemed not to be really available for partition. A suit for partial partition has also been allowed when the portion excepted is impartible property. In another class of cases, the rule has been relaxed, namely, when the portion excluded is held jointly with strangers who have no interest in the family partition. [p. 792, cols. 1 & 2; p. 793, col. 1.]

The general rule is that all property held in co-tenancy and nothing but property held in co-tenancy should be included in a partition suit. A co-tenant whose title to an undivided share of joint property is admitted or is clear, is entitled to partition as a matter of right; a difficulty in making a division of the subject-matter or a resulting prejudice to some of the co-tenants, is not a sufficient ground for refusing a partition. [p. 791, col. 1.]

The rule that a partition suit should embrace all the joint property is neither arbitrary nor technical; it is founded on sound and weighty reasons. If the rule were not recognised and firmly applied, multiplicity of litigation would be the inevitable result. [p. 794, col. 2.]

Although partial partition by suit is allowed where different portions of the property lie in different jurisdiction, or some portion of the property is at the time incapable of partition or is from its nature impartible or is held jointly with strangers who cannot be joined as parties to a general suit for partition, these exceptions must not be taken to have frittered away the fundamental rule that a partition suit should embrace all the joint property. [p. 793, col. 2; p. 794, col. 1.]

Appeal against the decree of the Sub-Judge, Dacca, dated the 29th March 1920.

Dr. *Dwarka Nath Mitter* and Babu *Hira Lal Chakerburty*, for the Appellant.

Babus *Ram Chundar Mazumdar, Gunada Charan Sen* and *Heramba Chandra Guha*, for the Respondent.

JUDGMENT.—This is an appeal by the defendant in a suit for partition. The plaintiff and the defendant are two brothers, governed by the Dayabhaga school of Hindu Law. Under a testamentary disposition of their father, now deceased, they are entitled in equal shares to the properties in suit and many other properties. In this suit, the plaintiff seeks partition of an ancestral house at Srinagar two horses at Dacca and a large number of moveables. The defendant contends that all the joint properties should be included in the suit and divided by the decree therein. The Subordinate Judge has overruled this objection, and has made a preliminary decree. On the present appeal, the defendant has urged

that the plaintiff should not be allowed to sue for partial partition.

The principles applicable to cases of this character are well settled. The general rule is that all property held in co-tenancy and nothing but property held in co-tenancy should be included in a partition suit. A co-tenant, whose title to an undivided share of joint property is admitted or is clear, is entitled to partition as a matter of right; a difficulty in making a division of the subject-matter or a resulting prejudice to some of the co-tenants, is not a sufficient ground for refusing a partition; and it has sometimes been maintained that partition may be claimed, even though it be impossible to divide the property without materially impairing its value, or even totally destroying it: *Norris* v. *Le Neve* (1); *Parker* v. *Gerard* (2); *Baring* v. *Nash* (3); *Calmady* v. *Calmady* (4), *Turner* v. *Morgan* (5); *Agar* v. *Fairfax* (6); *Clarendon* v. *Hornby* (7). Since partition can be claimed as a matter of right, a co-tenant is not required to make a demand or to agree upon terms prior to institution of suit. But although, as a general rule, all joint property of the co-tenants must be included in a partition suit, it is within the power of co-tenants, by mutual agreement, to make partition of a part only of the joint property, retaining the rest in common: *Darvill* v. *Roper* (8). The principle that a partition suit should include all the property of the co-tenancy is widely recognised, and it has been pointed out that if the rule were not enforced, a co-tenant might institute as many suits to partition the property as his caprice dictated. Consequently a partial partition cannot, as a general rule, be compelled against co-tenants who do not consent thereto. But if some of the co-tenants desire to continue holding their moieties together and undivided, the Court may permit them to do so, and instead of making a separate allotment to each, set apart, to all who so desire, an allotment to be held by them jointly. If it appears, however, that all the defendants have already received all that is equitably due to them, the remainder may be awarded to the plaintiff; this is not partial but complete partition: *Hobson* v. *Sherwood* (9); *Clarendon* v. *Hornby* (7). The rule is enunciated in these or similar terms by text-writers of recognised authority. Thus, Freeman (Co-tenancy and Partition, section 508) states that a tract held in common cannot be partitioned by fragments, and a suit for partition should always embrace the whole tract held by the co-tenancy. But while it is indispensable that the whole tract should be embraced in the suit for partition, it does not follow that those who are mutually desirous of continuing the relation of co-tenancy among one another, are obliged to have their several portions allotted to them to hold in severalty. It is true that there are cases where a partial partition has been treated as improper and unauthorised under all circumstances: *Robertson* v. *Robertson* (10). But the weight of the authorities is in favour of the view that the plaintiff in partition is entitled to have his share set off, if the premises are capable of being divided, for that is his object in instituting the proceedings; if the situation of the defendants is such as to render it for their interest to retain their portion together and undivided, there can be no possible objection in principle in permitting it to be done. To the same effect is the statement by Knapp (Partition, p. 192) that common property cannot be partitioned in fragments; it is not the practice of the Court to cause or decree a partial partition. The established rule may accordingly be taken to be that a suit for partition should include all the lands of the co-tenancy, and if it does not, any party interested may insist

(1) (1744) 3 Atk. 83; 26 E. R. 850.
(2) (1754) Ambl. 236; 27 E. R. 157.
(3) (1813) 1 V. & B. 551 at p. 554; 35 E. R. 214.
(4) (1795) 2 Ves. Jur. 568; 30 E. R. 780.
(5) (1803) 8 Ves. 143; 32 E. R. 307; 149 R. R. 667.
(6) (1808) 17 Ves. 533 at p. 543; 1 Wh & T. L. C. (7th Ed.) 181; 34 E. R. 533.
(7) (1718) 1 P. Wms. 446; 24 E. R. 465.
(8) (1855) 3 Drewry 294; 3 Eq. R. 1041 24 L. J. Ch. 779; 3 W. R. 467; 61 E. R. 915; 106 R. R. 355.
(9) (1841) 4 Beav. 184; 49 E. R. 309; 55 R. R. 40.
(10) (1852) 2 Swan (Tenn) 199.

that the omitted land or lands be included in the suit.

There is little doubt that the general principle enunciated above was recognised by Hindu jurists; see Mitakshara, Chap. II, section 10; Vishnu, XV, 33; Narada XIII, 32; *Radha Churn Dass* v. *Kripa Sindhu Dass* (11); *Manjanatha Shanabhaga* v. *Narayana Shanabhaga* (12); *Sudarsanam Maistri* v. *Narasimhulu Maistri* (13). Jolly, Tagore Lectures on Partition, p. 135.

The principle that a suit for a division of a portion of the family property cannot lie and must comprise the entire family property has been affirmed in numerous cases: *Nanabhai Vallabdas* v. *Nathabhai Haribhai* (14); *Trimbak Dixit* v. *Narayan Dixit* (15); *Venkatesh* v. *Ganpaya* (16); *Gopal* v. *Narnapa* (17); *Parbati Churn Deb* v. *Ain-ud-deen* (18); *Upendra Narain Myti* v. *Gopee Nath Bera* (19); *Haridas Sanyal* v. *Pran Nath Sanyal* (20); *Ramjoy Ghose* v. *Ram Ranjan Chukerbutty* (21); *Kalka Pershad* v. *Budree Sah* (22); *Hoolas Khan* v. *Munsub Ali* (23); *Venkayya* v. *Lakshmayya* (24); *Jugco Lall Oopadhya* v. *Minohar Lal Opadhya* (25); *Shivmurteppa* v. *Virappa* (26). *Kristayya* v. *Narasimham* (27); *Cheyt Narain Singh* v. *Bunwarree Singh* (28); *Jogendra Nath Mukerji* v. *Jugobundhu Mukerji* (29); *Ram Lochun Pattuck* v. *Rughoobur Dyal* (30); *Venkata Narasimha* v. *Bhashyakarlu* (31); *Srimohan Thakur* v. *Macgregor* (32).

Exceptions to the rule that a suit cannot lie for partition of a portion of the family property have been recognised when different portions of the family property are situated in different jurisdictions, and separate suits for separate portions have sometimes been allowed, where different rules of substantive or adjective law prevail in the different Courts; *Hari Narayan Brahme* v. *Ganpatrav Daji* (33); *Ramacharya* v. *Anantacharya* (34); *Moti Ram* v. *Kanhiyalal* (35), *Punchanun Mullick* v. *Shib Chunder Mullick* (36); *Balaram Bhaskarji* v. *Ramchandra Bhaskarji* (37); *Abdul Karim Sahib* v. *Badrudeen Sahib* (38); *Srimati Padamani Dasi* v. *Srimati Jagadamba Dasi* (39); *Ram Mohan Lal* v. *Mul Chand* (40); *Lachmana* v. *Terimul* (41); *Subba Rau* v. *Rama Rau* (42); *Jairam Narayan Raje* v. *Atmaram Narayan Raje* (43); Again, a suit for partial partition has been allowed when the portion excluded is not in the possession of co-parceners and may consequently be deemed not to be really available for partition; *Balkrishna Vithal* v. *Hari Shankar* (44); *Narayan Babaji* v *Pandurang Ramchandra* (45); *Shivmuteppa* v. *Virappa* (46); *Kristayya* v. *Narasimham* (27). *Pattaravy Mudali* v. *Asidimula Mudali* (47); *Gora Chand Haldar* v. *Basanta Kumar Haldar* (48). A suit for partial partition has also been allowed when the portion excepted is impartible

(11) 5 C. 474; 4 C. L. R. 428; 2 Ind. Dec. (N. S.) 911.
(12) 5 M. 362; 6 Ind. Jur. 518; 2 Ind. Dec. (N. S.) 252.
(13) 25 M. 149; 11 M. L. J. 353.
(14) 7 B. H. C. R. A. C. J. 46.
(15) 11 B. H. C. R. 69.
(16) (1876) Bom. P. J. 110.
(17) (1883) Bom. P. J. 3.
(18) 7 C. 577; 4 Shome L. R. 46; 9 C. L. R. 170; 3 Ind. Dec. (N. S.) 920.
(19) 9 C. 817; 12 C. L. R. 356; 4 Ind. Dec. (N. S.) 1193.
(20) 12 C. 566; 6 Ind. Dec. (N. S.) 385.
(21) 8 C. L. R. 367.
(22) 3 N. W. R. H. C. R. 267.
(23) 3 N. W. R. H. C. R. 37.
(24) 16 M. 98; 5 Ind. Dec. (N. S.) 775.
(25) 19 W. R. 43.
(26) 24 B. 128; 1 Bom. L. R. 620; 12 Ind. Dec. (N. S.) 623.
(27) 23 M. 608; 10 M. L. J. 141; 8 Ind. Dec. (N. S.) 827.
(28) 23 W. R. 395.
(29) 14 C. 122; 7 Ind. Dec. (N. S.) 81
(30) 15 W. R. 111.
(31) 25 M. 367; 4 Bom. L. R. 543; 6 C. W. N. 641; 29 I. A. 76; 8 Sar. P. C. J. 258 (P. C.).
(32) 28 C. 769.
(33) 7 B. 272; 4 Ind. Dec. (N. S.) 183.
(34) 18 B. 389; 9 Ind. Dec. (N. S.) 768.
(35) 77 Ind. Cas. 780; 2 L. L. J. 514.
(36) 14 C. 835; 7 Ind. Dec. (N. S.) 552.
(37) 22 B. 922; 11 Ind. Dec. (N. S.) 1198.
(38) 28 M. 216.
(39) 6 B. L. R. 134.
(40) 28 A. 39; 2. A. L. J. 700; A. W. N. (1905) 169.
(41) 4 Mad. Jur. 241.
(42) 3 M. H. C. R. 376.
(43) 4 B. 482; 2 Ind. Dec. (N. S.) 830.
(44) 8 B. H. C. R. A. C. J. 64.
(45) 12 B. H. C. R. 148.
(46) 1 Bom. L. R. 620.
(47) 5 M. H. C. R. 419.
(48) 12 Ind. Cas. 684; 15 C. L. J. 258.

property: *Malikarjuna Prasad* v. *Durga Prasad* (49); *Parvathi* v. *Thirumalai* (50); In another class of cases the rule has been relaxed, namely, where the portion excluded is held jointly with strangers who have no interest in the family partition: *Purshottam* v. *Atmaram Janaradan* (51); *Venkatachella Pillay* v. *Chinnaiya Mudaliar* (52); *Sripati Chinna Sanyasi Razu* v. *Sripati Suriya Razu* (53); *Manjanatha Shanabhaga* v. *Narayana Shanabhaga* (12); *Venkayya* v. *Lakshmayya* (24; *Subramanya Chettyar* v. *Padmanabha Chettyar* (54); *Lachmi Narain* v. *Janki Das* (55); *Ram Mohan Lal* v. *Mul Chand* (40); *Ram Charan* v. *Ajudhia Prasad* (56); *Banwari Lal* v. *Sheo Sankar Misser* (57); *Gadadhar* v. *Balvant* (58); *Subbarazu* v. *Venkataratnam* 59); *Ibramsa Rowthan* v *Thirumalai* (60), *Hari Kristna* v. *Venkatalakshmi* (61); *Kadegan* v. *Periya Munusami* (62); *Ajodhya Pershad* v. *Mahadeo Pershad* (63); *Kailash Chandra Das* v. *Nityananda Das* (64). We are not concerned here with the question whether an alienee from a co-sharer is entitled to institute a suit for partition of the property he is interested in; upon that point there has been some divergence of judicial opinion as is clear from the decisions reviewed in *Subba Row* v. *Ananthanarayana Iyer* (65). In such a contingency, two conflicting opinions have been maintained; on the one hand, it is urged that the purchaser is in precisely the same position as his transferor; on the other hand, it is said that the transfer really effects a severance, and the only joint property held in common by the transferee and the co-sharers of his transferor is what forms the subject-matter of the conveyance. The first alternative is supported by the decisions in *Ibramsa Rowthan* v. *Thirumalai* (60); *Parbati Churn Deb* v. *Ain-ud-deen* (18); *Shivmurteppa* v. *Virappa* (26); *Maharaja of Bobbili* v. *Venkataramanjulu Naidu* (66); *Padala Chekkaya* v. *Vethagirisvarudu Garu* (67). The second alternative is favoured in *Chundernath Nundi* v. *Hur Narain Deb* (68); *Mukunda Lal Pal Chowdhury* v. *Lehuraux* (69); *Barahi Debi* v. *Debkamini Debi* (70); *Hemadri Nath Khan* v. *Ramani Kanta Roy* (71); *Uma Sundari* v. *Benode Lal* (72); *Subba Row* v. *Ananthanarayana Iyer* (65); *Hanmandas Ramdayal* v. *Valabhdas Shankardas* (73); *Kailash Chandra Das* v. *Nityananda Das* (64); *Hari Kristna* v. *Venkatalakshmi* (61); *Chinnu Pillai* v. *Kalimuthu Chetti* (74); *Hem Chandra* v. *Hemanta Kumari Debi* (75); *Ram Taran* v. *Hari Charan* (76); *Sris Chandra Datta* v *Mahima Chandra* (77); *Dhulabhai Dabhai* v. *Lala Dhulu* (78). But although partial partition by suit is allowed where different portions of the property lie in different jurisdictions

(49) 27 I. A. 151; 24 M. 147; 2 Bom. L. R. 945; 5 C. W. N. 74; 10 M. L. J. 294; 7 Sar. P. C. J. 761 (P. C.).
(50) 10 M. 334; 3 Ind. Dec. (N. S.) 986.
(51) 23 B. 597; 1 Bom. L. R. 76; 12 Ind. Dec. (N. S.) 399.
(52) 5 M. H. C. R. 166.
(53) 5 M. 196; 6 Ind. Jur. 410; 2 Ind. Dec. (N. S.) 137.
(54) 19 M. 267; 6 Ind. Dec. (N. S.) 891.
(55) 23 A. 216; A. W. N. (1901) 50.
(56) 28 A. 50; A. W. N. (1905) 174.
(57) 1 Ind. Cas. 670; 13 C. W. N. 815.
(58) (1883) Bom. P. J. 250.
(59) 15 M. 234; 5 Ind. Dec. (N. S.) 514.
(60) 7 Ind. Cas. 559; 34 M. 269; (1910) M. W. N. 380; 8 M. L. T. 269; 20 M. L. J. 743.
(61) 5 Ind Cas. 491; 34 M. 402; 7 M. L. T. 155; 20 M. L. J. 323; (1910) M. W. N. 555.
(62) 13 M. L. J. 477.
(63) 3 Ind. Cas. 9; 14 C. W. N. 221.
(64) 3 Ind. Cas. 21; 11 C. L. J. 384.
(65) 14 Ind. Cas. 524; 23 M. L. J. 64; 11 M. L. T. 393.
(66) 25 Ind. Cas. 585; 39 M. 265; 27 M. L. J. 409; 16 M. L. T. 181.
(67) 12 Ind. Cas. 408; (1911) 2 M. W. N. 382.
(68) 7 C. 153; 4 Shome L. R. 44; 3 Ind. Dec. (N. S.) 648.
(69) 20 C. 379; 10 Ind. Dec. (N. S.) 256.
(70) 20 C. 682; 10 Ind. Dec. (N. S.) 460.
(71) 24 C. 575; 1 C. W. N. 406; 12 Ind. Dec. (N. S.) 1052 (F. B.).
(72) 34 C. 1026.
(73) 46 Ind. Cas. 133; 43 B. 171; 20 Bom. L. R. 472.
(74) 9 Ind. Cas. 596; 35 M. 471; 21 M. L. J. 246; (1911) 1 M. W. N. 238; 9 M. L. T. 389 (F. B.).
(75) 23 Ind. Cas. 442; 19 C. W. N. 356.
(76) 22 Ind. Cas. 30; 18 C. L. J. 556.
(77) 33 Ind. Cas. 17; 23 C. L. J. 231.
(78) 64 Ind. Cas. 115; 23 Bom. L. R. 777; 46 B. 28; (1922) A. I. R. (B.) 137.

or some portion of the property is at the time incapable of partition or is from its nature impartible or is held jointly with strangers who cannot be joined as parties to a general suit for partition, these exceptions must not be taken to have frittered away the fundamental rule that a partition suit should embrace all the joint property. That rule is recognised in a long series of decisions *Baboo Lalljeet Singh* v. *Baboo Raj Coomar Singh* (79); *Ram Lochun Pattuck* v. *Rughoobur Dayal* (80); *Hari Narayan Brahme* v. *Ganpatrav Daji* (81); *Jogendra Nath Mukerji* v. *Jugobundhu Mukerji* (29); *Satya Kumar Banerjee* v. *Satya Kirpal Banerjee* (82); *Radha Kanta* v. *Bipro Das* (83); *Syed Bavuddeen Saheb* v. *Syed Esaff Sahib* (84); *Kailash Chandra Das* v. *Nityananda Das* (64), *Koer Hasmat Rai* v *Sunder Das* (85); *Haridas Sanyal* v. *Pran Nath Sanyal* (20); *Jogendra Nath Rai* v. *Baldeo Das* (86); *Syed Habibur Rasul* v. *Ashita Mohan Ghose* (87); *Mahomed Fazlur Rahman Chowdhury* v. *Mahomed Fayzur Rahman Chowdhury* (88); *Upendra Nath Banerjee* v *Umesh Chandra Banerjee* (89); *Mansaram Chakravarti* v. *Ganesh Chakravarti* (90); *Mukunda Lal Chakrabarty* v. *Jogesh Chandra* (91); *Beni Madhab* v. *Gobinda Chandra* (92); *Shivmurteppa* v. *Virappa* (26); *Doman Lal* v. *Prokash Lal* (93); *Ranku* v. *Hukmi* (94); *Burugapalli Sriramulu* v. *Nandigam Subbarayadu* (95). The decisions mentioned on behalf of the respondent cannot be deemed to have abrogated this rule : *Hem Chandra* v. *Hemanta Kumari Debi* (96); *Kali Charan Singha* v. *Kiranbala Debi* (97); *Ram Mohan Lal* v. *Mul Chand* (40); *Durga Charan Acharjee* v. *Enamol Huq* (98).

The rule that a partition suit should embrace all the joint property is neither arbitrary nor technical; it is founded on sound and weighty reasons. If the rule were not recognised and firmly applied, multiplicity of litigation would be the inevitable result. If suits for partition were allowed to be instituted in fragments the jurisdiction of the Trial Court and the forum of appeal might be altered; it might be of paramount importance to a party litigant whether he should have a first appeal or a second appeal to the High Court, and whether he should at all be permitted to seek the judgment of the Judicial Committee with regard to the matters in controversy. The rule further ensures a just partition; parties might otherwise be greatly prejudiced as regards equitable distribution, retention of possession, liability for improvements, and adjustment of accounts. It need not be disputed that there may be very special cases where the application of the rule may be justly relaxed. The case before us, however, is not of an exceptional description. The plaintiff asserts that if all the joint properties were included in the suit, it would take a long time to complete the partition. There is no substance in this contention. The two brothers have fallen out and the Subordinate Judge has found that there is great bitterness of feeling between them. There can be no room for doubt that the sooner they cease to be joint owners, the better for them. The partition may be expedited if suitable arrangements are made; for instance, there is no reason why different surveyors and valuers should not be employed to deal with the various properties; and whoever may be appointed commissioner, may have such assistance placed at his disposal that the

(79) 25 W. R. 353.
(80) 15 W. R. 111.
(81) 7 B. 272; 4 Ind. Dec. (N. S.) 183.
(82) 3 Ind. Cas. 247; 10 C. L. J. 503.
(83) 1 C. L. J. 40.
(84) 3 Ind. Cas. 20; 6 M. L. T. 156 (?).
(85) 11 C. 396; 10 Ind. Jur. 261; 5 Ind. Dec. (N. S.) 1023.
(86) 35 C. 961; 12 C. W. N. 1271; 6 C. L. J. 735.
(87) 12 C. W. N. 640.
(88) 10 Ind. Cas. 354; 15 C. W. N. 677.
(89) 6 Ind. Cas. 346; 15 C. W. N. 375; 12 C. L. J. 25.
(90) 16 Ind. Cas. 383; 17 C. W. N. 521.
(91) 35 Ind. Cas. 370; 20 C. W. N. 1276; 1 P. L. J. 393.
(92) 46 Ind. Cas. 165; 22 C. W. N. 669.
(93) 18 Ind. Cas. 866.
(94) 35 Ind. Cas. 545; 2 P. L. R. 1917; 156 P. W. R. 1916.
(95) 10 Ind. Cas. 571; 10 M. L. T. 213.
(96) 23 Ind. Cas. 442; 19 C. W. N. 356.
(97) 51 Ind. Cas. 948; 29 C. L. J. 494.
(98) 60 Ind. Cas. 762.

work of partition may be speedily completed.

The result is that this appeal is allowed and the preliminary decree made by the Subordinate Judge set aside. The case will be remanded to him for re-trial. The joint properties owned by the two brothers will all be included in the suit and will be dealt with in such manner as the Court may consider consistent with justice, equity and good conscience. If the plaintiff declines to have a partition of the entire joint estate, the suit will stand dismissed with costs in both Courts. The appellant is entitled to his costs of this appeal. The hearing fee will be assessed at 15 gold *mohurs*. The costs in the Trial Court, before and after remand, will be in the discretion of that Court.

B. N. *Appeal allowed;*
Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 207 OF 1920.

February 2, 1923.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Rankin.

RAJENDRA NARAIN CHOUDHURY —DEFENDANT—APPELLANT

versus

SATISH CHANDRA CHOUDHURY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Assam Land and Revenue Regulation (I of 1886), s. 154—Partition—Imperfect partition—Jurisdiction of Civil Court—Partition of definite tract—Jurisdiction, question of, abandoned in Trial Court, whether can be taken in appeal.

Section 154 of the Assam Land and Revenue Regulation does not bar by a Civil Court an imperfect partition, on the basis of possessory title, of specefic lands, forming a definite tract and a specific share of a revenue-paying estate, provided that the partition does not involve a partition of the entire estate. [p. 796, cols. 1 & 2.]

No property can be included in a suit for partition unless each of the parties to the suit claims an interest therein. [p. 798, col. 1.]

Sris Chandra Datta Chaudhuri v. *Mahima Chundra Datta Chaudhuri*, 33 Ind. Cas. 1 = 23 C. L. J. 241, followed.

A question of jurisdiction depending on undisputed facts can be raised in appeal though it was abandoned in the Trial Court. [p. 795, col. 2.]

Appeal against a decree of the Subordinate Judge, First Court, Sylhet, dated the 1st of June 1920.

Babu *Hemendra Kumar Das*, for the Appellant.

Babus *Brojolal Chakrabarti*, *Benoyendra Nath Palit*, *Priyenath Datta*, *Birendra Chandra Das*, for the Respondent.

Babus *Monilal Bhattacharyya*, for Babu *Sib Chandra Palit*, for the Deputy Registrar.

JUDGMENT.—This is an appeal by the third defendant in a suit for partition of joint porperty, situated in the District of Sylhet and subject to the operation of the Assam Land and Revenue Regulation, 1886. In the Trial Court, an objection was taken that the suit could not be entertained by the Civil Court and an issue was framed accordingly; but no argument was addressed on the question of jurisdiction. The suit was tried on the merits and a preliminary decree was made in favour of the plaintiff. On the present appeal the objection has been urged that the Civil Court has no jurisdiction to entertain the suit under section 154 of the Assam Land and Revenue Regulation. There is no room for controversy that the point, though abandoned in the Trial Court, can be raised here; *Mlnakshi Naidu* v. *Subramanya Sastri* (1) and *Maha Prasad Singh* v. *Ramani Mohan Singh* (2). In the case last mentioned, the Judicial Committee observed as follows: "Seeing that it is a question of jurisdiction, and depends on no disputed facts, their Lordships are of opinion that they cannot decline to entertain it, although it is not specifically raised on the appeal, more especially as it necessarily presented itself in the argument."

Section 154 of the Assam Land and Revenue Regulation provides that, except when otherwise expressly provided in the Regulation or in rules

(1) 14 I. A. 160; 11 M. 26; 5 Sar. P. C. J. 54; 11 Ind. Jur. 393; 4 Ind. Dec. (N.S.) 18 (P. C.).

(2) 25 Ind. Cas. 451; 41 I. A. 197; 42 C. 116; 18 C. W. N. 994; 16 M. L. T. 105; (1914) M. W. N. 565; 1 L. W. 619; 20 C. L. J. 235; 27 M. L. J. 459; 16 Bom. L. R. 824 (P. C.).

issued under the Regulation, no Civil Court shall exercise jurisdiction in any of the matters mentioned. The subjects thus specified include the claims of persons to perfect partition and the claims of persons to imperfect partition except in cases in which a perfect partition could not be claimed from and has been refused by the Revenue Authorities on the ground that the result of such partition would be to form a separate estate liable for an annual amount of revenue less than five rupees. The terms "perfect partition" and "imperfect partition" are defined in section 96 in these terms: "Partition is either perfect or imperfect. Perfect partition means the division of a revenue-paying estate into two or more such estates, each separately liable for the revenue assessed thereon. Imperfect partition means the division of a revenue-paying estate into two or more portions jointly liable for the revenue assessed on the entire estate." The term "estate" is defined in clause (*b*) of section 3. It is not contended that the present suit is a suit for perfect partition. The plaintiff does not seek to effect a division of a revenue-paying estate into two or more such estates, each separately liable for the revenue assessed thereon. The contesting defendants urge, however, that the suit is in essence one for imperfect partition; in other words that the plaintiff really seeks a division of a revenue-paying estate into two or more portions jointly liable for the revenue assessed on the entire estate.

The true scope of section 154 has been the subject of judicial decisions by no means easy to reconcile. But before we consider them, we may describe the scope of the suit. The property in dispute admittedly belonged to one Khusal Raj; he left two sons, each of whom obtained one half share of the *taluk*. The plaintiff claims to have acquired an interest to the extent of 2-annas and 10-*gundas* of the disputed property by virtue of a sale in execution of a decree on a mortgage granted by the descendants of the second son of the original owner. The plaintiff alleges that by virtue of his purchase at the mortgage sale, he acquired an interest in a tract of land which is described in Schedules (1) and (2) attached to the plaint. Schedule (1) sets out the boundaries of an area of 580 acres 3 roods and 16 poles. Schedule (2) sets out the boundaries of an area of 15 *hals* which, we are informed, correspond approximately to 45 acres. The plaintiff asserts that he acquired title, not to all the lands in Schedule (1) but only to such of the lands comprised therein as are not included in Schedule (2), in other words, the lands in Schedule (2) have to be excluded from the lands in Schedule (1) in order that we may ascertain the precise area claimed by the plaintiff by virtue of his purchase. There is a Third Sechedule annexed to the plaint, which describes an area of 1 *hal* or 3 acres within certain boundaries. This area, however, is not situated in the same village as the lands of Schedule (1). The lands of Schedule (1) and consequently the lands of Schedule (2) are situated in village Hizla whereas the land of Schedule (3) is situated in village Badalura. The plaint narrates the history of the title to the disputed land and makes out that the specific lands covered by the mortgage represent a demarcated plot, corresponding to a specific share in the *taluk*. The case for the plaintiff consequently is that the specific area which he invites the Court to divide as between himself and the contesting defendants represents a share of the *taluk*. What is asserted is not that there was a previous partition of the *taluk* but that the persons interested in all the lands of the *taluk* have, by mutual arrangement, held possession of specific lands as corresponding, more or less approximately, to the share held by them in the entire property. The question arises, whether section 154 of the Assam Land and Revenue Regulation bars the partition of lands in these circumstances by a Civil Court, merely because the lands are comprised in a revenue-paying estate. The defendants have invited us to hold, on the authorities which will be presently mentioned, that the question should be answered in the affirmative and that the only remedy of the plaintiff is by a proceeding before the Revenue Authorities for partition of the disputed tract.

In *Abdul Khaliq Ahmed* v. *Abdul Khaliq Chowdhury* (3) the land to be partitioned was comprised in four estates. Before the partition could be effected, it would obviously be necessary to ascertain the land. This involved an enquiry as to what specific land out of each estate was comprised in the disputed area. In these circumstances, it was pointed out that the process involved in essence, a partition not of one estate but of each of four estates. The plaintiff could not escape from the bar of section 155, because he sought, in effect, a partition of lands comprised, not in one estate, but in four estates, each of these would, in reality, be subjected to partition in the suit.

In *Sarat Chandra Purkayestha* v. *Prokas Chandra Das Chowdhury* (4) it was ruled that an estate does not cease to be an entire estate within the meaning of the Assam Land Revenue Regulation because a few plots of land are common to it and some other estate or because they are held jointly with other persons. It was pointed out, however, that cases were conceivable where there might be imperfect partition of a definite tract where such partition did not involve a partition of the estate itself.

In *Gouri Krishna* v. *Sabanunda Sarma* (5) there was a difference of opinion between Mr. Justice Rampini and Mr. Justice Brett resulting in a reference to Mr. Justice Ghose. Mr. Justice Ghose pointed out that whether section 154 does or does not operate as an effective bar must depend upon the circumstances of each litigation and that the test to be applied is, whether what was sought by the plaintiff did not in essence involve a partition of the estate. There are two other cases where the point has been recently considered, namely, *Brojendra Kishore Roy* v. *Kali Kumar Chowdhury* (6) and *Yasin Ali* v. *Radha Govinda* (7) but neither of them helps the contention of the appellant. The question which really requires decision in the present case is, whether, it is open to the plaintiff to seek a partition of the disputed tract which is obtained by a deduction of the land comprised in Schedule (2) from the lands comprised in Schedule (1), without a partition of the entire estate, within the meaning of the Assam Land and Revenue Regulation. We are of opinion that the answer must be in the affirmative.

It is well settled that a partition may be effected on the basis of possessory title, as appears from the decision of the Judicial Committee in the case of *Sundar* v. *Parbati* (8). In that case, possession of the estate, left by their deceased husband, was taken by the two widows of a childless Hindu, who had before his death adopted a son to whom by a Will he bequeathed his estate. The adopted son died shortly after the testator. It was ruled that the widows had a possessory title or interest in the estate, notwithstanding that a preferable title might exist in others through the deceased legatee, the estate thus jointly held by them, was partible, and either widow might maintain a suit for partition. This is consistent with the principle frequently enunciated, that the object of a partition suit is to transform joint possession into possession in severalty, *Durga Charan Acharjee* v. *Khundkar Enamal Huq* (9). In the case before the Judicial Committee, it was observed that the Allahabad High Court had correctly held that possessory title was sufficient to justify the institution of a suit for partition; and it is precisely on this footing that the Judicial Committee held in *Bhagwat Sahai* v. *Bipin Behary Mitter* (10), that partition might be effected as between co-owners, although their interests were not of equal grade, for instance, between a proprietor and a tenure-holder. We are of opinion that, in the case before us, as between the plaintiff and the contesting defendants there may be a partition on the basis of possessory

(3) 23 C. 514; 12 Ind. Dec. (N. S.) 342.
(4) 24 C. 751; 12 Ind. Dec. (N. S.) 1169.
(5) 32 C. 1036; 1 C. L. J. 421.
(6) 46 Ind. Cas. 967; 46 C. 236.
(7) 55 Ind. Cas. 180; 30 C. L. J. 489; 47 C. 354; 26 C. W. N. 381.
(8) 16 I. A. 186; 12 A. 511; 5 Sar. P. C. J. 448; 6 Ind. Dec. (N. S.) 782.
(9) 45 Ind. Cas. 705; 27 C. L. J. 441.
(10) 7 Ind. Cas. 549; 37 I. A. 198; 37 C. 918; 14 C. W. N. 962; 12 C. L. J. 240; 8 M. L. T. 228; (1910) M. W. N. 691; 7 A. L. J. 1137; 12 Bom. L. R. 997; 20 M. L. T. 907 (P. C.).

title; and it is for this purpose, immaterial that the title to this tract is liable to be challenged by the other co-owners of the *taluk*. There is, however, no possibility of such a contingency here, because the other co-owners who have been made parties have not raised objection to the proposed partition.

Finally, it has been urged that if this view be adopted, the suit is defective, as it does not include all the lands comprised in the *taluk*, and must be deemed a suit for partial partition; *Rajendra Kumar Bose* v. *Brojendra Kumar Bose* (11). There is plainly no force in this contention. No property can be included in a suit for partition, unless each of the parties to the suit claims an interest therein; *Ram Taran Nag Mozumdar* v. *Hari Charan Nag Mozumdar* (12) and *Srls Chandra Datta Chaudhuri* v. *Mahima Chandra Datta Chaudhuri* (13). It is not disputed that all the lands in which the plaintiff and the defendants are interested are comprised in this litigation, and in the lands excluded, the plaintiff has no interest, although the defendants have an interest therein along with other persons.

We are of opinion that the Court below has correctly held that the suit was triable in the Civil Court. As regards the merits, there is no substance in the appeal. An objection was indeed raised in the course of argument, as to the extent of the shares of the defendant's interests. That question does not appear to have been raised in the Court below and is not covered by the grounds of appeal in this Court. We must consequently decline to entertain the point.

The result is that the decree made by the Subordinate Judge is affirmed and this appeal is dismissed with costs, to the plaintiff-respondent.

S. D.

Appeal dismissed.

(11) 77 Ind. Cas. 790; 37 C. L. J. 191; (1923) A. I. R. (C.) 501.
(12) 22 Ind. Cas. 30; 18 C. L. J. 556.
(13) 33 Ind. Cas. 17; 23 C. L. J. 231.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE NO. 720 OF 1915.

December 1, 1916.

Present:—Mr. Mittra, Offg. A. J. C.

Musammat LAHINI AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

BALA—DEFENDENT—RESPONDENT.

Evidence Act (I of 1872), ss. 32 (2), 67—Execution of document, proof of—Handwriting, proof of—Statement by deceased writer as to execution, admissibility of—C. P. Tenancy Act (XI of 1898), s. 60, whether retrospective—Occupancy tenant, lease granted by, validity of—Interpretation of Statutes—Retrospective effect.

Section 67 of the Evidence Act does not require any particular kind of proof to establish execution of a document. [p. 799, col. 1.]

Abdool Ali v. *Abdoor Rahman*, 21 W. R. 429, relied on.

Where direct evidence of the handwriting or mark of a person is not available, indirect evidence may be given. [p. 799, col. 2.]

Haria v. *Manakchand*, 27 Ind. Cas. 866; 11 N. L. R. 9, followed.

A statement in a document by the writer that a particular mark is that of the executant is admissible in evidence under section 32 (2) of the Evidence Act, where the writer is dead and it is proved that the document was written by him. [p. 799, col. 2.]

Abdulla Paru v. *Gannibai*, 11 B. 690; 6 Ind. Dec. (N. S.) 453, relied on.

The heir of an occupancy tenant inherits the tenancy with the liabilities attached to it. If a valid lease has been created by the deceased occupancy tenant, his heir can inherit the occupancy rights only subject to such lease. [p. 800, col. 1.]

There is nothing in the language of section 60 of the C. P. Tenancy Act which points to an intention on the part of the Legislature to interfere with rights validly created before the passing of the Act. [p. 800, col. 1.]

No Statute must be construed so as to have retrospective operation unless such construction appears very clearly in the terms of the Act or arises by necessary and distinct implication, nor is a Statute to be construed so as to have a greater retrospective operation than its language renders necessary. Even in construing a section which is to a certain extent retrospective, the maxim ought to be borne in mind as applicable whenever the time is reached at which the words of the section cease to be plain. [p. 800, col. 2.]

Unless from the language a contrary effect is clearly intended every Statute which takes away or impairs vested rights must be presumed not to have a retrospective operation. [p. 800, col. 2.]

Kala Tiharl v. *Narayan*, 13 C. P. L. R. 143 followed.

Appeal against a decree of the District Judge, Nagpur, dated the 6th August 1915.

reversing that of the Munsif, Umrer, dated the 31st March 1915.

Mr. *M. R. Bobde*, for the Appellants.

Mr. *M. K. Padhye*, for the Respondent.

JUDGMENT.—The plaintiffs sue for possession of two occupancy fields on the allegation that their grandfather Jago had given on the 4th May 1889 a lease to the defendant of the said fields for 20 years. The defendant admitted the lease, but he said that there was a further lease given by Jago on the 6th December 1893 for 30 years commencing from the expiry of the first lease. Although the instrument is a registered instrument the plaintiffs denounced this second lease as a forgery. It is unnecessary to state at present the other pleas which have been raised as they will appear when I proceed to discuss the grounds of appeal. The lower Appellate Court has held the lease of 1893 proved and has dismissed the plaintiffs' suit. The first ground questions the finding regarding execution of the disputed lease. The writer and both the attesting witnesses are dead. The document bears only the mark of Jago as he was illiterate. Witnesses have been called to prove the handwriting of the writer and both the attesting witnesses. Narain, witness No. 2 for the defendant, says that the *thika patra* is in the handwriting of the deceased writer Mahadeo Laxman. He was not specifically asked about the endorsement after the mark of Jago to the effect that it was the mark of Nagar by Jago, son of Paiku Teli. But the District Judge, having regard to the similarity of the handwriting, concludes that this part was written as is ordinarily the case by the writer. Now section 67 of the Indian Evidence Act does not, as was held in *Abdool Ali* v. *Abdoor Rahman* (1), require any particular kind of proof to establish execution of a document. The lower Court has relied upon the case *Harla* v. *Manakchand* (2). But the appellant's learned Pleader tries to distinguish the present case on the ground that they have pleaded that the document is forged, but that no such suggestion was made in the reported ruling. That case merely lays down that where direct evidence of the handwriting or mark of a person is not available indirect evidence may be given. As laid down in *Abdulla Paru* v. *Gannibai* (3), the statement of the writer that the mark was Jago's is admissible under section 32, clause (2). Although the statement is relevant it was for the lower Court to decide whether due execution of the lease by the deceased Jago has been proved or not. The Exhibit D-1 is a statement made by Jago in Suit No. 136 of 1907. In this he admits having executed two deeds of lease in favour of the defendant Jairam. In order to understand the exact reference to the two deeds, the lower Appellate Court sent for the record of Suit No. 136 of 1907 and it conclusively proves that it refers to the disputed lease dated 6th of December 1893, as also to the admitted lease dated 4th May 1889. It is urged that there is nothing to show that the person who made the statement in the previous suit was the grandfather of the appellants. He is described in both the leases as well as in the former suit as Jago, son of Paiku Teli, surname Lambat of Makardhokra, and the lower Court was perfectly justified in holding that the person who made the statement recorded in Exhibit D-1 was the grandfather of the plaintiffs.

It is contended that as tenancy is based upon a personal contract the plaintiffs are not bound by the lease made by Jago as his rights came to an end on his death. In support of this proposition reliance is placed upon a passage in the judgment of this Court in *Ghanya* v. *Ukund Rao* (4): "It is an estate created by contract and Statute, and its devolution is governed by the same Statute. No doubt the Statute provides that such estate shall devolve as if it were land, but this is merely a rule for guidance in dealing with each tenant acording to the personal law to which he is subject. It is not enacted that all the principles of such personal law shall be applied to the estate. The Statute merely

(1) 21 W. R. 429.
(2) 27 Ind. Cas. 866; 11 N. L. R. 9.
(3) 11 B. 690; 6 Ind. Dec. (N. S.) 453.
(4) 4 N. L. R. 9.

directs that when it becomes necessary to find the heir of a deceased tenant he shall be the person who would be heir to an estate of ownership in land." The *dictum* of Grosthwaite, J. C. in *Laxmi Bai* v. *Alyar Khan* (5) is also referred to. It runs as follows: "As tenant he has obviously no right whatever beyond his own life, and, unless such right is given by law, he cannot by will affect the landlord's or any one else's rights in his holding after his death." These cases have no bearing whatever on the point now before me. No doubt ordinarily tenancy is the result of a personal contract, but its incidents and devolution are governed by Statute. The Act of 1883 which governs this lease allowed transfers, which were binding upon the tenant and persons deriving title from him, though they were voidable by the landlord unless entered into with his consent. The right of an occupancy tenant has been made heritable by Statute, and the heir inherits as heir with the liabilities attached to such heir. If a valid lease has been created then the heir can inherit only the occupancy rights subject to such lease. It is idle to suggest that each heir takes under a fresh contract with the landlord.

It is contended that the lease of 1893 was an *interesse termini*. The Tenancy Act of 1898 came into force before the first lease expired and it is urged that the proviso to section 6 is retrospective in its effect. The learned Pleader's contention that the document of 1893 is merely an agreement to lease is wrong. It certainly is an *interesse termini* which as Fletcher, J., in *Adolphe Stuger* v. *Emma Price* (6) points out is an existing real right vested in the lessee which gives him an immediate right of entry. It is not of much consequence whether the document creates a vested estate or a vested right for the rule of presumption against interference with such a right is well established. Maxwell, on the the Interpretation of Statutes, 5th Edition at page 348 states:—"There is a fundamental rule of English Law that no Statute shall be construed so as to have retrospective operation unless such construction appears very clearly in the terms of the Act or arises by necessary and distinct implication; and the same rule involves another and subordinate rule to the effect that a Statute is not to be construed so as to have a greater retrospective operation than its language renders necessary. Even in construing a section which is to a certain extent retrospective, the maxim ought to be borne in mind as applicable whenever the time is reached at which the words of the section cease to be plain." In *Kaka Tihari* v. *Narayan* (7) it was laid down that unless from the language a contrary effect is clearly intended every Statute which takes away or impairs vested rights must be presumed not to have a retrospective operation. There is nothing in the wording of section 60 which would make it applicable to contracts entered into before the passing of the Act. As I have already mentioned it was competent under the old Act to an occupancy tenant to give a long term lease. The words "notwithstanding any agreement to the contrary" in Act XI of 1898 refer to agreements entered into after the passing of the Act and the words "lease granted to a sub-tenant" also refer to a grant after the passing of the Act. Taking the plain grammatical meaning of the proviso I am unable to hold that there is anything in the language of the section which points to an intention on the part of the Legislature to interfere with rights validly created before the passing of the Act. I hold, therefore, that the lease of 1893 did not become a mere lease for one year, as section 60 of the Tenancy Act has no application to it.

The appeal is dismissed with costs.

Appeal dismissed.

Z. K.

(5) 2 C. P. L. R. 167.
(6) 12 C. W. N. 1059.
(7) 13 C. P. L. R. 143.

PATNA HIGH COURT.

DEATH REFERENCE CASE NO. 25 OF 1923.
(CRIMINAL APPEAL NO. 194 OF 1923.)
November 15, 1923.

Present:—Justice Sir John Buckhill, KT., and Mr. Justice Adami.

PHULMANI MUNDAIN AND ANOTHER—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 302, 304A—Death caused by love potion—Intention to cause death, absence of—Offence.

Where death is caused by the administration to a person of a substance which is believed by the accused to be a love portion, the accused cannot be convicted of murder, unless it is shown clearly and without possible doubt that the intention of the accused was to cause death. The proper conviction in such a case is one under section 304A of the Penal Code. [p. 804, col. 2.]

Emperor v. *Ramava Chennappa*, 28 Ind. Cas. 641; 17 Bom. L. R. 217; 3 Bom. Cr. C. 38; 16 Cr. L. J. 305, *Pika Bewa* v. *Emperor*, 14 Ind. Cas. 195; 15 C. L. J. 512; 13 Cr. L. J. 195; 16 C. W. N. 1055; 39 C. 855, relied on.

Appeal from a decision of the Judicial Commissioner, Chota Nagpur, dated the 11th October 1923.

Messrs. *A. D. Patel* and *A. K. Ray*, for the Appellants.

The Government-Advocate, for the Crown.

JUDGMENT.

Adami, J.—The appellant Phulmani Mundain has been found guilty of the murder of her husband, Lodro Munda, and has been sentenced to death by the learned Judicial Commissioner of Chota Nagpur. The appellant Sagar Munda has been found guilty of abetment of the murder and has likewise been sentenced to death. The learned Judicial Commissioner has referred these sentences to this Court for confirmation.

It appears that Lodro Munda had for nine years before served as a servant of one Abraham Munda at Kadma, Abraham being some relation of his, but for the last eighteen months he had transferred his services to one Masidas Kumar who lived not far away from Abraham. Lodro had no house of his own; he took his meals with his relation Abraham and slept at the house of his master Masidas.

Three years ago Lodro married the appellant, Phulmani, whose parents lived at a village called Hesahatu some little distance away. Having no home of his own Lodro had to let his wife live generally with her parents but she used to come at times and stay with him at the house of Abraham. As far as one can see there were no quarrels between Phulmani and Lodro but the neighbours inferred that they did not get on very well together from the fact that Phulmani used only to stay for a short time at Abraham's house and then used to escape home.

At mid-day on the 11th June 1923 Phulmani came to the house of Abraham and stayed there for the day. In the evening when Abraham, Lodro, Phulmani's mother, Bharosi, who had come with her, and Abraham's wife Mariam were in the house, Phulmani cooked the food for the party. Lodro partook of rice and *dhal* which had been cooked by Phulmani and after staying for sometime in the house of Abraham left for the house of Masidas where he went to sleep. During his meal he had mentioned that the rice and *dhal* tasted bitter. At about 10 o'clock that night Lodro complained to Israel, the son of Masidas, that he was feeling ill and that there were burnings in his body; he also started vomitting. Isreal told Masidas and Masidas came and saw Lodro, and seeing his condition, sent for Abraham and Mariam; and Phulmani also came to the house. The women proceeded to rub oil on Lodro's body. Then Masidas sent for a *baid* called Boraya who brought two kinds of roots which he crushed and administered to Lodro in water, but Lodro, it seems, could not swallow the mixture and vomitted it out. His condition grew worse and early in the morning, at about 4 A. M., he died. He had been lying on a mat in the verandah and had, it seems, vomitted on the mat. In the morning Masidas went off to the Police Station and gave information at 7 o'clock. The Sub-Inspector came and investigated the case and found the dead body of Lodro on a mat in Masidas' verandah. He also found vomitted matter a little distance away below the verandah; it looked as it had been swept there. He collected this and he also cut portions of the mat where he found stains, he collected also scrapings of portions of the surface of the verandah

where he saw what he thought were blood stains or vomitted matter, and these substances were subsequently sent to the Chemical Examiner. The Sub-Inspector then went to the house of Abraham and there found a chicken that had died and also two dogs which had been paralysed during the night. He was handed the *dubha* in which Phulmani was said to have administered the *dhal* to her husband and he also collected what remained of the rice from the evening before.

The Sub-Inspector took all proper steps to forward the substances which he had found to the Chemical Examiner. The chicken, and the hen which was subsequently found were sent to the Veterinary Surgeon in order that the contents of their bodies might be submitted to the Chemical Examiner. The result of the chemical analysis may be stated now. Aconite was found in the rice vomitted by Lodro Munda as also in the rice which had been vomitted by the dogs and in the *kitora* (brass cup) which had contained the *dhal* which Lodro had consumed. No trace of poison was found in the other articles, namely, the cut pieces of mat and the scrapings from the verandah in Masidas' house. In the vomit of the dogs were found some pieces of wood and in the vomit collected out side Masidas' verandah were found small pieces of paper. No explanation has been given how the wood and the paper came to be mixed with the vomit but it is quite likely that in scraping up the substances some wood or paper got mixed up with it.

Lodro's body was duly sent to the Assistant Surgeon for *post mortem*. The *post mortem* examination was held by Assistant Surgeon who found signs leading him to believe that death was caused by some poisonous stuff such as aconite or belladona. There was general venous congestion and haemorrhages in the mucuous membrane of the stomach while the heart was full of dark clotted blood. All the symptoms of poisoning were present and the stomach and other vital organs such as the liver, kidney and intestines were sent to the Chemical Examiner who detected aconite in the portions sent to him. There can, therefore, be no doubt that the death of Lodro was due to poisoning by aconite.

In his information Masidas stated that Phulmani served Lodro with the food and that Lordro and his wife were not on good terms. It transpired too that, though Phulmani had been rubbing Lodro's body with oil while he was ill, she had disappeared before he died. It also came to be known that there was some intimacy between Phulmani and the appellant Sagar Munda, and it was suspected that she had gone to join Sagar, but when search was made both at her parents' house and in Sagar's village neither of these two persons could be found. It was not until some days later, after warning had been given to the *chaukidar* of Kolma to look out for these two people, that one day prosecution witness No. 19, Simon, saw Phulmani in Kolma about 40 yards from Sagar's house. He asked her who she was and where she was going and she said that she was looking for Sagar. He asked her what she had to do with Sagar and she replied that she had asked Sagar for medicine so that she might give it to her husband to make him cease to care for her and that he had given her some medicine which she had given to her husband who had died in consequence and so she was looking for Sagar. Simon also saw Sagar and told him what the woman had said to him and Sagar said that he had done no wrong and he could not understand why the woman had made such statements. The *chaukidars* were called in and Phulmani and Sagar were both taken to the Sub-Inspector on the 16th June. They got to the Police station on the 17th and were taken before the Sub-Divisional Magistrate of Khunti. After the necessary warning had been given, and precautions taken, the statements of these two persons were recorded by a Magistrate of the First Class. Phulmani stated that she had given her husband some medicine but not with the intention of killing him; she had given it to him so that he might not leave her; she had run away in fear when she saw him dying because she thought that it might be suspected that her intention had been to kill him. Sagar corroborated what Phulmani had said. He asserted that the woman had asked him for a medicine to

give her husband so that the husband should not desert her and that he had secured the medicine from one Birsa of Giring. A week after he got it he gave the medicine to Phulmani, but he denied that he had asked for any medicine which would kill Lodro. Sagar said that after Lodro's death Phulmani had come to his house.

Again on the 9th of August both Phulmani and Sagar made statements to the Committing Magistrate. Here Phulmani said that on the day on which Lodro had died from illness she had given her husband medicine in order that he might cease to care for her. She said that when she married him she had cared for him but she no longer did so. Sagar had given her the medicine and when Lodro was dying she had run away to Sagar to inform him that, whereas she had wanted medicine to make Lodro leave her, the medicine was causing Lodro's death. She admitted that it was she who cooked Lodro's rice and *dhal* and that she had put the medicine into his *dhal*. She had not, however, given him the medicine with the intention of killing him but only in order to cause him to leave her. Before the Committing Magistrate Sagar made a similar statement corroborating what Phulmani had said. Phulmani, he said, had told him that she had no longer cared for her husband and wanted her husband to give her up. He had procured the medicine from Birsa, whom he had asked whether he knew of any medicine which would make husband and wife leave each other, and Birsa said that he knew some medicine and had given him some a week afterwards. He, Sagar, had given the medicine to Phulmani and then he heard from Phulmani that Lodro was dying owing to the medicine. Before the learned Judicial Commissioner these statements by the two accused were retracted. Phulmani stated that it was Mariam, the wife of Abraham, who prepared the *dhal* and rice and that she, Phulmani, had been driven to make the previous statements because she had been tutored to do so by the Sub-Inspector and the Head Constable. She denied that she was present when Lodro died and she also denied that she had any intercourse with Sagar. Sagar stated that it was Phulmani who had implicated him and that he had made previous statements to the Police and to the Magistrate out of fear; he denied giving any medicine to Phulmani. The reason he gave for his implication by Phulmani was that he had scolded her and told her that she ought to stay with her husband.

Now the evidence as to the events which took place on the 11th June is quite clear. There is no doubt that Phulmani administered the poison to her husband in his *dhal*. This is proved quite conclusively by the witnesses and by the chemical analysis and there is no doubt that Lodro died of poison administered in the *dhal*. Of course the confessions made by Phulmani as to the administration of the drug have to be taken with care because they were afterwards retracted but those previous statements are strongly corroborated by all the evidence given in the case. The case is a clear one so far as the facts are concerned. The only question which really arises here is the question of the intention with which the powder was procured by Phulmani and the intention with which it was administered to her husband.

With regard to Sagar and also with regard to Phulmani we have to decide whether either of these two, or both of them, were cognisant of the fact that the powder they were handling was a poison. It is true that Phulmani has changed her statement in her confessions. She first said that her object was to make her husband love her and afterwards that her object was to make her husband leave her; but in both statements she has averred that her object was to use the powder as a potion to influence her husband's heart, and she denied throughout that her object was to kill her husband. The learned Judicial Commissioner with regard to the knowledge of the appellants as to what the powder was, holds that "the guilty relations between Phulmani and Sagar and the frequency with which the root of aconite is met with in Indian Bazars appear to me to justify the conclusion that they must have known perfectly

well what the medicine was. The frequency with which aconite is met with in Indian Bazars is mentioned in Lyon's Jurisprudence." This statement is rather too broad. We have to remember that these people were Mundas and even if Sagar knew the nature of the poison there was nothing which can satisfy us without a doubt that Phulmani also knew. It is to be noted that Sagar stated that he had procured the aconite from one Birsa and Birsa has not been produced for examination, nor does the evidence show why he was not produced. The probability is that Birsa denied that he had supplied aconite. It is hardly likely that he would admit it, but anyhow we have no evidence to show that Sagar was informed what the poison was when he procured it. It is possible that he too thought that he was procuring some substance which would be a potion of some sort. From the statement which Simon says Phulmani made to him, and from her confessions it would appear that Phulmani thought she was using the substance as a potion. There is no evidence throughout to show that she knew the substance was a poison, or that she intended to kill her husband. The evidence as to enmity between Phulmani and her husband is based on inference. The witnesses themselves say that they have never seen any quarrel between the two.

Now, if we are to hold that these confessions are corroborated by the evidence although they have been retracted, at the same time we have to remember that if we accept the confessions at all we must accept them as they stand and cannot add to them; we can only take them as confessions by Sagar and Phulmani and that the substance procured by Sagar was administered with the object of influencing in some way or another the heart of Lodro. It is true that having regard to the fact that Phulmani's own mother stated that Phulmani and Sagar had for the last year been intimate, (Bharosi puts it that they had been of one mind with each other), Sagar probably would not be anxious to make Lodro fonder of his wife. It is, as the learned Judicial Commissioner has found, very probable that the couple wanted to get rid of Lodro; but in this case there is no sufficient evidence to show us that such was their intention without any reasonable possibility of doubt. We have to remember that the people are ignorant and that such love potions are believed in by the ignorant. There have been several cases, all very much of the same nature as the present one, in which it has been held that where the intention to cause death cannot be clearly found without any other possible explanation of the act of the person giving poison, a conviction for murder cannot stand. The case of *Emperor* v. *Ramava Chennappa* (1) is very similar on facts to the present one. It was there held that in a case like the present one, the proper conviction is a conviction not under section 302 but under section 304 A. In *Pika Bewa* v. *Emperor* (2) the Calcutta High Court also held that unless it is shown clearly and without possible doubt that the intention was to cause death where a substance is administered as a love potion, the accused cannot be convicted of murder. It was there said that "the mere administering of a love potion or drug, which a person thinks might be beneficial, is not in itself an offence; but when it is supposed to have effect upon persons with whom the paramour of the accused had enmity, and when she administers it without due care and caution or any enquiry as to what it really is, her act certainly falls within section 304 A." Similarly in the case of *Jamna* v. *Emperor* (3) it was held in a case almost similar to the present one that the offence comitted was an offence under section 304A of the Penal Code.

The learned Judicial Commissioner has held that there cannot be any possible doubt as to the intention of Phulmani and Sagar; but we are not able to hold that, considering the statements and the evidence

(1) 28 Ind, Cas. 641; 17 Bom. L. R. 217; 3 Bom. Cr. C. 38; 16 Cr. L. J. 305.

(2) 14 Ind. Cas. 195; 15 C. L. J. 512; 13 Cr. L. J. 195; 16 C. W. N. 1055; 39 C. 855.

(3) 2 Ind. Cas. 214; 31 A. 290; 6 A. L. J. 603; 9 Cr. L. J. 522.

there is no possibility that Phulmani at at any rate really believed that the drug which was given to her would merely influence her husband's heart. Her subsequent action as shown by Simon's Evidence corroborates this idea. There is no doubt that Phulmani was acting on the suggestion of Sagar and it is impossible in the absence of Birsa to say whether Sagar really thought that the substance was harmless. He too must get the benefit of the doubt so far as the conviction of murder is concerned, but of the two he is probably the more responsible for the consequences of the administration of the drug.

It is clear that Phulmani, even if she had neither the intention to cause death nor the knowledge that she was likely to cause death, was careless of the consequences of her act, and administered the poison without due care and caution or any inquiry as to what it really was. Sagar, too, made no sufficient inquiry before he handed the poison to Phulmani, and by supplying her with the powder abetted the offence of which she has been found guilty.

The convictions under section 302 and section 302 read with section 109 and the sentences of death passed against the two appellants must be set aside, and there must be substituted therefor the conviction of Phulmani under section 304 A, Indian Penal Code, and of Sagar under section 304 A read with section 109. They are sentenced to rigorous imprisonment for two years under those sections respectively.

Bucknill, J.—I agree.

Z. K. *Sentence set aside.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION NO. 200 OF 1923.

October 22, 1923.

Present:—Mr. Kinkhede, A. J. C.

SUKRULLA FAKIR—APPLICANT

versus

FATMA—NON-APPLICANT.

Criminal Procedure Code (Act V of 1898), s. 488—Muhammadan husband—Second marriage—Maintenance claimed by first wife—Offer to provide separate residence, effect of—Refusal to live with husband.

The mere fact that a Muhammadan husband marries a second wife is no ground for his first wife to refuse to live with him and to claim separate maintenance. But she cannot be said to refuse to live with her husband within the meaning of sub-sections (3) and (4) of section 488 of the Criminal Procedure Code, merely because she refuses to accept his offer to provide separate residence for her. [p. 806, col. 1.]

Criminal revision against an order of the Magistrate, First Class, Murwada, dated the 4th July 1923.

Mr. *M. R. Dixit*, for the Applicant.

Mr. *G. P. Dick*, for the Non-Applicant.

ORDER.—The non-applicant who is the married wife of the present petitioner moved the Criminal Court of Murwada where she resides with her brother, for an order to the petitioner to give her a monthly allowance of Rs. 15 on the ground that he neglects or refuses to maintain her in spite of written notice of demand dated 21st April 1922 and that her brother also objects to maintain her. She alleges that about seven years ago she was cruelly beaten and turned out by the petitioner and since then lived with her brother. The husband admitted having received the notice and alleged that he had gone to take her to his house but she declined and her father and brother were adverse to her returning. He expressed his willingness to take her to his house. He added that the wife left his protection six years ago and so he took another wife. He offers to keep her in another village and wont keep her with himself and with another wife.

On evidence the Magistrate came to the conclusion that the husband had ill-treated the wife and turned her out and she, therefore, naturally refuses to go

back to him unless she gets the assurance of fair and equal treatment and residence with her husband. The Magistrate thought an offer to take her and make her live apart from the other wife in a separate village, which presumably implied that she was not to get all the privileges and respect due to her position as the petitioner's wife, was not such as would deprive her of her right to demand separate maintenance. He fixed Rs. 10 per month as maintenance, I presume from the date of the order. It is against this order that the revision is filed. It is contended that the order was without jurisdiction inasmuch as neither party resided within the jurisdiction of the Magistrate who tried the case and that the petitioner's offer was sufficient to disentitle the wife to a separate maintenance and that the mere fact that a second wife was taken by him was no valid reason for the applicant to demand separate maintenance.

As regards the question of jurisdiction, the applicant's version was that her marriage with the petitioner took place at Gourha, which is in Murwada Tahsil of the Jubbulpore District and that she resided with him there for a period of one year. Under these circumstances I think section 488 sub-section 9 clearly gives jurisdiction to a "Magistrate of the District where the husband last resided with his wife" to entertain the petition. Ground No. 1, therefore, fails.

As regards ground No. 3 all I have to say is that the mere fact that the petitioner has taken another wife will be no ground for the wife to refuse to go back under his protection. But here we cannot lose sight of the fact that the offer is only to give her *separate residence* which necessarily involves a refusal on the husband's part allow her to *live with him*. The applicant cannot be said to "refuse to live with her husband" within the meaning of sub-sections 3 and 4 of the said section if she disapproves of the so-called offer. In fact there is no offer to allow her to *live with him*. I think there is ample justification for refusing the offer in view of the strained feelings that exist between the parties. This disposes ground No. 2 also.

The application is rejected.

Application rejected.

Z. K.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 343 OF 1923.

July 13, 1923.

Present:—Mr. Justice Daniels.

JOTI PRASAD—APPLICANT

versus

DURGA PRASAD—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 195, 439—Sanction to prosecute—Revision—Interference by High Court, when justified.

Where an application for sanction to prosecute has been dealt with by two Courts, the High Court can only interfere, if at all, in the exercise of its revisional jurisdiction under section 439 of the Criminal Procedure Code, and then only to prevent a gross and palpable failure of justice. [p. 807, col. 1.]

Ahsanullah Khan v. *Mansukh Ram*, 25 Ind. Cas. 350; 36 A. 403; 12 A. L. J. 511; 15 Cr. L. J. 598, relied on.

Choti v. *Khacheru*, 58 Ind. Cas, 250; 42 A. 649 18 A. L. J. 758; 2 U. P. L. R. (A.) 353; 21 Cr. L. J. 746, referred to.

Criminal revision against an order of the Sessions Judge, Mainpuri, dated the 30th of April 1923.

Mr. *Salla Nath Mukerji*, for the Applicant.

Mr. *Kumuda Prasad*, for the Opposite Party.

JUDGMENT.—This is an application for revision of an order of the Sessions Judge of Mainpuri setting aside a sanction for the prosecution of Durga Prasad for perjury. Durga Prasad was arrested in possession of a battery said to have been stolen. He was the servant of Chaudhri Badan Singh, Honorary Magistrate. He had in his possession a letter which he said he had written at the dictation of Badan Singh showing that he was being sent to return the battery to one Joti Prasad. Joti Prasad was put on his trial under section 411, Indian Penal Code, but acquitted, the Trying Magistrate being of opinion that the letter of Durga Prasad

was not written at the dictation of Badan Singh and that Durga Prasad had sworn falsely in saying that it was so written. Badan Singh himself swore that the letter was genuine and this Court has already rejected an application for the prosecution of Badan Singh.

As this matter has already been before two Courts under section 195, Criminal Procedure Code this Court can only interfere, if at all, in the exercise of its revisional jurisdiction under section 439, Criminal Procedure Code. Sir George Knox in *Choli* v. *Khacheru* (1), held that no revision lay in such cases. Mr. Justice Piggott in *Ahsanullah Khan* v. *Mansukh Ram* (2) held that the Court could interfere but only in order to prevent a gross and palpable failure of justice. Whichever view is correct, and I incline to the view of Mr. Justice Piggott, this is not a case in which I shall be justified in disturbing the order of the Court below. The case against Durga Prasad stands on the same footing as that against Badan Singh. If Badan Singh's evidence was true, that of Durga Prasad was true also. The Court below was of opinion that the evidence was not sufficient to justify a prosecution and I decline to interfere with this order. I, therefore, dismiss the application.

Application dismissed.

Z. K.

(1) 58 Ind. Cas. 250; 42 A. 649; 18 A. L. J. 758; 2 U. P. L. R. (A.) 353; 21 Cr. L. J. 746.

(2) 25 Ind. Cas. 350; 36 A. 403; 12 A. L. J. 511; 15 Cr. L. J. 598.

PATNA HIGH COURT.

CRIMINAL REVISION PETITION NO. 471 OF 1923.

November 12, 1923.

Present:—Mr. Justice Kulwant Sahay.

NARENDRA NATH SARKAR AND OTHERS—FIRST PARTY—PETITIONERS

versus

EAST INDIAN RAILWAY COMPANY REPRESENTED BY THEIR AGENT AND OTHERS—SECOND PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 144, 147, procedure under—Inquiry—Order passed after ex parte enquiry, legality of.

Petitioners complained to a Magistrate that the opposite party was about to close a road over which the petitioners had a right of easement and that there was immediate danger of a breach of the peace. Their application purported to be under sections 144 and 147 of the Criminal Procedure Code and invited the Magistrate to take action. The Magistrate instead of calling for written statements of the parties and hearing evidence or holding any enquiry at all went over to the office of the opposite party and after obtaining some information passed an order declaring that the road belonged to the opposite party and they could deal with it in any manner they pleased;

Held, that the procedure adopted by the Magistrate was wholly unwarranted by law and his order was consequently illegal and must be set aside.

Criminal revision from an order of the Additional District Magistrate, Dhanbad, dated the 31st July 1923, affirming that of the Sub-Divisional Officer, Dhanbad, dated the 30th July 1923.

Messrs. *Yunus* and *S. C. Mazumdar*, for the Petitioners.

Mr. *S. N. Bose*, for the Opposite Party.

JUDGMENT.—On the 24th July 1923 the petitioners filed a petition before the Senior Deputy Magistrate of Dhanbad wherein they stated that there was a road within the jurisdiction of the Dhanbad Municipality commencing from the Dhanbad old station road towards the east of the Indian Railway Institute and leading to Manaitanr village. They claim the said road to be a public road in existence from a very long time. They stated that at any rate the public and the residents of Manaitanr had been using it as public road for over 70 years and they claim to have acquired a right of easement over the said road. It was stated that the second party, namely the East Indian Railway Company, their Chief Engineer, Mr. Johnstone, and their District Engineer, Mr. Hackforth, were trying to convert the road into a private road and to obstruct or prevent the petitioners and the public from using the road. On the 21st July 1923 they had published a notice in the *Amrita Bazar Patrika* to the effect that "it was notified for the information of all concerned that the East Indian Railway private road commencing from the Dhanbad old station road towards the

east of the Indian Railway Institute and leading to Manaitanr village will be closed against all traffic from 1st August 1923." They stated that the description of the road as a private road in the said notice was incorrect and false and it was alleged that the said notice had been published with the object of making the road a private one and that it was the first attempt on the part of the Railway Company to close the road which had been used by the public during the last 70 years. They stated in their petition that they had plenty of documentary and oral evidence including old registered deeds to support their case and they alleged that any attempt on the part of the Railway Company to close the road on the 1st August 1923 would lead to a serious breach of the peace. They accordingly after stating these facts prayed for a notice upon the Railway Company restraining them from closing the road on the 1st August 1923. The petition was headed as one under sections 144 and 147 of the Criminal Procedure Code, and having regard to the urgency of the matter it was prayed that notice should at once issue to the Railway Company restraining them from closing the road on the 1st August 1923. Upon receipt of this petition the learned Deputy Magistrate passed the following order on the 24th July 1923. "I shall enquire into the matter and pass order on the 30th July 1923." Before the 30th July 1923 the learned Deputy Magistrate adopted a procedure which is not warranted by law. Instead of holding any enquiry as provided by law either under section 147 or under section 144 he went over to the office of the District Engineer, examined certain documents and correspondence relating to the road and made certain enquiries in the office and he ascertained what he calls the history of the road. He held no enquiry as provided by section 147, Criminal Procedure Code, at all. He never heard the petitioners, never drew up any proceeding under section 147 and never called upon the parties to adduce evidence or file written statement. Without asking the petitioners to adduce any evidence and without hearing the petitioners he passed his order on the 30th July 1923 wherein he set out what he calls the history of the road from the information he gathered by examining the documents and making enquiries in the office of the District Engineer. He came to the conclusion that the road was a private road belonging to the Railway Company. He nowhere comes to any conclusion as to whether the petitioners or the public had acquired any right over that private road by way of easement. After discussing the documents and after placing upon the file a copy of the agreement executed by one Mr. Mathews in favour of the Railway Company which he had obtained from the District Engineer's office he came to the conclusion that the right of the Railway Company had been established and towards the end of his order he estates. "It is true that the road has been used not only by the lessee but by others as well for a considerable time but that does not to my mind affect the Company's right. I cannot, therefore, issue an order under section 144, Criminal Procedure Code, as prayed for by the petitioners restraining the Railway Company from exercising their ordinary proprietary rights over their own land. If the petitioners have any grievance they may go to the Civil Court. There can be no breach of the peace unless instead of doing this they take the law into their own hands which they will do at their own risk."

Now to my mind this is in effect deciding the case under section 147, *i.e.*, declaring the right of the second party without complying with the provisions laid down under the law. If the learned Deputy Magistrate had come to the conclusion that there was no likelihood of a breach of the peace and that, therefore, no action need be taken either under section 144 or under section 147, Criminal Procedure Code, he would have been justified in doing so; but instead of disposing of the matter in that way he takes evidence *ex parte* by going over to the office of the second party. He makes enquiries in the absence of the petitioners and without giving them an opportunity of adducing their own evidence and examining witnesses and coming to a distinct finding as to the alleged right of easement set up by the petitioners he comes to the conclusion that

the right is with the Railway Company and that if the petitioners go upon the land they do so at their own risk. In effect he makes an order in favour of the second party under section 147 and prevents the petitioners from going upon the land. Such a procedure is wholly unjustifiable. When the petitioners went up before the Additional District Magistrate against this order of the Deputy Magistrate he declined to interfere. He observed that the whole history of the road in dispute was that it was constructed as a carriage approach road to two bungalows especially that of Mr. Mathews and that when the Railway land was acquired and that fencing put up it was never suggested that the access to the village of Manaitarr was being closed. Where he gets these facts from it is difficult to say. There does not appear to be anything on the record from which he could come to this conclusion. He says that he went to the locality and made a local inspection. Now these facts could not be ascertained by mere local inspection. It was necessary to take evidence to come to a finding upon this point and the learned Additional District Magistrate upon the same materials from which the Deputy Magistrate has come to the conclusion that the Railway Company had established its right to the land has affirmed the order of the Deputy Magistrate and refused to interfere with it. He says "the petitioners have not made out a *prima facie* case that this is a right of way or that it is the only access to the village or that any breach of the peace is likely unless they deliberately provoke it" without giving them an opportunity to adduce evidence. This is not a satisfactory mode of dealing with the petition and I am constrained to set aside the order of the Deputy Magistrate as well as of the Additional District Magistrate. The petition treating it either as a petition for action under section 144 or one under section 147, Criminal Procedure Code must be dealt with according to law. No doubt it would be open to the Magistrate to reject the petition upon the ground that there was no longer any likelihood of a breach of the peace, but he must dispose of it according to law and not by a finding upon evidence in contravention of the procedure laid down by the law.

The order of the learned Deputy Magistrate as well as of the Additional District Magistrate must, therefore, be set aside.

Z. K. *Order set aside.*

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION NO. 1598 OF 1923.

November 30, 1923.

Present:—Mr. Justice Martineau.

BUTA—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 442—Walled courtyard, without door, whether building.

A walled courtyard which is not provided with a door is not a building within the meaning of section 442 of the Penal Code.

Petition, under section 439, Criminal Procedure Code, for revision of an order of the Sessions Judge, Sialkot, dated the 9th July 1923, varying that of the Magistrate, First Class, Sialkot, dated the 29th March 1923.

Mr. *Ghulam Rasul*, for the Petitioner:

Mr. *B. P. Khosla*, for the Government Advocate, for the Reponden t.

JUDGMENT.—It is not disputed that Buta struck Ilm Din on the head, and the evidence appears to justify the finding that the hurt was grievous.

With regard to the conviction under section 452, Indian Penal Code, it was only the courtyard that Buta entered, and although it appears from the plan that the courtyard is walled there is nothing to show that it is provided with a door. If the entrance is open I do not think that the courtyard can be said to be a building, and in that case the offence comitted would amount only to criminal trespass and not to house trespass.

I accordingly alter the conviction of Buta under section 452 to one under section 447, Indian Penal Code, and

reduce the term of imprisonment, to two months, maintaining the fine and the imprisonment to be undergone in default. I maintain the conviction and sentence for the offence under section 325.

Z. K. *Sentence reduced.*

PATNA HIGH COURT.

CRIMINAL MISCELLANEOUS CASE NO. 57 OF 1923.

December 7, 1923.

Present:—Mr. Justice Kulwant Sahay.

NAND KISHORE MISRA—PETITIONER

versus

KALKA MISRA AND OTHERS—OPPOSITE PARTY.

Criminal prosecution—Witnesses, costs of—Complainant, whether can be compelled to pay costs—Criminal Procedure Code (Act V of 1898), s. 526—Transfer of case—Complainant, whether can apply.

All criminal prosecutions are at the instance of the Crown, and the Crown is really the prosecutor in a criminal case and all costs ought to be paid by the Crown for summoning witnesses for the prosecution. [p. 811, col. 1.]

It is open to a Magistrate to consider whether or not the deposition of a witness is material for the prosecution in a case, and if he is of opinion that the witness sought to be summoned is not a material witness and the application for summoning the witness is frivolous and vaxatious, he might refuse to summon him. But once he thinks that the witness ought to be summoned, he cannot compel the complainant to pay his travelling allowance from his own pocket, as all costs for the prosecution must be paid by the Crown. [p. 811, col. 2.]

Jamuna Kanth Jha v. *Rudra Kumar Jha*, 52 Ind. Cas. 424; 4 P. L. J. 656; 20 Cr. L. J. 648; (1920) Pat. 42, relied on.

Quaere:—Whether a complainant can apply for the transfer of a case under section 526 of the Criminal Procedure Code?

Mr. *S. N. Sahay*, for the Petitioner.

Messrs. *Jayswal* and *M. N. Pal*, for the Opposite Party.

JUDGMENT.—This is an application on behalf of the complainant in a case pending in the Court of the Second Officer of Buxar. The application is for transfer of the case from the file of the learned Deputy Magistrate on the ground that the petitioner has serious apprehension that he will not have a fair trial of the case before the learned Deputy Magistrate. There is a further prayer that the order made by the Deputy Magistrate directing the petitioner to deposit the travelling allowance of a witness should be set aside.

As regards the first point, namely, the application for transfer, the grounds urged are that the learned Deputy Magistrate has refused to admit in evidence a certain *kobala* on the erroneous ground that none of the attesting witnesses or the scribe has been examined. The second ground for the alleged apprehension in the mind of the petitioner is that although in the first instance the learned Magistrate had ordered issue of summons upon a witness Dr. Susilananda Sen, yet when the witness did not appear and the petitioner applied for issue of fresh summons upon him, the learned Deputy Magistrate directed him to deposit a sum of Rs. 50 before he would issue a summons upon the witness. These two facts he says have raised an apprehension in his mind that there will not be a fair trial of the case in the Court of the learned Deputy Magistrate. To my mind these two grounds are not sufficient to create a reasonable apprehension in the mind of the petitioner that the case will not be properly tried by the learned Deputy Magistrate.

As regards the disallowing of the evidence, that may be an erroneous view of the law, but that cannot be a reasonable ground for apprehension that the case will not be properly tried by the learned Deputy Magistrate. As regards his directing the petitioner to deposit the travelling allowance of the witness, the learned Deputy Magistrate says that when he issued the summons in the first instance he was not aware that the witness was a resident of Purulia and that when an application for fresh summons was made on the second occasion, it was pointed out to him by the Sub-Inspector that the witness was a resident of Purulia and that his summoning would cost Rs. 50 or thereabout and upon this he directed the petitioner to deposit Rs. 50 for the travelling allowance of the witness. The order may be wrong in law. But it cannot be

said that the mere fact of the Magistrate's directing the petitioner to deposit a sum of Rs. 50 can raise a reasonable apprehension in the mind of the petitioner that he will not have a fair trial of the case by the Deputy Magistrate. These are the only two grounds for asking for transfer and in my opinion they are not sufficient. It was urged by Mr. Jayaswal who appears for the opposite party that the complainant has no *locus standi* to apply for transfer and reliance was placed upon the case of *Jamuna Kanth Jha* v. *Rudra Kumar Jha* (1 Although Mr. Justice Mullick was of opinion that a private person who set the Criminal Law in motion has no control over the proceeding and has, therefore; no *locus standi* to apply for transfer, Mr. Justice Jwala Prasad took a different view and he was of opinion that a complainant was entitled to apply for transfer under section 526. It is not necessary to decide the question in the present case inasmuch as it has been held that there is no reason to transfer the case.

As regards the second question, namely, whether the learned Magistrate could direct the petitioner to deposit Rs. 50 for travelling allowance of the witness before summons could issue, in my opinion, the order is clearly wrong. No provision in the law has been shown to me under which the learned Magistrate could direct the complainant to deposit a sum of Rs. 50. As was pointed out by Mr. Justice Jwala Prasad in the case cited above all criminal prosecutions are at the instance of the Crown and the Crown is really the prosecutor in a criminal case and all costs ought to be paid by the Crown for summoning witnesses for the prosecution. No doubt it was open to the Magistrate to consider whether or not the deposition of the witness was material for the prosecution in that case. If he was of opinion that the witness sought to be summoned was not a material witness and the application for summoning the witness was frivolous and vexatious, he might refuse to summon him. But once he thinks that the witness ought to be summoned he cannot compel the complainant to pay his travelling allowance from his own pocket as all costs for the prosecution must be paid by the Crown.

The order directing the petitioner to deposit Rs. 50 as the travelling allowance of the witness must, therefore, be set aside.

Order set aside.

Z. K.

(1) 52 Ind. Cas. 424; 4 P. L. J. 656; 20 Cr. L. J. 648; (1920) Pat. 42.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL NO. 94-B OF 1923.

October 31, 1923.

Present:—Mr. Prideaux, A. J. C. and Mr. Kinkhede, A. J. C.

JAIRAM KUNBI—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (*Act V* 1898), *ss.* 15, 268, 537—*Sessions trial—Assessors, number of, less than that required by law, effect of—Irregularity or illegality.*

Where a Sessions Judge tries a case with the aid of assessors, it is the Judge plus the assessors who constitute the Court, not the Judge alone; and where, therefore, a Sessions Judge tries a case with the aid of a number of assessors less than that fixed by law there is no trial at all, and the defect cannot be cured by section 537 of the Criminal Procedure Code. [p. 812, col. 1.]

Jalsukh v. *Emperor*, 59 Ind. Cas. 559; 43 A. 125; 19 A. L. J. 1; 22 Cr. L. J. 127, *King-Emperor* v. *Jayram*, 25 B. 694; 3 Bom. L. R. 274, *King-Emperor* v. *Tirumal Reddi*, 24 M. 523 at p. 535; 2 Weir 340 & 712; 11 M. L. J. 241, relied on.

Criminal appeal against the judgment of the Sessions Judge, Amraoti, dated the 24th September 1923.

Dr. *H. S. Gour*, and Mr. *A. V. Khare*, for the Appellant.

Mr. *G. P. Dick*, for the Crown.

JUDGMENT.—One Narayan Sonar was killed in a riot that took place on the 29th May last at Sirasda a village in Daryapur Taluq. Ten persons have been tried and convicted by the Sessions Judge, Amraoti, in connection with that offence. They have all appealed and their appeals are before us. In Criminal Appeals Nos. 94-B

and 95-B of 1923 the appellants Jairam and Parashram have been found guilty of offence under section 302 of the Indian Penal Code and both have been sentenced to death. In Criminal Appeals Nos. 96-B, 97-B, 98-B, 99-B, 100-B, 101-B, 102-B, and 103-B of 1923 the appellants, namely, Surebhan, Mahadeo, Ramji, Sakharam, Gopal, Januji, Vithal and Champat have each been found guilty of an offence falling under section 302-149 and each appellant has been sentenced of transportation for life. We find that there has been no trial in the present case. Section 15 of Act XII of 1923 runs as follows: "In section 284 of the said Code, for the words 'two or more shall be chosen, as the Judge thinks fit', the words 'not less than three and, if practicable, four shall be chosen' shall be substituted." This section came into force on the 1st September last. Section 268 of the Code of Criminal Procedure says that all trials before a Court of Sessions shall be either by Jury or with the aid of assessors. It is settled law that where a Sessions Judge is trying a case with the aid of assessors, it is the Judge plus the assessors who constitute the Court, not the Judge alone, and where, therefore, the Sessions Judge has tried a case with the aid of a number of assessors less than that fixed by law there has been no trial at all: see *Jansukh* v. *Emperor* (1) *King-Emperor* v. *Jayram* (2), and *King-Emperor* v. *Tirumal Reddi* (3). This wrong procedure cannot be cured by section 537 for that section refers only to errors of procedure and not to substantive errors of law. As the trial in the present case has been held with the aid of only two assessors while it should have been held with the aid of three or four there has been no trial at all. We, therefore, set aside the convictions and sentences in the cases of the ten persons mentioned at the commencement of this judgment and remand the case to the Court of Sessions East Berar for trial *de novo*. The appellants be informed of the result of the appeal through the Superintendent of the Jail where they are confined.

Z. K.

Order accordingly.

(1) 59 Ind. Cas. 559; 43 A. 125; 19 A. L. J. 1; 22 Cr. L. J. 127.
(2) 25 B. 694; 3 Bom. L. R. 274.
(3) 24 M. 523 at p. 535; 2 Weir 340 & 712; 11 M. L. J. 241.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 438 OF 1923.

June 6, 1923.

Present:—Mr. Justice C. C. Ghose and Mr. Justice Cuming.

SAILENDRA CHANDRA SINGH AND ANOTHER—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 342—Examination of accused, absence of, effect of—Re-trial.

The record of a case contained the following note:—

"Examination of the accused after the cross-examination of the prosecution witnesses and before he is called on for his defence.—

Pleads:—Not guilty."

Held, that this was not a substantial compliance with the provisions of section 342 of the Criminal Procedure Code, and a re-trial from the point at which the accused should have been examined under the section was necessary.

Appeal against an order of the Additional District Magistrate, Dacca, dated the 12th April 1923, modifying that of the Deputy Magistrate of Manickganj, dated the 26th February 1923.

FACTS.—In the Manikganj Sub-division of District Dacca there were two plots of land half of which belonged to the petitioner, Sailendra, and his brother, Puma, and the other half to one Prosanna. They were all in joint possession and the petitioner, Sailendra, was looking after them subsequently to the death of petitioners' brother, Puma, his widow, Kiranbala, at the instigation of one Khirode Nandi caused a complaint to be lodged through Khiroda's servant, Gandu Sheikh, under section 379, Indian Penal Code alleging that the said two plots of land belonged exclusively to and had been in exclusive possession of Kiranbala through her *bargadar* Melu who had grown paddy and that on 6th October 1922 the said Gandu had gone in a boat to the field to

fetch from Melu, Kiran's share of the paddy and when the paddy had been put into the boat the petitioner with two others came and forcibly removed the boat with the paddy. The complaint was dismissed by the Sub-Divisional Officer but the complainant moving the Sessions Judge a further inquiry was directed to be held.

The trial commenced on 2nd February 1923 before Mr. J. C. Chakrabarti, Sub-Deputy Magistrate, Second Class when seven prosecution witnesses were examined-in-chief and on the same date the learned Magistrate also examined the petitioners and framed a charge under section 379, Indian Penal Code, against them to which they pleaded not guilty and the case was adjourned to 12th February 1923. On this date two more witnesses for the prosecution were examined-in-chief and all the nine prosecution witnesses were cross-examined and the case was adjourned to 22nd February 1923 for defence where four defence witnesses were examined-in-chief and cross examined. Neither on 12th February 1923 after the close of the prosecution evidence and before the petitioners were called on to enter on their defence nor at any time thereafter, were they examined under section 342, Criminal Procedure Code to enable them to explain away the evidence elicited in cross-examination of the prosecution witnesses. The Trial Magistrate on 26th February 1923 convicted the petitioners under section 379, Indian Penal Code, and sentenced each of them to undergo rigorous imprisonment for two months, which was affirmed on appeal but the sentence was reduced to one month's rigorous imprisonment of each of the petitioners by the District Magistrate of Dacca on 12th April 1923.

One of the grounds stated in the petition *inter alia* was ground No. 3 which was as follows: "For that the convictions and sentences complained of had been vitiated by the non-compliance of the Trial Courts with the mandatory provisions of section 342, Criminal Procedure Code" and upon which their Lordships issued the Rule. The learned Magistrate in his explanation in reference to ground No. 3 stated "that the convictions and sentences have not been vitiated as it will appear from the reverse side of the form prescribed for the examination of the accused under section 364, Criminal Procedure Code, that the provisions of section 342 were duly complied with on 22nd February 1923 before the defence witnesses were examined."

The examination of the accused was recorded thus:

The examination was taken in my presence and hearing and contains a full and true account of the statement made by the accused.

(Sd.) J. CHAKRAVARTY.

(On the back)

Examination of the accused after the cross-examination of all the prosecution witnesses and before he is called on for his defence.

Pleads—not guilty.

(Sd.) J. CHAKRAVARTY.

Babu *Manmatha Nath Mukerjee* (for Babu *Dasarathi Sanyal*) *Debendra Narain Bhattacharjee* and *Kanai Lal Saha*, for the Petitioners.

JUDGMENT.—This Rule was limited to the ground of non-compliance with the provisions of section 342 of the Code of Criminal Procedure. The Magistrate has submitted an explanation in which he pointed out that there was an examination of the accused under the provisions of section 342 as would appear from the record of such examination on the back of the form used for examination under section 364. We have looked into the record. We are not prepared to say that there has been in this case a substantial compliance with the provisions of section 342.

In that view of the matter, the re-trial from the point at which the accused should have been examined under section 342 would seem to be necessary. But Mr. Mukherjee who has argued on behalf of the petitioners has brought to our notice the fact that out of the sentence of rigorous imprisonment for a period of one month the petitioners have already undergone the sentence for a period of 22 days. In those circumstances the petitioners have not displayed any great keenness in asking for a re-trial and they have appealed to us to consider whether in the events which have happened the

EMPEROR *v.* KHANU KORI.

conviction and sentence may not now be set aside and no further action may not be directed. Having regard to all the circumstances of this case, we think, we may stretch a point in favour of the petitioners.

We accordingly set aside the conviction and sentence and direct that the bail bonds of the petitioners be discharged.

Rule made absolute;
Conviction set aside.

Z. K.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REPORT NO. 178 OF 1923.

December 17, 1923.

Present:—Mr. Kincaid, J. C., and Mr. Kennedy, A. J. C.

EMPEROR—APPLICANT

versus

KHANU KORI—OPPONENT.

Penal Code (Act XLV of 1860), ss. 224, 225B—Criminal Procedure Code (Act V of 1898), s. 109—Proceedings under section 109—Escape from Police custody—Offence.

A person escaping from Police custody while proceedings under section 109, Criminal Procedure Code, have been taken against him commits an offence under section 225B and **not** section 224 of the Indian Penal Code.

Report made by the District Magistrate, Upper Sind Frontier, against an order of the First Class Magistrate, Shahdadkote, dated the 25th September 1923.

Mr. *T. G. Elphinston*, Public Prosecutor, for the Crown.

JUDGMENT—The case of Crown *v.* Khanu Kori has been submitted to the Court of the Judicial Commissioner by the District Magistrate of the Upper Sind Frontier. From the learned District Magistrate's letter, it appears that on the 6th of September 1923, Khanu Kori escaped from Police custody while he was being taken to the First Class Magistrate, Shahdadkote. There proceedings were to be taken against him under section 109 of the Criminal Procedure Code. He was afterwards re-arrested, tried by the First Class Magistrate, Shahdadkote and convicted under section 224 of the Indian Penal Code. He was sentenced to undergo rigorous imprisonment for eight months.

The learned District Magistrate has drawn our attention to the fact that the offence committed by the accused was not an offence under section 224 of the Indian Penal Code but one under section 225 B of the Indian Penal Code. We concur with the view of the learned District Magistrate. Section 224 requires that the accused person must offer resistence or illegal obstruction to the lawful apprehension of himself for any offence with which he has either been charged or of which he has been convicted. In the case before us, Khanu Kori had not been charged with or convicted of any offence. The proceedings were merely to be taken against him under section 109 of the Criminal Procedure Code. The pertinent section was 225-B. From it the words "any offence" have been omitted. This distinction is not merely academic. Section 224 empowers a Magistrate to inflict an imprisonment for two years whereas under section 225-B the maximum term of imprisonment is six months. In the case before us the learned First Class Magistrate, Shahdadkote, as I have said, sentenced the accused to eight months' rigorous imprisonment that is two months longer than the maximum prescribed by law.

Acting under section 439 of the Criminal Procedure Code, we alter the conviction under section 224 of the Indian Penal Code to one under section 225 B of the Indian Penal Code. We reduce the sentence of eight months' rigorous imprisonment to one of four months' rigorous imprisonment.

Sentence reduced.

F. B. A.

RAM DIN *v.* EMPEROR.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE NO. 510 OF 1923.

October 9, 1923.

Present:—Mr. Justice Sulaiman.

RAM DIN—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Salt Act (XII of 1882), ss. 15, 18—Manufacture of saltpetre in unlicensed place—Search—Procedure.

Section 15 of the Salt Act is confined to the search of a place in which an article is manufactured under a license or any rule made under the Act.

Where salt or saltpetre is being unlawfully manufactured, refined or stored in an unlicensed place, the search of the place must be conducted under section 18 and not under section 15 of the Salt Act.

Criminal Reference made by the Sessions Judge, Azamgarh.

JUDGMENT.—This reference must be accepted. The accused has been convicted under section 9 (*a*) and (*b*) of Act XII of 1882 (Salt Act) for having manufactured saltpetre without a license.

He originally had license in the year 1922, which expired on the 31st of July 1922. He did not take out any fresh license until the 24th of April 1923. On that date the Salt Inspector visited a certain building, which is said to have been the place of the former factory of the applicant, and found a woman at work there. It is said that as soon as she saw him she threw into a pan some stuff which she was manufacturing. A quantity of this, however, was taken out of the pan by the Inspector, and it is said to have been indelible salt. On these facts the accused was convicted under the Salt Act.

There are several difficulties in the way of the prosecution. The first point to note is, which by the way has not been noted by the learned Sessions Judge, that at least on the very day, the 24th of April 1923, when according to the Inspector salt manufacture was detected in the accused's building, he did obtain a license with effect from that date. The second thing is that there is no evidence on the record to show who this woman was, and there is no evidence to support the suggestion of the Inspector that she was the wife of the accused. Next, there is no satisfactory evidence to show that the stuff taken possession of by the Inspector was really salt.

It also appears that the search of the premises was irregular. Under section 18 of the Salt Act whenever any Salt Revenue Officer has reason to believe that salt or saltpetre is being unlawfully manufactured, refined or stored in an unlicensed place, he shall first record in writing the name, residence and calling of the informant, then the locality and description of the house where the manufacture is going on, the name of the person by or for whom the salt or saltpetre is so manufactured, refined or restored, and the supposed quantity and description of the salt or saltpetre, with the grounds for believing the same to be unlawfully manufactured; and may then summon an officer in charge of the Police Station of the circle to attend him, and may then, during the day, in the presence of the Police Officer enter and search any house in which there is reason to believe that salt or saltpetre was being manufactured, and may carry away all the salt or saltpetre so manufactured. If the place so entered is an apartment in the occupancy of a woman, who does not appear in public the officer shall be guided by the rules prescribed for such cases in the Criminal Procedure Code. But before conducting a search under that section he should call upon two or more respectable inhabitants of the locality in which the house is situate to attend and witness the search, and the search should be made in the presence of such inhabitants.

It is not pretended that these formalities were complied with. No record was made of the nature of the information, there was no summoning of respectable neighbours as search witnesses, or the obtaining of a Police Officer to attend. It was, however, urged on behalf of the prosecution that under section 15 of the Act, the Salt Revenue Officer was entitled to search the house. In my opinion that section has no application as it is confined to the search of any place in which any article is manufactured or refined *under the license* or any rule made under the Act. If salt or saltpetre was being

unlawfully manufactured, refined or stored in an unlicensed place, it would be section 18, and not section 15, which would apply. No search witness was examined on behalf of the prosecution. The Salt Inspector has stated that *Patwari* was present. The latter was examined on behalf of the defence and his evidence totally disproved the case for the prosecution.

In view of all these circumstances I set aside the conviction of the accused, acquit him of the offence charged, and direct that the fine if paid be refunded.

Conviction set aside.

Z. K.

CALCUTTA HIGH COURT.

REFERENCE NO. 27 OF 1923.

March 15, 1923.

Present:—Mr. Justice Newbould and Mr. Justice Suhrawardy.

LALIT MOHON BHATTACHARJEE—COMPLAINANT

versus

NONI LAL SARKAR AND OTHERS—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 204, 369—Order directing summons to issue—Magistrate, power of, to rescind order.

An order under section 204 of the Criminal Procedure Code, directing the issue of a summons, is not a judgment to which the provisions of section 369 would be applicable. A Magistrate, therefore, has jurisdiction to rescind such an order, and direct the holding of an inquiry under section 202 of the Code.

Reference under section 438, Criminal Procedure Code, by the District Magistrate, Howrah, dated the 6th March 1923.

Babus *Debendra Narain Battacharjee* and *Bibhuti Bhusan Lahiri*, for the Accused.

JUDGMENT.—This is a Reference from the District Magistrate of Howrah recommending that in the alternative one of the two orders by the Sub-Deputy Magistrate of Uluberiab be set aside. A complaint was made before that officer on the 22nd December and he passed an order directing that the two accused persons be summoned. Subsequently on that date one of the persons against whom summons had been ordered to be issued appeared and laid a cross complaint. The Magistrate then rescinded the order passed by him and sent both the cases to a Subordinate Magistrate for local enquiry and report. The learned District Magistrate recommends that either the order directing the issue of summons or the order rescinding that order should be set aside on the ground that the Magistrate having formed an opinion that summons should issue under section 204, Criminal Procedure Code, cannot rescind that order and direct the holding of an enquiry under section 202. We are unable to accept the recommendation of the learned District Magistrate. The order passed by the Magistrate under section 204 was certainly not a judgment to which the provisions of section 369, Criminal Procedure Code, would be applicable. There is nothing in the Code which forbids the Magistrate to reconsider an order of this kind on sufficient grounds. In the present case we think that the order passed by him was a right and proper order and that it was not made without jurisdiction. We accordidgly are unable to accept this reference.

Let the papers be sent down at once.

Reference rejected.

W. C. A.

RAJA *v.* EMPEROR.

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 766 OF 1923.

November 19, 1923.

Present:—Mr. Justice Campbell.

RAJA AND OTHERS—CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 154—First Information Report—Presumption of correctness—Prosecution, whether bound.

The prosecution is bound by practice to produce in Court the First Information Report made to the Police but it is not bound to refrain from leading evidence that the report is not accurate. To hold that the prosecution is tied down tightly to the words of the First Information Report would recognise the recording officer as possessing an authority which in no way belongs to him and would be most dangerous.

Criminal appeal from an order of the Magistrate, First Class, with section 30 powers, Gujrat, dated the 25th April 1923.

Mr. *Zafar Ullah Khan*, for the Appellants.

Mr. *M. Sleem*, for the Respondent.

JUDGMENT.—Of the eight appellants, Raja, Bahadur and Dadu, have been convicted under section 304, Indian Penal Code, and the remaining five, Mahla, Shahu, Ahaman, Khawaja and Raushan, have been convicted under sections 325 and 324, Indian Penal Code. In all eight cases section 149, Indian Penal Code, has been applied.

These convictions are the result of an occurrence which took place on the 15th April and resulted in the death of one Allah Dad. According to the findings of the Magistrate some cattle belonging to Raja, appellant, trespassed in the field of Gahna and Lehna on the 13th April and were beaten and driven out by Gahna. On the 15th April Raja arrived with a body of supporters and attacked the people who were cutting wheat in this field. Allah Dad was one of these persons and five of the assailants beat him and caused his death. These were Raja, Bahadur and Dadu appellants and two men who have absconded. The remaining five injured Lehna and Budha who attempted to rescue Allah Dad.

The learned Counsel for the appellants has confined himself mainly to a plea on behalf of these latter five appellants based on the ground that their names were not mentioned in the First Information Report. The injury to Allah Dad was first reported to a Head Constable named Lal Khan who was in a neighbouring village. He arrived on the scene and recorded a statement by Allah Dad which he sent by one Mahla (not the appellant of that name) to the Police Station. The statement of Mahla was written down there as the First Information Report and according to it the same five persons, who attacked Allah Dad, also injured Lehna and Budha, and the appellants Mahla, Shahu, Ahman, Khawaja and Raushan, were not mentioned. In Court Mahla stated that he did mention these names and that the report as recorded was not correct. Lal Khan deposed that the names of these five persons were given to him in the village and that he did not mention any names in his letter to the Police Station but merely enclosed the dying declaration of Allah Dad in which the five assailants of the declarent alone were mentioned. It is urged for the appellants that these explanations should be rejected and that the contents of the First Information Report must be presumed to be correct.

The Police Officer, who wrote the report, has not been produced as a witness. Thus the report is not proved to have been correctly written down and the only evidence on the question of correctness is that of Mahla who says that the document is not correct. In such cases the prosecution is bound by practice to produce in Court the First Information Report made to the Police but it is not bound to refrain from leading evidence that the report is not accurate. To hold that the prosecution is tied down tightly to the words of the First Information Report would recognise the recording officer as possessing an authority which in no way belongs to him and would be most dangerous. In the present instance we have the report as placed on the record without the testimony of the person who wrote it against the assertion of Mahla, the reporter, who says that five names given by him were not taken down. Several witnesses have deposed that Mahla, Shahu, Ahman, Khawaja and Raushan

did attack and beat Lehna and Budha and Lehna and Budha have themselves said so. No reason is apparent why they should implicate the appellants falsely or deliberately substitute for the names of those actually responsible for the injuries the names of other persons. On the evidence the guilt of these five appellants is established and there is no good reason for interfering with their convictions.

The convictions of the remainig three appellants, Raja, Bahadur and Dadu, are not challenged and the evidence justifies the finding of the learned Magistrate. It is pleaded, however, on behalf of Raja that the sentence imposed upon him of seven years' rigorous imprisonment is excessive in comparison with that of five years' rigorous imprisonment imposed upon Bahadur and Dadu. The learned Magistrate's reason for making the distinction is that Raja was the leader of the party and palpably responsible for the whole occurrence. The witnesses may have exaggerated his actions, and indeed, if this were not held to be the case, the appellants might have found themselves convicted of a much graver offence, but with due allowance for this I consider that the sentence is not excessive.

I dismiss the appeal.

Z. K.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 296 OF 1923.

July 12, 1923.

Present:—Mr. Justice Daniels.

PUTTOO LAL AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 234, 239—Joinder of charges—Offences of different kinds committed on different days—Joint trial—Illegality.

A misjoinder of charges constitutes an illegality invalidating the entire trial.

Subrahmania Ayyar v. *King-Emperor*, 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 2 Weir 271; 8 Sar. P. C. J. 160 (P. C.), followed.

Sections 234 and 239 of the Criminal Procedure Code cannot be combined.

Nitya Gopal v. *Jiban Krishna Bagchi*, 20 Ind. Cas. 412; 40 C. 318; 14 Cr. L. J. 428, *Emperor* v. *Mata Prasad*, 30 A. 351; A. W. N. (1908) 152; 5 A. L. J. 400; 8 Cr. L. J. 4, relied on.

Several accused persons were tried at one trial for offences under sections 147 and 325 of the Penal Code alleged to have been committed on one day and for offences under sections 147, 323 and 342 of the Penal Code alleged to have been committed on the next day:

Held, that the joint trial was illegal as the offences for which the accused were tried were neither of the same kind nor committed in the same transaction.

Criminal revision from an order of the Sessions Judge, Farrukhabad, dated the 9th of April 1923.

St. *C. Thompson*, for the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This application in revision is based on a misjoinder of charges which constitutes an illegality invalidating the entire trial under the Privy Council ruling in *Subrahmania Ayyar* v. *King-Emperor* (1). The six accused were tried at one trial for offences under sections 147 and 325 of the Indian Penal Code alleged to have been committed on the 24th of January, and at the same time for offences under sections 147, 323 and 342 of the Indian Penal Code alleged to have committed on 25th January. This joint trial cannot be justified under section 234 or 239 of the Criminal Procedure Code. The offences are not offences of the same kind, since the offence under section 342 at any rate is an offence quite different from that under section 325. Neither were the offences committed in the same transaction. It has been held in several cases that sections 234 and 239 of the Criminal Procedure Code cannot be combined *e. g.*, *Nitya Gopal* v. *Jiban Krishna Bagchi* (2) and *Emperor* v. *Mata Prasad* (3) I must, therefore, and hereby do set aside the convictions and direct a re-trial of the accused. The offences alleged to have been committed on January

(1) 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 2 Weir 271; 8 Sar. P. C. J. 160 (P. C.).

(2) 20 Ind. Cas. 412; 40 C. 318; 14 Cr. L. J. 428.

(3) 30 A. 351; A. W. N. (1908) 152; 5 A. L. J. 400; 8 Cr. L. J. 4.

24th must be tried separately from those alleged to have been committed on January 25th. I regret this result inasmuch as no objection was taken at the time of the trial or even in the appeal to the Court below. I have been asked to let the accused on bail. I make no order on this application but leave it to the Court before whom the accused may be brought to pass orders on any application that may be made to it.

Proceedings quashed;
Re-trial ordered.

Z. K.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 550 OF 1923.
December 14, 1923.
Present:—Sir Grimwood Mears, KT., Chief Justice.

ROSHAN SINGH AND ANOTHER—APPLICANTS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 107, 436, 438—Security proceedings—Further enquiry—District Magistrate, power of—Procedure.

Proceedings under section 107 of the Criminal Procedure Code are not included within the provisions of section 436 of the Code, and a District Magistrate has, therefore, no jurisdiction to direct further enquiry in such a case. The proper procedure is for the District Magistrate to report the result of his examination of the record to the High Court, which can pass appropriate orders in the case.

Criminal revision from an order of the District Magistrate, Cawnpore, dated the 4th September 1923.

Mr. *S. D. Sinha*, for the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application in revision from an order of the District Magistrate, who set aside the order of the Sub-Divisional Magistrate on an enquiry under section 107 of the Code of Criminal Procedure, and directed a further enquiry to be made. The Sub-Divisional Magistrate had come to the conclusion that Roshan Singh and Mannoo Chaube could not properly be called upon to furnish security for keeping the peace. The point that has been taken is that whilst the District Magistrate had power to set aside an order, he had no power to send the matter back for further enquiry. Apparently he was purporting to act under section 436 of the Code of Criminal Procedure; but it has been pointed out by the Counsel for the applicant and accepted by Mr. Sankar Saran that the proceedings under section 107 are not included in the provisions of section 436. Under section 438 the District Magistrate could have reported the result of his examination of the record to this Court, which would then have passed the appropriate orders. In these circumstances the order of the District Magistrate must be set aside, with the consequent result that the order of the First Court absolving Roshan Singh and Mannoo Chaube from any necessity to give security stands.

Order set aside.

Z. K.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL NO. 401 OF 1922.
December 12, 1922.
Present:—Mr Justice Newbould and Mr. Justice Suhrawardy.

MAHOMMED YUNUS—APPELLANT
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 128, 132, 297—Penal Code (Act XLV of 1860), s. 100—Unlawful assembly, dispersing of—Police Officer in charge of patrol boat, power of—Jury trial—Charge to Jury—Right of private defence, failure to explain, effect of—Misdirection—Charge by angry crowd—Right of private defence, extent of.

The power to disperse an unlawful assembly by force is not given by the Code of Criminal Procedure to any Police Officer below the rank of an officer in charge of a Police Station. The powers of a Police Officer in charge of a patrol boat are no higher than those of an officer in charge of an outpost, and such an officer has no power to act under Chapter IX of the Code of Criminal Procedure

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and cannot, therefore, purport to act under that Chapter within the meaning of section 132 of the Code. [p. 821, col. 1.]

Where in explaining section 100 of the Penal Code to the Jury the Sessions Judge failed to explain that an apprehension of grievous hurt would also confer a right on the accused to cause death in the exercise of the right of private defence:

Held, that the omission amounted to a serious misdirection.

When a person is set on by any angry crowd and there is apprehension of death or grievous hurt being caused the only remedy is the drastic one of shooting to kill in the first instance, as anything less is likely to increase the fury of the crowd. [p. 822, col. 1.]

An angry crowd is the more dangerous because persons composing it will commit crimes jointly that they would never commit individually. [p. 822, col. 2; p. 823, col. 1.]

Appeal against an order of the Additional Sessions Judge, Dacca, dated the 12th June 1922.

Babus *Manmatha Nath Mukerjee* and *Trailokhya Nath Ghose*, for the Appellant.

Babu *Dasarathi Sanyal*, for the Crown.

Babu *Asitaranjan Ghosh*, for the Complainant.

JUDGMENT.—The appellant, Mahommed Yunus, has been convicted of abetment of the offence of culpable homicide not amounting to murder, and of abetment of voluntarily causing grievous hurt with a dangerous weapon punishable under sections 304 and 326 read with section 109, Indian Penal Code. He has been sentenced to five years' rigorous imprisonment on both counts, the sentences running concurrently.

The appellant, who was an Assistant Sub-Inspector of Police, was jointly tried with two Constables, Ahmadali and Kadamali, who were charged with offences punishable under sections 304 and 326 read with section 34, Indian Penal Code. Ahmadali was convicted on both charges and concurrent sentences of five years' rigorous imprisonment for each offence were passed. We are informed that he has since died. Kadamali was acquitted.

The occurrence which led to this trial took place at the Mirzapur *Hat* on Wednesday, the 8th June 1921. This *hat* is the property of the Bhawal Estate which is under the management of the Court of Wards. Sometime before the occurrence, a Sadhu claimed to be the second Kumar, one of the owners of the estate who was said to be dead. A large number of tenants of the estate believed the claims of the Sadhu to be genuine. There was great excitement about this and consequent difficulty about the management of the estate. The Board of Revenue held an enquiry, and authorised the Collector of Dacca to publish a notice (Exhibit A) to the effect that the Board had got conclusive proof that the corpse of the second Kumar of Bhawal had been burnt twelve years previously in the town of Darjeeling and that the Sadhu who was making himself known to be the second Kumar was an imposter and anybody paying any rent or subscription to him would do so at his own risk. On the day of occurrence this notice was being published in the Mirzapur *Hat* by beat of drum by servants of the local *kachari* of the estate. Then there was the following sequence of events which, as stated by the learned Sessions Judge in his charge to the Jury, are more or less admitted by both sides. The people assembled at the *hat* objected to the proclamation of the notice, and there was a *fracas* between them and the *kachari* servants. The accused had come to Mirzapur in a Police patrol boat and there was an altercation between them and the crowd. Jamiruddin (P. W. No. 1) who is a past *ijaradar* of the *hat* and also a *panchayet* interceded, and to prevent matters getting worse, had the two Constables removed to the *kachari* under the protection of Mohit Narayan (P. W. No. 2) a former servant of the *kachari*. A large number of persons followed them up to the steps of the *kachari*. Then the appellant, the Assistant Sub-Inspector Mohamad Yunus, arrived. Shortly after his arrival, under his orders, two shots were fired from the guns held by the Constables. Ahmadali admitted having fired his gun. Kadamali admitted that the gun was in his hand but set up the defence that the trigger was pulled by the appellant. The Jury acquitted Kadamali on the ground that they doubted whether he fired the gun. In consequence of the firing of these two guns one Jhumerali received a mortal wound of which he died a few hours later. Srinath (P. W. No. 4) had his finger blown off; the wrist of Kemu (P. W. No. 5) was

lacerated, and Ram Saran (P. W. No. 6) had his lower jaw and cheek lacerated and his eye injured.

The main issue in the case is whether the accused were justified in firing in exercise of the right of private defence. The principal contention in this appeal is that the verdict of the Jury should be set aside on the ground of misdirection by the learned Sessions Judge on this main issue. Before discussing this point it will be convenient to first deal with a preliminary objection that the trial was without jurisdiction by reason of the provisions of section 132, Criminal Procedure Code. This section provides that no prosecution against any person for any act purporting to be done under Chapter IX of the Code shall be instituted in any Criminal Court except with the sanction of the Governor-General-in-Council. It is contended that the act of the appellant in ordering the Constable to fire was justified by the provisions of section 128, or at any rate the act purported to be done under that section, so as to render the provisions of section 132 quoted above applicable. But this contention fails because the power to disperse an unlawful assembly by force is not given by the Code to any Police officer below the rank of an officer in charge of a Police Station. An examination of the Police Manual shows that the powers of an officer in charge of a patrol boat are no higher than those of an officer in charge of an outpost. From such an officer the power to investigate cognizable cases has been withheld and this is a power which he would necessarily have under section 156, Criminal Procedure Code if he were in charge of a Police Station. As an officer in charge of a patrol boat the appellant had no power to act under Chapter IX of the Code of Criminal Procedure and he cannot even have purported to act under that section.

But on the main issue we hold that there has been positive misdirection on certain points of law and also that, reading the charge as a whole, the case on the facts has not been fairly placed before the Jury. In the first place the learned Judge has not realised that on the case set up for the prosecution a charge of murder should have been framed. The case as stated by him is that "the Constables were never in danger of their life and property; at the first stage in the *hat* the two Constables might have been threatened by the mob, but when, under the protection of Mohit, they were taken into the *kachari*, the apprehension of violence ceased. Facts which happened after they were taken into the *kachari* and Yunus (the appellant) appeared were not such as to make them reasonably apprehend serious violence." But if guns loaded with ball were fired under these circumstances directly at a crowd of people at close quarters, the person or persons who were directly responsible for the act would be guilty of murder of Jhumarali. The act was so imminently dangerous that it must in all probability cause death, and this came within clause 4th of section 300, Indian Penal Code. The heads of charge to the jury do not show how the law was explained to the Jury so as to render an act, which the learned Judge himself decribed as "imminently dangerous," punishable under section 304, Indian Penal Code. If, as seems probable from another portion of his charge, the Jury were told that the case fell within Exception 2 of section 300. which relates to exceeding the right of private defence, this was a serious misdirection, since the case for the prosecution was that there was no right of private defence at all. That the right of private defence was exceeded was neither party's case, and it should have been put clearly to the Jury that the question they had to decide was whether or no the right of private defence came into existence, and not how far it extended.

The learned Judge's remarks on the burden of proof were likely to mislead the Jury. As the accused had examined witnesses to prove their plea of the right of private defence, there was no necessity to refer to the provisions of section 105 of the Evidence Act. The incidence of the burden of proof means that the person on whom it lies must prove that fact. But the meaning of "proved" as defined in section 3 of the Evidence Act is in no way affected by the incidence of the burden of proof. When, as in the present case, evidence has been given to support the defence of an exception, the burden of proof is discharged if the evidence is believed, and the Jury have their

ordinary duty of deciding a question of fact on the evidence before them. But the learned Judge's remarks seemed to suggest, and were probably understood by the Jury to direct, as a matter of law, that the defence set up required a higher standard of proof. In dealing with the law as to the right of private defence, there are omissions of important points which amount to serious misdirection. In explaining section 100, Indian Penal Code the learned Sessions Judge told the Jury: "If there be reasonable apprehension of killing or robbing, the attacks may be met by killing" but no mention was made of an apprehension of grievous hurt. It is pointed out on behalf of the Crown that the heads of charge show that section 100, Indian Penal Code, was read and explained, but this section contains a list of six heads of offences, several of which could have no application to the case they were trying and the Jury would naturally disregard those to which their attention was not specially directed by the Judge. A second important omission is that no reference appears to have been made to the provisions of section 101, Indian Penal Code which relate to the right to cause any harm other than death. It was necessary that the Jury should understand this section also before giving a verdict on the minor charges of causing grievous hurt.

There are other points in respect of which the learned Vakil for the appellants has satisfied us that there was misdirection. When the statement of Kadamali before the Magistrate was put in, his deposition in the trial in the cross case should have been put in with it, since Kadamali then wished it to be considered as his defence. The Jury should have been warned that the statement of Kadamali in the Sessions Court not being a confession, could not be considered as against his co-accused. Exhibits 2 and 5, the first information lodged by Momtazuddin and a report of Mainuddin Sarkar, who were not examined as witnesses, were not admissible as evidence. It is not necessary to dwell on these points as the misdirection was not such as is likely to have occasioned a miscarriage of justice, apart from the general misdirection in the charge considered as a whole. There is another point urged on behalf of the appellant that the Jury should have been directed to draw an inference adverse to the prosecution because a number of persons who could have given important information were not examined as witnesses for the Crown. The more important of these were the Bhawal Estate Jamadar, peon and drummer, who were publishing the notice that led to the disturbance, Momtazuddin who laid the first information Exhibit 2, and who is brother-in-law of Jhumerali who was killed, Mainuddin, the President Panchayet who wrote the report, Exhibit 5, Radha Khan and Ahmadulla who were admittedly present. It was the duty of the prosecution to put all the evidence before the Court, and the only valid excuse for not examining the witnesses would be that no reliance could be placed on their evidence. By discarding these witnesses the prosecution emphasized the fact that the case for the Crown was a total denial of any right of self-defence, and not that the right of private defence was exceeded. As stated above, we hold that the learned Sessions Judge erred in not putting this issue clearly before the Jury. But we also hold that he was unfair to the accused in his remarks on the restrictions to the right of private defence and his suggestions that that right was exceeded. If the three Policemen were in danger of attack from an angry mob, it could not be said that "the injury apprehended may be warded off by inflicting harm, less grievous than death." Experience teaches us that in such a case the only remedy is the drastic one of shooting to kill in the first instance, and that anything less is likely to increase the fury of the crowd. There are also several points in favour of the accused to which the attention of the Jury should have been drawn. It is admitted that at the commencement of the occurrence there was great excitement—the peon was assaulted and the Constables had to be taken under protection. We find it hard to believe that the excitement should have at once subsided when the Constables were taken to the *kachari*—when the grievance the mob had, was that the Constables were siding with the *kachari* servants. The Jury should also have been reminded of the fact that an angry crowd is the more dangerous because the persons composing it will commit

crimes jointly that they would never have committed individually. The learned Judge, in his order passed after the Jury had given their verdict, referred to the tendency of Juries now-a-days not to be lenient to Policemen, still less Police or Military officers who fire upon an unarmed or even an armed crowd. But nowhere in his charge did he warn the Jury against being prejudiced in this way, or point out the difficulties and dangers of Police officers when confronted by an excited mob. Nor did he remind the Jury, as he might have done, that the accused were men of Eastern Bengal like themselves who would have probably been unwilling to cause the death of a fellow creature unless they felt compelled to do so.

For the above reasons we hold that there has been serious misdirection which has occasioned a failure of justice. On a full consideration of the case we do not think it would serve any useful purpose to order a re-trial.

We accordingly allow this appeal. We set aside the conviction and sentence passed on the appellant, and direct that his bailbond be discharged.

Appeal allowed.

Z. K.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION NO. 1305 OF 1923.

November 21, 1923.

Present:—Mr. Justice Broadway.

JALAL-UD-DIN—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal trial—Charge of offence committed at particular time and place—Conviction in respect of offence committed at different time and place, legality of.

Where an accused person is charged with having beaten the complainant at a particular place at a particular time and the prosecution evidence fails to establish that charge, he cannot on that evidence be convicted of having beaten the complainant at a different place on a different occasion. [p. 824, col. 1.]

Petition, under section 439, Criminal Procedure Code, for revision of an order of the Sessions Judge, Shahpur at Sargodha, dated the 14th May 1923, modifying that of the Magistrate, First Class, Sargodha, dated the 14th April 1923.

Mr. *Zafar Ullah Khan*, for the Petitioner.

Mr. *Sagar Chand*, for the Government Advocate, for the Respondent.

JUDGMENT.—Haji Jalal-ud-Din, Vice-President of the Miani Municipal Committee, was convicted by a Megistrate of the First Class of an offence under section 452, Indian Penal Code, and sentenced to six months' simple imprisonment. On appeal by him to the Sessions Court the learned Sessions Judge found that irregularities had been committed by the Magistrate which had prejudiced the accused person but instead of remanding the case the learned Sessions Judge allowed the irregularities to be rectified in his Court by summoning certain witnesses for the prosecution and allowing the said accused person to cross-examine them further before him. As a result the learned Sessions Judge came to the conclusion that "the prosecution witnesses are so hopelessly discrepant and untrustworthy that I am bound to say that a number of them were simply hired and had never seen the attack with their own eyes." He has given excellent reasons for the above view.

The learned Sessions Judge then proceeded to acquit the appellant before him of the charge under section 452, Indian Penal Code, but finding him guilty of an offence under section 323, Indian Penal Code, reduced the sentence to the term of imprisonment he had then undergone.

Haji Jalal-ud-Din has come up to this Court under section 439, Criminal Procedure Code, and I have heard Mr. Zafar Ullah Khan on his behalf while Mr. Sagar Chand has addressed me on behalf of the Crown. The case for the prosecution briefly was that the petitioner had, on the 26th March 1923 at a out 10 P. M., gone to the house of the complainant and had there beaten

him and his wife with a stick. It has been urged before me that inasmuch as the learned Sessions Judge has definitely found that the story told by the prosecution was false and that the offence with which the petitioner had been charged had not been proved, there was no evidence on which a conviction under section 323 could be based. There seems to be very considerable force in this contention. The learned Sessions Judge has written a very elaborate judgment pointing out in detail the various reasons for holding that the story for the prosecution was wholly unworthy of credence. As I understand the judgment it amounts to this that the learned Sessions Judge has definitely found that the complainant's story that he was beaten in his house by the petitioner was not true. He has also found that at least one of the injuries found to exist on the complainant was self-inflicted and that possibly others were. It seems to me that before the learned Sessions Judge could properly find the petitioner guilty of an assault under section 323, Indian Penal Code, it was necessary for him to find where that assault took place and this matter has been entirely ignored. The petitioner was definitely charged with committing an assault in the house of the complainant. This charge he denied and this charge has been found not to be true. It seems unfair to convict the petitioner of an offence with which he was never charged, as it is obvious that had he been charged with having beaten the complainant in some other place he might have had a complete reply to give.

In these circumstances I feel constrained to accept this petition and to set aside the conviction of the petitioner under section 323, Indian Penal Code.

Z. K.

Order accordingly.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 517 OF 1923.

December 12, 1923.

Present:—Mr. Justice Stuart.

UMED SINGH—ACCUSED

versus

EMPEROR, THROUGH UCHHAB SINGH—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 499, Excep. 10, 500—Defamation—Excommunication—Warning to caste-fellows not to deal with person excommunicated—Offence.

Complainant had been put out of caste for having taken water from the hands of a certain person, and the accused warned certain other members of the caste that if they took water from the hands of the complainant they would also be liable to be put out of caste:

Held, that the action of the accused was covered by the tenth Exception to section 499 of the Penal Code and did not amount to defamation.

Queen v. *Sankara*, 6 M. 381; 1st Weir 595; 2 Ind. Dec. (N. S.) 546, distinguished.

Application for revision of an order of the Sessions Judge, Kumaon, dated the 31st of August 1923.

Dr. *M. L. Agarwala*, for the Applicant.

The Assistant Government Advocate and Dr. *K. N. Katju*, for the Opposite Party.

JUDGMENT.—The matter now before me has dragged on for nine months. The facts can be stated very shortly. A certain Uchhab Singh of Kumaon took water from the hands of a certain Lachhi and for so doing was put out of caste by a meeting of his caste-fellows. The charge is that the applicant Umed Singh told three men Sohan Singh, Nar Singh, and Balkrishan not to take water from the hands of Uchhab Singh, as if they did so they would be liable to be put out of caste. This statement has been found to be true. Uchhab Singh had taken water from the hands of Lachhi and had been put out of caste and anyone who took water from the hands of Uchhab Singh was liable to be put out of caste. On these allegations Umed Singh was found guilty of the offence of defamation and sentenced under section 500 of the Indian Penal Code to one month's imprisonment. He has already served this sentence. The Magistrate in his judgment has laid stress on the fact that Umed Singh the applicant is a scheming busy body who is always endeavouring to make trouble in the

district and that he had probably been sedulously circulating rumours to the detriment of Uchhab Singh in this connection in a large number of villages. It is difficult to find how the evidence supports this conclusion in full. The Magistrate was, however, in no way concerned with anything except the charge before him and I find it hard to understand how after a perusal of the charge itself, once the facts were ascertained, he could have considered the conviction supportable. Both the learned Sessions Judge and the Magistrate have laid stress on the fact that Umed Singh had denied having made the statement which he is found to have made and they refused to look at a plea of justification. But the plea of justification is so inextricably connected with the finding of fact that it is a matter of no consequence that it was not raised explicitly. The case is covered clearly by the 10th Exception to section 499 and a very slight consideration would show how impossible the charge was. The man had been put out of caste, so the imputation was true, and any person taking water from his hands was liable to be put out of caste. Thus a caution not to take water from his hands was for the benefit of the person who received it. The learned Sessions Judge has referred to the decision *Queen* v. *Sankara* (1). That case, however, has no bearing upon the present one. The conviction there was upheld upon a point which does not arise here. The point was that the author of the ex-communication had published the ex-communication in such a manner as to make it known to persons unconnected with the caste. Here the case is different. The communications were made only to members of the caste and for their benefit.

I, therefore, set the conviction aside. The matter is academic. The sentence has already been served and if the applicant has come into this Court in order to benefit his reputation he has failed in that object.

Conviction set aside.

Z. K.

(1) 6 M. 381; 1 Weir 595; 2 Ind. Dec. (N. S.) 546.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL NO. 147 OF 1923.

October 12, 1923.

Present:—Mr. Hallifax, A. J. C.

GAJANAN SAKHARAM—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 466, 468—Forgery and using as genuine a forged document, convictions for, legality of—Two offences.

If a man commits two offences he can be convicted of them both, more especially when they are separate transactions and the commission of one does not necessarily involve the commission of the other.

There is nothing to prevent a forger from being convicted both of forgery and of using as genuine the forged document.

Criminal appeal against the judgment of the Magistrate, First Class, Nagpur, dated the 20th July 1923.

JUDGMENT.—The investigation, submission, trial and decision of this case all show such thoroughness and so much care that nothing remains to be said about it but that the conviction and sentence must be maintained, which is perhaps for all concerned the highest praise possible in an appellate judgment. After studying the record I can only find one point on which it is even possible to remark without repeating something that has already been said. The appellant has been convicted of abetting the forgery of a power-of-attorney and also of the abetment of the commission of forgery with intent to cheat, and has been sentenced to concurrent period of five years' rigorous imprisonment for each offence. But he has been acquitted of the charge of abetting the use of a forged document on the ground that "it has been held in more than one case that a forger cannot be convicted both of forgery and of using as genuine the forged document" In the first place I cannot see the necessity of any mention of abetment, the appellant himself did all the using of the forged document that was done. But there certainly never has been any judicial decision to the effect stated. If a man commits two offences he can certainly be convicted of them both more especially when they are separate transactions and the commission of one

does not necessarily involve the commission of the other. The appeal is dismissed.

Appeal dismissed.

Z. K.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 684 OF 1923.

December 13, 1923.

Present:—Sir Grimwood Mears, KT., Chief Justice.

S. M. BOSE—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Companies Act (VII of 1913), s. 282—False declaration—Company promoters, duties and liabilities of.

Accused sent a prospectus and a memorandum and articles of association of a proposed Company to the Registrar, Joint Stock Companies, and from those documents it appeared that five persons had consented to become Directors of the Company and had undertaken to take up a certain number of shares. Three of them carried out the undertaking but the remaining two did nothing towards fulfilling it. The accused then filed a declaration with the Registrar stating that every Director had paid to the Company the sum necessary to be paid on the number of shares agreed to be taken by them:

Held, that the accused was guilty of an offence under section 282 of the Companies Act, and it was no defence to urge that in law the two Directors who had failed to carry out their undertaking had ceased to be Directors and that, therefore, the declaration filed by the accused could not refer to them. [p. 206, col. 2.]

It is of the utmost importance that in a country like India, where every body hopes that there will be a very great extension of industrial prosperity, and that industrial prosperity probably conducted along the lines of Limited Companies, that the persons who embark on Company flotation, and who assume offices of responsibility, should understand that they have got to carry out their duties not only carefully but honestly. [p. 207, col. 1.]

Criminal revision against an order of the Sessions Judge, Allahabad, dated the 12th December 1923.

Mr. *P. L. Banerji*, for the Applicant.

JUDGMENT.—I am of opinion that this application in revision must be rejected. The facts are very simple. In November 1919 Mr. Bose sent a prospectus to the Registrar, Joint Stock Company, a memorandum and articles of association, and from those documents it appeared that five persons consented to be Directors of the Company, and as such had undertaken to take up 500 shares of Rs. 10 each. Three of those persons subsequently did discharge their obligations but Raja Ram Gopal Singh of Manda and Goshain Rampuri never paid any sums due from them and beyond the fact that their names were given out as Directors of the Company, they did nothing whatever. On the 10th of September 1920, nearly a year after, Mr. Bose made a declaration, as required by Statute, to the Registrar of Joint Stock Companies, with the object of inducing the Registrar to grant permission to allow the Company to commence business. In that declaration he stated "Every Director of the Company has paid to the Company on each of the shares taken or contracted to be taken by him, and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription." The only information that the Registrar had of the persons who were described as Directors was that there were five persons including the Raja of Manda and Goshain Rampuri; that is to say, had he attempted to ascertain what was meant by the phrase "every Director" and had turned to the list of Directors, furnished by Mr. Bose, he would have seen five names. It is suggested that if he had turned to another document wherein shares were allotted he would have seen that in point of fact a period of two months had expired without the Raja of Manda and Goshain Rampuri having paid their dues as Directors, and, therefore, by a process of reasoning and by applying some knowledge of law, he would have been able to decide for himself that the Directors had dropped from 5 to 3. I am of opinion that the Registrar was under no duty of that character, that he was entitled to assume that the five Directors, whose names had been given to him by Mr. Bose, were intended to be and were in fact included in the words "every Director" entered in the declaration given in September, and if anything had happened in the interval between November 1919 and September 1920 to reduce the

number of Directors, it was the duty of Mr. Bose to tell that to the Registrar as one of the material facts to be taken into consideration by him in deciding whether this Company should be allowed to commence business. His omission to make this clear to the Registrar brought him in the opinion of the Joint Magistrate and in the opinion of the Sessions Judge within section 282 of the Act, and also in my opipion.

It is said that six months' rigorous imprisonment is too severe a sentence in the circumstances. I do not agree with that view. It is of the utmost importance that in a country such as this, where every body hopes that there will be a very great extension of industrial prosperity, and that industrial prosperity probably conducted along the lines of Limited Companies, that the persons who embark on Company flotation, and who assume offices of responsibility, should understand that they have got to carry out their duties not only carefully but honestly. I accept the conclusion that the Sessions Judge has come to; and as I said at the outset this application in revision must be, and is, rejected.

Application rejected.

Z. K.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION NO. 167 OF 1923.

August 7, 1923.

Present:—Mr. Kotval A. J. C.

SAMUEL ILQANAH—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 420, 511—Cheating—Delivery of property—Attempt, whether possible.

It cannot be laid down as a proposition that there can never be an attempt to commit the offence described in section 420 of the Penal Code.

Appeal against an order of the District Magistrate, Jubbulpore, dated the 11th July 1923.

Mr. *C. B. Parekh*, for the Applicant.

ORDER.—It is argued that section 468, Indian Penal Code, completely covered the offence as set forth in the *challan*, and that being so, the Police had no power to investigate and put up the *challan* as the offence under section 468 is not cognizable. This is not correct. The offence under section 468 is complete as soon as there is a forgery with the particular intent mentioned in the section. When the intended cheating or attempt at it takes place another distinct offence is committed. The *challan* alleges not only an offence under section 468 but also an attempt to cheat under section 420 which is cognizable. This is not a case of splitting up of an offence for the purpose of giving the Police jurisdiction to investigate.

It is pointed out that it is not the offence of cheating under section 420 that is alleged to have been comitted by the accused, but only an attempt to commit it and it is argued that there cannot possibly be an attempt to commit an offece under that section. The section it is pointed out says "whoever cheats and thereby dishonestly induces, etc." and it is argued that these words show that before the offence under the section is committed there must have been a completed offence of cheating. I am not pressed by this argument. The section refers to graver forms of cheating and provides enhanced punishment for them. There is no reason why there cannot be an attempt to cheat and thereby induce delivery of property etc.

Unless I am able to hold that there cannot possibly be a case under section 420 read with section 511 against the accused I do not see how I can interfere and quash the present proceedings. On the *challan* as it stands I am unable to do so. The complaint and the *challan* both allege that offence and it is only after evidence is taken that it can be determined whether the alleged offence has taken place. The application is rejected.

Application rejected.

Z. K.

SHEO PRASAD SINGH *v.* MAHANGOO NONIA.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE NO. 541 OF 1923.

October 6, 1923.

Present:—Mr. Justice Sulaiman.

SHEO PRASAD SINGH AND OTHERS—APPLICANTS

versus

MAHANGOO NONIA—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 107, 117, 545—Security to keep the peace—Procedure—Costs, order as to, legality of.

A proceeding under section 107 of the Criminal Procedure Code must be conducted in the manner prescribed for conducting trials and recording evidence in summons cases.

Section 545 of the Criminal Procedure Code cannot apply to a case under section 107 of the Code, inasmuch as no fine can be imposed in such a case. An order, therefore, directing an accused person under section 107 of the Criminal Procedure Code, to pay costs to the complainant is *ultra vires*.

Criminal reference made by the District Magistrate, Ballia, dated the 11th September 1923.

JUDGMENT.—This reference must be accepted. The accused persons were bound over under section 107 of the Criminal Procedure Code and were also ordered to pay Rs. 75 as costs of the case to be paid to the complainant Mahangoo.

Under section 117 sub-clause (2) of the Criminal Procedure Code the inquiry had to be as nearly as might be practicable in the manner prescribed for conducting trials and recording evidence in summons cases. That provision was ignored and the case was tried as if it were a warrant case.

Then again the order as to the payment of costs was altogether illegal. Section 545 of the Code of Criminal Procedure cannot possibly apply to a case under section 107 inasmuch as no fine was or could have been imposed. The order directing the accused persons to pay Rs. 75 as costs to the complainant was therefore *ultra vires*.

On the merits too the case must fall to the ground. Only three witnesses were produced by the complainant and none of them expressly stated that there was any likelihood of a future breach of the peace. On the other hand the third witness, the *chaukidar* of the village, when cross-examined admitted that he himself felt no fear of a breach of the peace on seeing the happenings alleged by the complainant. It is proved that there was no previous enmity between the parties. The complainant's case is that there have been a series of bad years, impoverished crops and bad outturns and that, therefore, he made efforts to pay up his arrears of rent to the accused *zemindars* by division of his crops instead of in cash, but the *zemindars* refused the offer. The trying Magistrate remarked "The adamantine hearts of these oppressors of the poor have been untouched by the sight of helpless poverty and stricken misery." The amount of the arrears of rent stated to be due was only Rs. 42-11-6. In the same breath the complainant, said to be in "helpless poverty and stricken misery," alleged that the accused persons owed him Rs. 85 as the price of sugarcane crops sold to them last year and that in spite of demands the money had not been paid. It is difficult to conceive that on the one hand the accused would not pay up the debt due from them and the other they would insist on the payment of arrears of rent due from their creditor. Having read the judgment of the Trying Magistrate as well as the reference by the Sessions Judge I have come to the conclusion that this is a case in which the order passed under section 107 should be altogether set aside.

I accordingly set aside that order and direct that the sum of Rs. 75, if already paid by the accused persons, should be refunded.

Order set aside.

Z. K.

ALLAHABAD HIGH COURT.

CRIMINAL GOVERNMENT APPEAL NO. 1040 OF 1923.

December 19, 1923.

Present:—Mr. Justice Walsh and Mr. Justice Ryves.

EMPEROR—APPELLANT

versus

BANARSI—RESPONDENT.

Evidence Act (I of 1872), ss. 21, 132—Admission—Statement made by accused as witness in another case, whether admissible against him—"Compelled to answer," meaning of.

The statement of an accused person as witness in a previous case is admissible against him under section 21 of the Evidence Act to prove admissions of relevant facts made by him in that statement. [p. 830, col. 1.]

The question of compulsion under section 132 of the Evidence Act is one of fact. It does not follow that a witness is compelled to answer every question put to him by Counsel; but he may be compelled to do so in particular cases, and in such cases the section would be applicable. On the other hand, compulsion does not involve the necessity of a formal objection to giving the answer and an order made at the time to the witness compelling him to answer. [p. 830, col. 1; p. 831, col. 1.]

Kallu v. *Sital*, 43 Ind. Cas. 823; 40 A. 271; 16 A. L. J. 201; 19 Cr. L. J. 231, *Ganga Sahai* v. *Emperor*, 54 Ind. Cas. 890; 42 A. 257; 18 A. L. J. 112; 21 Cr. L. J. 186; *Chatur Singh* v. *Emperor*, 58 Ind. Cas. 825; 43 A. 92; 18 A. L. J. 940; 2 U. P. L. R. (A.) 355; 21 Cr. L. J. 825, referred to.

Appeal on behalf of the Local Government against an order of acquittal passed by the Magistrate, First Class, Allahabad, dated the 31st August 1923.

The Government Advocate, for the Crown.

Mr. *Kumuda Prasad*, for the Accused.

JUDGMENT.—This is an appeal by Government against an order of acquittal by a First Class Magistrate dated the 31st of August 1923. The whole case turns upon the question of unlawful possession of some cocaine found in a certain house in the City of Allahabad. There has been a previous prosecution and an acquittal. One Bishun, together with his sister, *Musammat* Kishun Piari, and Ganesh, who is believed to be his maternal uncle, were charged with the wrongful possession of this cocaine. In that case the present defendant one Banarsi, who is said to be 60 years of age and is also believed to be related to Bishun, although he strenuously denies it, gave evidence for the defence, and his statement on that occasion has been used against him in this case. In the order of acquittal, the Magistrate who tried the previous case directed that proceedings against Banarsi should be instituted. It was natural, therefore, and right, that the case should be heard and disposed of by another Magistrate. In our view the appeal must succeed on the ground that the facts proved against the defendant are particularly conclusive, and that the Magistrate unfortunately instead of taking a broad common sense view of the facts, which could not be explained except upon the hypothesis of guilt, has cut up the case into small pieces which he has disposed of one by one by a series of technical fallacies.

The matter is perfectly simple. In this house No. 70 Sarai Mir Khan in the City of Allahabad resides from time to time a varied assortment of individuals whose relationship to one another whether by blood or by matrimony or by contract of tenancy or otherwise, seems to be wrapped in some obscurity. A prominent person known in connection with this collection of people who frequent this house is the person Bishun who was acquitted. He is said to be a junior member of the family and the man who handles the wealth, and the evidence in this case of one of the occupants of the house is that Bishun was well to do. The City Excise Authorities had reason to suspect that the money was not unconnected with illicit traffic in cocaine and that the house No. 70 belonged to Bishun. As the Inspector very fairly said in this case when Banarsi was on trial, everything pointed to the house being in the possession of Bishun. A raid was made upon the house and the result of the search was that in one room cocaine was found in a coat hanging up on a peg on the wall, and in another room was found a locked wooden box which in addition to containing other things contained a small tin box in which cocaine was also discovered. There were a pair of scales also in the room and an empty phial, both of which articles, innocent in themselves, might have had no connection with cocaine. But on the

EMPEROR *v.* BANARSI.

other hand there is no evidence of any legitimate trade going on, or of the existence of any material with reference to which either a phial or scales would be useful except this cocaine, and as this was a house in the crowded part of a crowded city, the reasonable presumption is that traffic in cocaine, that is to say in selling cocaine in small quantities, as we say, by retail, was going on in that place to persons who wanted it in small quantities. That is to say the indications are in favour not of a store for safe keeping and removal to some other place on a large scale but rather in favour of a small trade going on with retail customers. We attach great importance to that feature of the case, because to enable it to be done secretly and to avade any possible search, it would be necessary to have the stuff well hidden and yet in an accessible place. It has this further bearing upon the case that it follows that if that inference is correct, it was impossible for a trade of that kind to be going on from day to day without the knowledge of the occupants who had access to the room where the cocaine was discovered. It also follows that mere temporary absence for three or four days from the premises would by no means afford an answer, which it might otherwise do, in the case of cocaine suddenly introduced into the building of a person charged with guilty possession.

The present accused gave evidence on the charge against Bishun. The learned Magistrate has excluded that sworn statement of Banarsi's altogether as inadmissible, and he has made a terrible mess of the sections applicable. The evidence was not tendered as a confession or as an admission of guilt, but as a statement of fact by the accused himself amounting to an admission of a very relevant fact connected with the discovery of the cocain, namely, the occupation of the house and the possession of a locked box. The evidence was properly proved by bringing the previous statement on the record of this case, and also by the direct testimony of the Inspector, and the Magistrate entirely misunderstands both the purpose for which it was tendered, and the plain meaning of section 21 of the Evidence Act which made it admissible.

It is necessary to pause here to deal with an ingenious argument now raised for the first time by Banarsi's Counsel, namely, that under section 132, the answers which Banarsi gave when he was examined in Bishun's case being such as he was not excused from giving, were answers which he was compelled to give, and, therefore, they could not be proved against him in a criminal proceeding. That argument undoubtedly raises a serious question. The proviso in this instance, as in most other cases, really depends upon the right meaning to be given to the word "compelled." It has been held that the word "compelled" involves the necessity of a formal objection to giving the answer, and an order made at the time to the witness compelling him to answer. We are of opinion that that is too narrow an interpretation. The matter has been recently discussed in two or three cases, particularly by a member of this Court in the case of *Ganga Sahai* v. *Emperor* (1) in which the judgment quotes with approval a sentence from Mr. Justice Piggott's judgment in the case of *Kallu* v *Sital* (2) and we are of opinion that the interpretation put upon the word "compelled" in the former case is right and ought to be followed. Subsequently Mr. Justice Tudball in the case of *Chatur Singh* v. *Emperor* (3) following the case of *Ganga Sahai* v. *Emperor* (1) and Mr. Justice Piggott's *dictum* in the case of *Kallu* v. *Sital* (2), held that it was impossible to deny that in the case of ordinary lay men unacquainted with the technical terms of this section, they were compelled to answer on oath questions put either by the Court or by the Counsel, especially when the question is relevant to the case. Mr. Justice Tudball's view was that a common sense meaning should be given to the word "compelled." In our view this really means that compulsion under that section is a question of fact. It by no means follows that the witness is com-

(1) 54 Ind. Cas. 890; 42 A. 257; 18 A. L. J. 112; 21 Cr. L. J. 186.
(2) 43 Ind. Cas. 823; 40 A. 271; 16 A. L. J. 201; 19 Cr. L. J 231.
(3) 58 Ind. Cas. 825; 43 A. 92; 18 A. L. J. 940; 2 U. P. L. R. (A) 355; 21 Cr. L. J. 825.

pelled to answer every question put by Counsel, and Mr. Justice Tudball did not say so. But he may, of course, be compelled in particular cases to answer questions put by Counsel, and in such cases the section is clearly applicable. We can only say that there is no evidence of any compulsion in this case at all. It is highly unlikely that Banarsi acted under any compulsion. The point was not taken until it was too late, but the probability is that whether Banarsi is the uncle, or whether he is not, he was a voluntary if not enthusiastic witness making statements which he thought, as they did, would satisfy the Court of Bishun's innocence. We are of opinion, therefore, that this statement is not excluded by section 132. What he says does not come to very much. Its importance is that it cannot be controverted. He said that the locked box was his, and he repeated the statement at this trial. He also said, which is even more important, that the house was in his occupation. That statement is also confirmed by the statement of Ganesh, who was an occupant of the house, and who was acquitted in the previous case. He gets out of the inference which would be otherwise drawn against a man in whose locked box cocaine is found, or in whose coat there are packets of cocaine, by alleging that the coat belongs to his son, and that the tin box in which cocaine actually was secreted, although found in the locked box of the accused, was not in fact his. Both these statements are very likely true, but they really do not carry the matter any further than the fact admitted by himself. He was away at the time and, therefore, not in physical possession either of the coat or of the locked box, but it is unlikely that, if he went away for four days, he did not leave the key of the locked box in the possession of some body else so that access could be obtained to it. But the coat is said to belong to his son Kandhai, and unfortunately Kandhai was not so anxious, as Banarsi had been in the previous charge, to tell the Court his view of the possession o the coat and the cocaine that was found therein. Nor has Banarsi attempted to give any explanation, or to call any evidence to explain, how it was that in his unfortunate absence in Benares during these four days, people living in this house in apparent harmony, friendship, and to some extent at any rate close blood relationship with him, should have planted upon him by means of putting into his locked box a tin box containing cocaine, or in other words damning evidence of traffic in this illicit substance. Nor has he attempted to call any evidence to explain how and why any one did the same thing with the son's coat. It is not improbable that the persons in the house at the time of the arrival of the search party seized upon the coat pocket as the most convenient place for rapidly disposing of the substance which they had then in a saleable form.

It is because of the very difficulty which arises in a case of this kind, where you have a body of persons, most of whom are related to one another, living jointly, and jointly living on the big profits which are made out of this substance, that the Legislature has enacted the provisions which are relied upon by the prosecution in this case. It is only natural that in a case of this kind, whenever a charge is made, efforts should be made by other members of the joint concern to prove that the person charged is the one person in the whole concern who had nothing whatever to do with it. There is always danger in doing so as Banarsi has now discovered in his own case. But that his own statement, and the evidence in this case independently of his own statement, were sufficient to raise the presumption against him under this section, admits of no possible doubt. Section 71 provides that it shall be presumed until the contrary is proved that the accused person has committed an offence, namely, in this case possessing the excisable article, when possession of which he is unable to account satisfactorily is established against him. The Magistrate says that there is not an iota of evidence of the cocaine being in the possession of Banarsi. Can the possession, asked the Magistrate, at the time of the search be said to be his when all the evidence points to the contrary, and he relies upon the statement that the key of the box was in the possession of Bishun. The

key of the box, if the locked box belonged to Banarsi and was in the house occupied by him, could only be in the possession of Bishun with the authority and consent of Banarsi, and it is a narrow and almost foolish view to take to hold the transfer of the key has the effect of dispossessing the owner of the box. All of us have things in our possession, for example, kitchen utensils in the kitchen house, which we seldom see and never touch, but they are in the possession of our cooks as our agents. The result is, possession established both by direct evidence and by the admissions of the accused, and no attempt has been made to account for it.

The appeal must be allowed and Banarsi must be convicted of being in unlawful possession of this cocaine in the box and in the coat of his son. Having made up our minds to this result we examined the Excise Inspector as to his knowledge of this household. Bishun has been acquitted of the particular offence charged against him arising out of these facts. But there is reason to believe from what we have heard in this case and from what the Inspector has added, that he is really the moving spitit of the concern, and that this man, Banarsi although we are satisfied that he is implicated in it, probably only takes a subordinate part and lives with his family on the proceeds. But he has chosen, if in fact he is not the person principally responsible, to come into the witness-box on oath in this case and to give evidence directed to establish the innocence of Bishun, one result of which, if true, was to increase the evidence against himself. It is impossible for us to decide whether his conduct was due to a desire to earn credit with Bishun and the other members of the family and to make himself a scapegoat for a person whom he knew to be guilty, or whether in fact what he said was literally true. In the ordinary way one would be disposed to take a more lenient view of the conduct of a man who, in aiding and abetting the principal offender in a subordinate capacity has been caught, while the principal offender has escaped. But it is impossible to do so in this case as this man, we are satisfied, coldly and deliberately put himself forward for the express purpose of shielding the man who is probably the principal offender, and the sooner people understand that they will not by that course escape the just punishment of their own admissions, the better for them. Everybody knows that they are really the principals and if they choose to take upon themselves that character, they will be dealt with, and ought to be dealt and punished as such, by the Courts which have to deal with their cases. The only punishment which seems in these cases to have a deterrent effect is, as the Inspector tells us, a punishment of imprisonment, and if Banarsi has brought upon himself the punishment which is merited by somebody else, he has only himself to thank. We sentence Banarsi to six months' rigorous imprisonment and a fine of Rs. 500. In default of payment of fine he will serve another six months' rigorous imprisonment. He must surrender to his bail.

Appeal allowed.

Z. K.

PRADYUMNA KUMAR *v.* PRAMATHA NATH.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL JURISDICTION NO. 92 OF 1922.

April 10, 1923.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Thomas Richardson, KT.

PRADYUMNA KUMAR MULLIK—
DEFENDANT—APPELLANT

versus

PRAMATHA NATH MULLIK—
PLAINTIFF—RESPONDENT.

Hindu Law—Idol, gift to, acceptance of—Shebait, *powers of.*

In determining whether the *shebait* of an idol is empowered to accept, on behalf of an idol, a gift coupled with conditions, the test is whether the conditions are for the benefit of the idol. [p. 837, col. 1.]

Appeal against the judgment of Mr. Justice Greaves, dated the 1st June 1922, reported as 76 Ind. Cas. 985.

Messrs. *B. L. Mitter* and *S. C. Bose*, for the Appellant.

Messrs. *S. N. Bannerjee*, *S. K. Chakravarty* and *H. D. Bose*, for the Respondent.

JUDGMENT.

Richardson, J.—This is an appeal from the judgment of Greaves, J., dated 1st June 1922. The parties to the suit are the present representatives of a well-known family in Calcutta, the founder of which was Moti Lal Mullik. Moti Lal died in 1846 leaving a widow, Rangomani Dasi, and an adopted son, Jadulal, then two years old. During his lifetime he established and consecrated the three deities who are the subject of this litigation, Thakur Sree Sree Radhashamsunder Jee, Thakurani Sree Sree Radharanee, and a Saligramsila known as Sree Sree Raj Rajeswar. These deities were located in his family dwelling house in Pathuriaghata Street. A room was set aside for them as a private or retiring room and there was also a *thakurdalan* into which they were brought on ceremonial or festival occasions.

By his Will dated the 3rd September 1846, Moti Lal provided that until Jadulal should attain the age of 20 years, his widow should be the *malik* or proprietor and attorney for the care of the whole of his estate which was considerable. On Jadulal attaining the age mentioned, the whole estate was to be made over to him except the monies or Government securities which the testator bequeathed to his widow or others or had set apart for his own *shradh* and so forth.

As regards the deities, no direct gift was made in their favour, but the widow was authorised to spend Rs. 600 a month in defraying the expenses of their worship "in the same manner that I have paid and defrayed the same hitherto." On Jadulal taking over the estate, he was "in the like manner to protect the whole of the property and effectuate the *krcah karmas* or religious acts and ceremonies and so forth." The whole estate, therefore, was given to Jadulal subject to a charge thereon for the maintenance of the worship both of the ancestral deities and of those established by the testator.

The two relevant portions of the Will ran according to an old translation as follows:—

"(1) As long as my adopted son Srijut Jadulal Mullik does not attain the age of 20 years (twenty) so long I do hereby appoint you the *malik* or proprietor and attorney for the protection and care of the whole of my estate. The whole of my property, fixed and moveable, *i. e.*, my land homesteads and gardens and my *nij* dwelling homestead and my ready money and my Company's papers and my pearls, diamonds, corals, etc., and my *jurrow* gold and silver *olonkar* or personal ornaments, my plates and brass and *kansa* or bell-metal vessels and my dresses and apparels and my *shawls*, *doshallahs*, etc., and my Sri Sri Issur Thakurs and Thakuranis, etc., established by me and ancestral, of the whole of my property agreeably to the list in my hand-writing under my signature, you remain the *malik* of protecting and taking care of whatever property and effects I leave behind. Upon my said *posslopoottro* or adopted son attaining the age above mentioned you will make over the whole of the said property to him in full and the said *posslopoottro* or adopted son is become our, *i.e.*, both your and mine, *uttaradheekary* or heir of the whole of the property, and will become so."

"(2) The Company's papers belonging to my estate that shall stand in the Government Agency to the credit of the name of my *possiopoottro* or adopted son Srijut Jadulal Mullik, you will draw Company's Rs. 600 monthly from the interest thereof or having sent for and obtained Company's Rs. 36,000 (thirty-six thousand rupees) at the interval for every six months, you will defray the expenses of the daily *sheba* or service and the *porbas* or festivals and the *teher* or ceremonies of the Sri Sri Issur Thakurs, Thakuranis etc., established by me and ancestral according to my *pala* or turn, as also the *nittoo* or daily and the *noimithoo* or periodical expenses and so forth, in the manner that I have paid and defrayed the same hitherto, as long as my said *possiopoottro* or adopted son does not attain his age above mentioned. Upon the said *possiopoottro* or adopted son's having attained his majority, you will, without *ozur* or objections make over the whole of the property to him fully and he will in the like manner protect the whole of the property and effectuate the *kreah karmas* or religious acts and ceremonies and so forth wherewith you have no concern, and the abovementioned Company's paper of one lac of rupees that I have given to you and Company's 25 thousand rupees that I have set apart for my *shrauddio* and *sopindeekoron* or offering of the funeral cake exclusive of that, Company's papers to whatever amount shall remain, agreeably to the aforementioned list under my signature, all those Company's papers you will place to credit in the name of Srijut Jadulal Mullik in the Government Agency, when I am no more, and they shall so remain. He will, upon his attaining the age above-mentioned, receive fully all the said Company's papers, together with interest agreeably to account and be entitled to the same."

Jadulal, after succeeding to the estate, pulled down the old family dwelling house and built a new house partly on the site of the old house (No. 67, Pathuriaghata Street) and partly on a new site (No. 7, Prosauna Kumar Tagore Street). On another site acquired for the purpose (No. 8, Prasanna Kumar Tagore Street) he built a *thakurbari*. There is no evidence that any special ceremony was performed but there he installed the three deities and there he worshipped them. The building is between No. 67 and No. 7, but is separate from them and has a separate entrance from the street. It is two-storied, and as in the old family house, the retiring room or sleeping apartment of the deities is on the first floor and the *thakurdalan* on the ground floor.

On the 26th April 1888 Jadulal executed a deed or declaration of trust which refers by name only to the Thakur Radha Sham Sunderjee. The erection of the *thakurbari* by Jadulal is recited and also the fact that, with the land on which it stood, it was of the value of Rs. 10,000. Then comes a dedication of the premises in the form of a conveyance in trust to Jadulal, his heirs and representatives to the use of the Thakur for the purposes of his location and worship. The proviso is added that if at any time it should appear expedient to Jadulal or his representatives so to do, "it shall be lawful for him or them upon his or their providing and dedicating for the location and worship of the said Thakur another suitable *thakurbari* of the same or greater value than the premises hereby dedicated, to revoke the trusts hereinbefore contained." Finally, there is a declaration in the following terms:—

"It is hereby declared that unless and until another *thakurbari* is provided and dedicated as aforesaid the said Thakur shall not on any account be removed from the said premises and in the event of another *thakurbari* being provided and dedicated as aforesaid the said Thakur shall be located therein but shall not similarly be removed therefrom on any account whatsoever and further that during the lifetime of the said Jadulal Mullik he shall be the sole *shebait* of the said Thakur and after his death and subject to any provision in that behalf to be hereafter made by the said Jadulal Mullik, his heirs in the male line shall be such *shebaits*, no female heir or widow of any male heir being entitled to the *shebaitship* although she shall have full liberty to worship the said Thakur and also that in case of any disagreement between any future *shebaits*

of the said Thakur the worship thereof shall be conducted by yearly *palas* or turns."

The subsequent history may be briefly narrated. Jadulal died on the 5th February 1894 leaving three sons, Anath Pramatha and Manmatha who separated. The partition of the family property was referred to the late Mr. W. C. Bannerjee as arbitrator. Under his award published in 1899 and made a rule of Court in Suit No. 913 of that year, No. 7, Prasanna Kumar Tagore Street was allotted to Anath and No. 67, Pathuriaghata Street to Manmatha; Pramatha, the second son, obtained his share otherwise and has since built himself a residence at No. 129, Cornwallis Street. The penultimate paragraph of the award decides that the entrance or passage to the *thakurbari* from the street "shall remain as the common passage to the said *thakurbari* and shall continue to be the joint property of the three brothers, their heirs and assigns for ever and that none shall be entitled to raise any structure or any building of any kind or in any way to obstruct the said common passage and that it shall always remain perfectly open to the sky throughout."

Anath died in June 1900 and was succeeded by his infant son, Pradyumna.

The partition of 1899 was not exhaustive and in a suit of 1900 (No. 890) to which Pradyumna was a party other assets were partitioned by Babu Bhupendra Nath Bose as Commissioner appointed by the Court for the purpose.

Then, it is stated, controversy arose as to the Will of Moti Lal's widow, Rangomani, who had died in 1891 and had devised certain property for the worship of the Thakur Radha Sham Sunderjee. In a suit of 1904 (No. 799) Mr. Bose was appointed to frame a scheme for the worship of the deity and to partition the residue of the Rangomani's estate. Neither Rangomani's Will nor Mr Bose's scheme has been placed before us, but it is common ground that as the result the right to manage the worship has since been exercised by each of the three branches of the family by *palas* or turns of one year each. I gather also from paragraph 31 of the plaint that the charge on Moti Lal's estate for the worship of the Thakur was then crystallized, and that a sum of Rs. 1,00,000 was then by agreement set apart in trust, the income of which was to be devoted to the maintenance of that worship.

The first turn of worship for the Bengali year 1317 (commencing in April 1910) fell to Pradyumna. During Pramatha's turns of 1911-12 and 1914-15, he removed the deities to the *pujadalan* in his own house, returning them to the *thakurbari* at the end of each period. When his turn came round again in April 1917, and he again desired to remove the deities to his house, Pradyumna, who had then come of age, and Manmatha joined in refusing to allow him to do so. He then brought this suit against them asking for a declaration of his right to take the course which he had taken in his previous turns and for other reliefs.

As in the case of *Ram Soondur Thakoor* v. *Taruck Chunder* (1), it is not contended that there is anything in the Hindu canon which forbids the manager of a Hindu deity from taking the deity to his own house during his turn of worship. The dispute owes its origin to the prohibition against the Thakur's removal from the *thakurbari* in Jadulal's deed of 1888, on which the defendants rest their case. As the other two deities are not specifically mentioned in the deed, there is a subsidiary question whether the prohibition applies to them.

A number of issues were framed for the trial but the only two of any present importance are the ninth, "Is the plaintiff entitled to remove the Thakurs to his residence, 129, Cornwallis Street during his turn of worship?" and the seventh, "Could the Thakur Radha Sham Sunderjee be severed from his consort, the Thakurani, and from the other ancillary deities?"

The learned Judge answered the ninth issue in the plaintiff's favour and it was accordingly unnecessary for him to decide the seventh issue.

The appeal is preferred by Pradyumna; Manmatha, however, though he appears as a respondent, is ranged on the same side against Pramatha.

(1) 19 W. R. 28.

The main ground o the learned Judge's decision is shortly and clearly expressed as follows:—

"There is no dispute that the Thakurs were established by Moti Lal and he imposed no conditions as to their location, and consequently I do not think that it was open to any subsequent *shebait* to impose restrictions which would fetter those who subsequently as heirs of the founder became *shebaits*."

This reasoning, which the first respondent, of course, endorsed, if I may say so, deserves consideration and I am not prepared to follow the argument for the appellant to the full length to which it was taken.

The learned Standing Counsel, Mr. B. L. Mitter, founding on Moti Lal's Will, argued that the testator treated the idols or images which he had set up as his personal property and left them absolutely to Jadulal. When pushed Mr. Mitter said, that Jadulal might, if he bad so pleased, have thrown them into the river. The inclusion of the idols, however, among items of property, moveable and immoveable, does not show that the testator regarded his interest in them in the same light as his interest in his secular property. The careful directions given later in the Will show that the testator intended the worship of the ancestral deities and the deities he had established to be a charge upon his estate.

Reference, again, was made to the broad statement in *Subbaraya Gurukal* v. *Chellappa Mudali* (2), that "in the eye of the law idols are property," and to the observation of Banerjee, J., in *Khetter Chunder Ghose* v. *Hari Das Bandopadhya* (3), to the effect that an idol may be the subject of gift. In legal conception, however, an image which represents a deity, or in which the deity resides or inheres, is a juristic or juridical entity capable of receiving gifts and holding property. Hindu religious conception carries the matter even further, as the following passage from a recent judgment of Mookerjee, J. [*Rambrahma Chatterjee* v. *Kedar Nath Banerjee* (4)], will show:—

"We need not describe here in detail the normal type of continued worship of a consecrated image,—the sweeping of the temple, the process of smearing, the removal of the previous day's offerings of flowers, the presentation of fresh flowers, the respectful oblation of rice with flowers and water, and other like practices. It is sufficient to state that the deity is, in short, conceived as a living being and is treated in the same way as the master of the house would be treated by his humble servants. The daily routine of life is gone through with minute accuarcy; the vivified image is regaled with the necessaries and luxuries of life in due succession, even to the changing of clothes, the offering of cooked and uncooked food, and the retirement to rest."

Now, the subject is abstruse and in its nature metaphysical. I have certainly no desire to be dogmatic or to find fault with the language of so great an exponent of Hindu Law as Sir Guru Das Banerjee. There may be purposes for which an idol, considered with reference to the material substance of which it is composed, may be regarded as moveable property. In this way it may be the subject of gift. But I find some difficulty in understanding how an image considered as a legal or spiritual entity can properly be said to be the subject of gift. What is probably true is that for certain purposes at any rate the office of manager or *shebait* of a deity may be regarded as property and the office will carry with it all such rights as properly pertain thereto, including the right to the custody of the image. In a loose way, therefore, the gift or transfer of the office may perhaps be spoken of as a gift or transfer of the image or the deity.

Assuming that the law will recognize such a gift or transfer *inter vivos* there is a further difficulty when a devise is suggested. Moti Lal himself, having estab-

(2) 4 M. 315; 1 Ind. Dec. (N.S.) 1055.
(3) 17 C. 557; 8 Ind. Dec. (N.S.) 911.
(4) 72 Ind. Cas. 1026; 36 C. L. J. 478 at p. 483; (1923) A. I. R. (C.) 60.

lised these deities, was only their manager during his lifetime. In *Rajeshwar Mullick* v. *Gopeswar Mullick* (5), Sir Francis Maclean, C. J., said: "A *shebait* is a manager or *quasi*-trustee for the benefit of the idol. His office only endures for his life, his Will only comes into operation on his death. What is then there for him to alienate by his Will? Nothing."

I cannot, therefore, accede to the contention that the terms of Moti Lal's Will conferred on Jadulal an unlimited discretion to deal with the deities according to his own pleasure. I will assume on the principle stated by Banerjee, J., in *Girijanund Datta Jha* v. *Sallajanund Datta Jha* (6), that Jadulal could not bind his successors by any act which was not for the benefit of the deities. Nevertheless, he had rightfully succeeded his father as sole manager, and within the limits of his duty he had full discretion to act as he might think best. No one suggests that dedication of a *thakurbari* was not the act of a pious Hindu, anxious to do more than fulfil his obligations and to mark his tenure of the estate by a work of supererogation. In his secular capacity he had a perfect right to make the gift and to impose the conditions which he did impose. The only question of substance in the case is whether in his capacity as *shebait* he exceeded his authority in accepting the gift on the Thakur's behalf subject to the conditions. The test to be applied is whether the condition with which we are immediately concerned in the present case was or was not for the benefit of the Thakur. A house, suitable in every respect, built at considerable cost, close to his original home, was set apart for the Thakur's use. The condition is annexed that he should not be taken therefrom unless and until another house of equal or greater value is provided for his reception and entertainment. That ensures that he will always have a suitable abode, so long at any rate as funds are available to keep the present building in repair. It is not suggested that funds for that purpose are likely to fall short. If a situation should arise in which it would be desirable in the interests of the Thakur that other arrangements should be made, an application could doubtless be made to the Court and a proper order obtained. Meanwhile the three existing branches of the family may split up into numerous sub-branches, each with its own turn of worship, and the Thakur is at least secured from undignified journeys from one place to another.

As the worship of the deities was made by Moti Lal a charge on his estate, now converted into a trust fund, Jadulal has no right, I think, to the title of a founder of the endowment. His liberality, however, should dispose his successors and the Court to respect his wishes as far as possible. We have not been informed as to the extent of Rangomoni's benefaction nor has the question been mooted whether she would have selected the Thakur as the object of her bounty if he had not been housed in the *thakurbari*. All we know is that at her death the Thakur was located there.

I do not regard the condition in question as making a change in the character of the worship, or, to use a phrase of their Lordships in *Juggut Mohini Dossee* v. *Sokheemoney Dossee* (7), as "varying the use." The deities are worshipped in the *thakurbari* as they were previously worshipped in the family dwelling house. Till 1886 they had never been removed from that house and till 1911 they had not been removed from the *thakurbari*. In the different partitions, the latter was treated as the property of the deity and, therefore, impartible among the members of the family. Mr. Bonnerjee, moreover, as above stated, was careful to provide that the passage to the building from the street should remain joint property. Up to 1911 no question arose as to the validity of the condition.

The suggestion that the condition is repugnant to the nature of an absolute grant and, therefore, void on the principle of

(5) 12 C. W. N. 323; 35 C. 226; 7 C. L. J. 315.
(6) 23 C. 645; 12 Ind. Dec. (N. S.) 429.

(7) 14 M. I. A. 289; 17 W. R. 41; 10 B. L. R. 1; 2 Suth. P. C. J. 512; 2 Sar. P. C. J. 231; 20 E. R. 795.

section 11 of the Transfer of Property Act, is far-fetched. It is inapt to speak of deities, who presumably transcend the limitations of time and space, as being "confined" or "imprisoned" in a habitation or temple erected in their honour, and such phrases have no application at all to their material images. Religious gifts are not in all respects on the same footing as secular gifts. They are exempt from the rule against perpetuities and in my opinion the condition cannot be said to be unreasonable.

It was suggested that the ladies of Pramatha's family would be inconvenienced in making their oblations if the deities were not removeable to his house during his turn of worship. I do not know whether the ladies of each branch only make oblations during the turn of worship of the head of the branch. The point is not specifically mentioned in the plaint though it is stated generally in paragraph 29 that the *thakurbari* "is so situate as to make it inconvenient to the plaintiff who lives at a distance to carry on the worship." In these days of motor cars this complaint appears to me in any case to have little substance. The principal complaint, however, appears in paragraph 29 which runs:

"The plaintiff has suffered considerable damage and has further felt greatly humiliated and injured, and suffered pain of mind by reason of his having been prevented from exercising any of his said rights."

I need hardly say in regard generally to complaints of this kind that in deciding this we must have regard not to the personal prestige of any individual *shebait* or to his personal convenience or the convenience of the members of his family, but solely to the interests of the Thakur.

As to the case of *Gossami Sri Gridharlji* v. *Romanlalji Gossami* (8), in the view I take, it is unnecessary to rely on the principle which their Lordships there applied. Moreover, as Greaves, J., has pointed out, this is not a suit for the possession of the *thakurbari* and the Thakur is not put to any election between conflicting rights, or between remaining permanently in the *thakurbari* and being removed therefrom every third year. If he had to elect, which of the *shebaits* is to speak for him? It was suggested for the appellant, that the views of the majority should prevail. But, as I understand the matter, the system of rotation which has been introduced amounts to a partition of the office of *shebait* and I do not know whether Mr. Bose's scheme provides for meetings of the separate holders of the office for the purpose of discussing and deciding disputed or difficult questions of administration.

No doubt it would be *pessimi exempli* that a deity should consent to be the recipient of a gift and should refuse to be bound by any valid condition annexed to it. But the whole question here is whether the condition is valid or not.

There remains the seventh issue, on which, as I have said, we have not the advantage of the learned Judge's decision. I gather that since their establishment, the three deities have been treated as companions. They have occupied the same apartments. They were installed together in the *thakurbari*, and in the issue itself as drawn, no doubt with the concurrence of the parties, the Thakurani is described as the consort of the Thakur. In the circumstances, I should be extremely loth to be party to any order which would admit of their being separated and occupying different abodes. In my opinion they should not in this respect be differentially treated. The location of the Thakur in the *thakurbari* appears to involve the same location for the Thakurani and the Salgramsila. The considerations, therefore, which govern the Thakur are also applicable to his companions.

In the result, differing with great respect from the learned Judge, I come to the conclusion that the suit should be dismissed with costs in this Court and in the Trial Court.

Sanderson, C. J.—I agree. In my judgment the real question in this case is whether Jadulal, in his capacity of *shebait*, was empowered to accept on behalf of the Thakur the conditions which he, as donor of the property, attached to the gift in the deed of 26th April 1888.

(8) 16 I. A. 137; 17 C. 3; 13 Ind. Jur. 211; 5 Sar. P. C. J. 250; 8 Ind. Dec. (N.S.) 541 (P. C.).

I agree that the test is whether the conditions were for the benefit of the Thakur. In my judgment they were.

Some of the reasons therefor have been stated by my learned brother, and I need not repeat them. The main reasons, which influence my mind in this respect, are that the premises were undoubtedly, eminently suitable for the worship and location of the Thakur; and, it is to be noted that the deed did not absolutely prohibit the removal of the Thakur but provided for its removal in the event of the provision of another suitable *thakurbari* of a value, the same as or greater than, the value of the premises comprised in the deed.

I agree that the appeal should be allowed with costs and the suit dismissed with costs in the Trial Court.

Appeal allowed.

W. C. A.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 41 OF 1921.

October 16, 1922.

Present:—Mr. Daniels, J. C.

BANKE LAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

KANHAIYA LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Principal and agent—Profit obtained by agent—Liability of agent—Contract for sale of sovereigns, legality of—Civil Procedure Code (Act V of 1908), O XLI, r. 1—Memorandum of appeal, contents of—Plea dealing with several issues, propriety of.

A person who accepts a profit for himself in a matter in which he is acting as an agent for another is bound to account to his principal for that profit. [p. 841, col. 2.]

A contract for the sale of sovereigns at market price is legal. [p 841, col. 1]

Shrinivasadas Lakshminarayan v. *Ramchandra Ramratandas*, 52 Ind. Cas. 546; 44 B. 6; 21 Bom. L. . 788, relied on.

Each plea in a memorandum of appeal should raise a specific issue. A composite pleading with several issues is open to serious objection, and a memorandum of appeal containing such a plea is liable to be returned for amendment. [p 841, col. 1.]

Appeal from a decree of the Subordinate Judge, Kheri, dated the 29th March 1921.

Messrs. *H. K. Ghosh* and *Har Gobind Daval* for the Appellants.

Messrs. *Ram Bharose Lal* and *Raj Narain Shukla* for the Respondents.

JUDGMENT.—This is an appeal in a complicated case for the balance alleged to be due on a settlement of accounts between the plaintiffs and the defendants. The appeal is by the defendants. The plaintiffs have filed cross objections. Both parties carry on business as commission agents and grain dealers. The plaintiffs are the proprietors of four different firms:—

Gatrumal Debi Charan carrying on business in Lakhimpur.

Manna Lal Fateh Chand carrying on business in Lakhimpur.

Gatrumal Debi Chand carrying on business in Phardhan.

Gatrumal Kanhaiya Lal carrying on business in Hargaon.

The defendants also do business under two different trade names, namely, the firms of Banke Lal Banwari Lal and Banwari Lal Sita Ram, both at Bareilly. The transactions between the parties have been of more than one kind. The plaintiffs used to send grain to the defendants for the defendants to sell as agents of the plaintiffs. The plaintiffs used also to purchase grain as agents for the defendants. Sometimes this grain was sent to the defendants themselves; sometimes it was sent to other firms at other places on the defendants' behalf.

Preliminary issues of jurisdiction and limitation were decided by me on 7th March last. At that time it was found necessary to send back the case to complete the cross-examination of a particular witness and to allow the defendants to file objections to the report of a Commissioner who had been appointed to go into the accounts. All this has now been done and the learned Judge has re-submitted the record with the additional evidence and his remand finding. As was noted in my remand order the issues on the appeal which still remain to be decided are those contained in paragraphs 3, 7, 10 and 12 of the memorandum of appeal in addition

to the issues raised by the plaintiffs' cross-objections. Besides these certain new issues have been introduced by the objections now filed to the Commissioner's report. In the memorandum of appeal, paragraph 7, a general allegation was taken that the report of the Commissioner is wrong and incorrect in several particulars.

I take first the objections to the Commissioner's report. The objections pressed are four in number. The first is that the Commissioner has erred in the calculations of interest. The main objection is to his allowing compound interest. It is urged that compound interest was not specifically claimed in the plaint, that no issue on this point was raised and that it is not usual to allow compound interest in the case of firms having mutual dealings. On the other hand it is pointed out by the respondents that compound interest was claimed in the plaintiffs' account-books which were filed with the plaint and that no objection on this score was taken by the defendants. Indeed the plaintiffs equally with the defendants rely on the fact that there was no dispute on this point and no issue framed in the Court below. Compound interest was allowed under the orders of the learned Subordinate Judge and the strongest point in favour of the learned Subordinate Judge's decision is that the second defendant has himself admitted in his evidence that his firm used to calculate interest on sums due to the plaintiffs with yearly rests. In view of these facts it is impossible to disturb the learned Subordinate Judge's finding.

A subsidiary objection is taken with regard to interest that in certain cases interest has been allowed to the plaintiffs beyond the date on which money was remitted by the defendants to the plaintiffs. The only concrete instance brought forward to support of this was of a sum of Rs. 3,550 relating to the Hargaon shop, which it is stated was not credited till more than a year after its receipt. The plaintiffs had no difficulty in showing from their books that this amount together with a sum of Rs. 1,490-11-0 relating to the Lakimpur shops which was paid at the same time was credited in the account of that shop on the date on which it was paid in. The delay which occurred was in transferring that portion of the amount which related to the Hargaon shop. The appellants' learned Counsel admits that he cannot claim anything in regard to this item and states that he has only brought it forward to show the general unreliability of the plaintiffs' account books. In view of the circumstances shown it does not, however, appear to support the conclusion which he wishes to draw from it.

The second objection is one claiming an item of Rs. 117-3-0 as due to the defendants on account of commission for grain sold by them for the plaintiffs at Bareilly. The objection is based on a particular entry in the plaintiffs' *roznamcha*, Exhibit 8, crediting the defendants with an item of Rs. 90 on account of commission. It is admitted that there is no evidence to support the claim to the remaining Rs. 27. The materials for deciding on this claim are altogether inadequate. No objection regarding it was taken before the Commissioner and there is no reference to it either in his report or in the decision of the learned Subordinate Judge. It appears to me impossible to say that this item may not have been taken into account in some form in the very lengthy and complicated account which has been prepared and on the materials put before me I am not prepared to allow this objection.

The third objection is to a sum of Rs. 125 allowed by the Commissioner against the defendants on the strength of an entry in the defendants' own accounts showing this sum as due to the plaintiffs. The appellants' complaint is that as the accounts have been prepared on the basis of the plaintiffs' account-books in which this item is not found, it should be assumed that it has been taken into account in some other form. Now on the very date to which this credit relates a considerable sum is entered to the credit of the defendants but this sum is, as was found on Issue No. 15, Rs. 127-8-0 short of the amount which the defendants actually paid. There is a strong presumption that this difference represents the item in question and that the small difference of Rs. 2-8-0 is due either to mistake or to a difference between the parties as to the exact amount

to be credited. The learned Subordinate Judge has credited the defendants with the sum of Rs. 127-8-0 in deciding Issue No. 15. They are not entitled to get this Rs. 125 in addition. The objection, therefore, fails.

The fourth objection relates to a sum of Rs. 415-11-0. This sum was allowed by the Court previous to the appointment of a Commissioner. The latter on examining the accounts found that one of the items composing it was shown in the plaintiffs' books and that the amount was not really due to him. The plaintiffs do not before me contest the correctness of this finding of the Commissioner. This objection is, therefore, allowed.

Plea No. 3 of the memorandum of appeal ran as follows:—"That the Court below should have decided Issues Nos. 6, 7, 8, 9, 10, 12 and 13 in favour of the defendants-appellants."

I may note in passing that a memorandum of appeal drawn up in this way is open to serious objection. Each plea should raise a specific issue. Appeals drawn up in this way are liable to be returned for amendment. The best way of dealing with the matter will be to take these different issues seriatim. I take them in the order in which they were taken in argument.

Issues Nos. 1, 11 and 12 were tried together in the Court below and the appellants' Counsel has argued these first.

Issue No. 1 was a general issue as to what amount was due. Issue No. 11 relates to a number of items contested in paragraph 17 of the written statement. Issue No. 12 is whether the defendants were entitled to credit for the value of 1366 bags of theirs said to be in the plaintiffs' possession. The issues have been pressed only as to certain specific items.

The first of these items is a sum of Rs. 488 on account of 244 sovereigns received by the defendants as agents of the plaintiffs. Rs. 750 were claimed but Rs. 488 only were allowed. The allegation is that these sovereigns had a premium value above their normal value of Rs. 15 to the pound. The lower Court has valued them at Rs. 17 and allowed the plaintiffs Rs. 2 per sovereign. The defendants deny that the plaintiffs are entitled to any premium and contend in the alternative that the amount allowed is far too high. It was no part of their case that traffic in sovereigns was illegal, indeed the second defendant has admitted that his firm was in the habit of selling sovereigns. The point was suggested by the Court in the course of the argument but it is brought to my notice that the Bombay High Court in *Shrinivasadas Lakshminarayan* v. *Ramchandra Ramrattandas* (1) has decided that a contract for sale of sovereigns at market price is legal and for the purposes of this case I accept the correctness of that ruling. The defendants' case is that there is no proof that they sold these particular sovereigns at a profit and if the sovereigns had a value above their currency value at which they were accepted the plaintiffs have no claim to it. It is proved that the persons by whom the payments were made paid their debts in gold as an inducement to the defendants to trade with them in future. That being so, the defendants are in the position of persons who have accepted a profit for themselves in a matter in which they were acting as agents, and according to a well-established principle of law they are bound to account to their principles for that profit. There remains the question of the rate. It is amply proved by evidence, which I need not set out here as the plaintiffs accept it, that at the time when the money was received the value of the sovereign was about Rs. 15-4-0. The plaintiffs rely on the fact that its value rose greatly at a later date, but the point of time to be considered is the time when the gratification was received. The plaintiffs are, therefore, entitled to 4 annas per sovereign or Rs. 61 in all instead of Rs. 488. They are, therefore, entitled to a deduction of Rs. 427 from the amount allowed by the Court below.

The next item is one of Rs. 249 allowed by the Court on account of refund of Railway freight. The plaintiffs sold grain to Satrans & Co., and paid Railway freight on it. Later on it was found that there had been an overcharge and Rs. 249 was refunded by the Railway to Satrans & Co., who efunded it to the defendants. The

(1) 52 Ind. Cas. 546; 44 B. 61; 21 Bom. L. R. 788.

facts are clear and in face of the second defendant's admission of liability it is impossible for the defendants to contend seriously that they are not liable.

A large number of consignments are discussed under the head of costs of bags. Two only of these are now in dispute. The first is an item of 251 bags due from the firm of Jadu Ram-Ram Kumar. This has been charged to the defendants on a finding that the firm of Jadu Ram-Ram Kumar is really an *alias* of the defendants. The evidence in support of this is really very thin. In the first place there is no allegation to this effect in the plaint. The lower Court relies on a statement in Exhibit Y4, a list filed by the defendants, and on the fact that the second defendant did not deny in his evidence that he was liable for that debt of this firm He was not asked about it and no argument can be based on his silence. The reference in Exhibit Y4 amounts to no more than this that Jadu Ram-Ram Kumar have delivered to the defendants a certain quantity of bags for which the defendants are liable. There is no admission of liability as to the balance of 251 bags which the defendants did not receive. The defendants are, therefore, entitled to succeed on this objection and are entitled to a deduction of Rs. 125-8-0 at the rate of 8 annas per bag which is the rate allowed by the lower Court.

The other disputed item is one of 600 bags which the defendants received from Satrans & Co., on the plaintiffs' account. The receipt of these bags is admitted. Defendants point to an entry in the plaintiffs' accounts showing that on another occasion the plaintiffs received 600 bags from Satrans and Co., and argue that these bags must have been received on behalf of the defendants. They urged that there was no evidence that the plaintiffs had independent dealings with Satrans and Co. In fact there is such evidence. It is detailed in the learned Subordinate Judge's judgment and the appellants are unable to explain it away. This objection fails.

The plea on Issue No. 6 was that the plaintiffs had failed to account for 590 maunds of grain bought by the plaintiffs on the defendants' account at Lakhimpur and Hargaon. This total includes a large number of items most of which are not now in dispute. The controversy turns on two points :—

(*a*) Whether the allowance for *karda dhalta* on certain accounts of grain, especially maize, should be at one seer per maund or one and a quarter seers as allowed by the Court, in respect of grain purchased by the plaintiffs for the defendants. This *karda dhalta* is a sort of commission paid in kind by the seller according to trade custom. If the contract is for forty seers the seller actually delivers 41 or 41½ seers as the case may be. The direct evidence on this issue is all in favour of the plaintiffs. The appellants want the Court to presume that the rate must be the same in respect of all kinds of grain and at all places, and that because the plaintiffs have admitted that the rate was one and a quarter seers in respect of wheat, therefore, it must have been the same in respect of maize. I am not prepared to draw any inference and the objection fails.

(*b*) After allowing for specific items there remained a deficiency of 225 maunds which the Court has found to be due to sifting. The defendants refused to admit that the plaintiffs sifted grain on their instructions, but the fact has been explicitly admitted by the defendant No. 2 in his evidence and in addition several letters from the defendants to the plaintiffs have been proved containing definite instructions to the plaintiffs to sift the grain before despatching it. The loss from sifting is very small in proportion to the grain involved, not being more than 7 *chhataks* per maund. The learned Subordinate Judge's finding on both branches of this issue is correct and I maintain it.

Issue No. 7 has not been argued. Appellants' Counsel said that he did not expressly abandon it but as he offered no argument upon it it is not necessary for me to discuss it.

On Issue No. 8 the dispute is whether an amount of Rs. 949-12-0 is due to the defendants on account of a deficiency in grain sent by the plaintiffs to outside firms under the defendants' instructions. In the defendants' written state-

ment the allegation was that this deficiency was due to the plaintiffs adulterating the grain with mud and rotten and worm-eaten grain. The evidence shows that there is commonly some deficiency in the case of grain sent to big Ports like Bombay and Karachi owing to the examination of the grain at these places being more rigorous than that to which it is subjected by an up-country trader. The evidence also shows that such loss is borne by the seller and not the agent. The defendants' case in this Court is that if the plaintiffs sifted the grain, as they say they did, there should have been no deficiency. The appellants' Counsel was unable at first to tell me what proportion the deficiency amounted to but on a calculation being made in Court it was found to be only between 1 and 2 per cent. The evidence which the appellants had been laying before me of their own witnesses, *e. g.*, D. W. No. 1 of the Bareilly commission witnesses and Amar Nath, pointed to this as being the normal rate. There is therefore, no reason for disturbing the learned Subordinate Judge's finding on this issue.

Issue No. 9 was whether the plaintiffs were entitled to *hatoti* and *bilta khata* at 5 per cent. When the case came to be argued in the Court below it was found that the plaintiffs had made no such charge and the defendants wanted to raise an entirely different plea—*vide* lower Court's finding on Issue No. 9. This was rightly disallowed and Issue No. 9 does not arise.

Issue No. 10 relates to the same item as the fourth objection to the Commissioner's report and has already been decided.

Issues Nos. 11 and 12 have already been dealt with.

Issue No. 13 was not argued.

This, therefore, completes the determination of the defendants' appeal.

The cross-objections which have been urged are six in number.—

(1) Issue No. 4 in the Court below is:—"Are the plaintiffs entitled to interest at twelve annas per cent. per month in respect of the Gatrumal Debi Charan and Gatrumal-Kanhaiya Lal shops?" Interest has been allowed in respect of the other shops at twelve annas but at seven annas nine pies in respect of these two shops. The parties have changed sides since the argument on the sixth issue and the plaintiffs adopt a similar argument to that used by the defendants on that part of the case, namely, that there is a presumption that the same rate of interest applied to all the shops. There might be such a presumption if there were no evidence, but the facts of this case raise a stronger presumption the other way. The account-books show, and the plaintiffs had to admit, that in respect of these shops interest was originally charged at seven annas nine pies. He alleged a definite agreement to change of interest. The learned Subordinate Judge has disbelieved him and there is no other evidence in support of his statement. The alleged agreement was not in writing. It was not even mentioned in the accounts. There is a presumption that the same rate of interest continued until there was a definite agreement superseding it. This objection fails.

The second objection, forming part of issue No. 11 in the lower Court, relates to 600 bags sent to the plaintiffs through the firm of Faranga Lal at Bareilly. The question at issue is whether the firm of Faranga Lal sent these bags on behalf of the defendants. The Court below has found that they did. The plaintiffs denied it but it has been proved by witnesses in the employ of Faranga Lal's firm. Their statements are against the interest of the firm which they represent but I can find no reason why they should not be accepted. I reject this objection.

The third objection (Issue No. 14 in the lower Court) relates to a very small amount, Rs. 55. The plaintiffs sent a rail receipt to the defendants with instructions to realise Rs. 75 from the firm of Babu Ram-Prag Das upon it. For some reason which has not been explained only Rs. 700 were realised. The defendants have been charged with the sum which they actually received. Plaintiffs wish to charge them with the whole, *i. e.* Rs. 755; no evidence was offered on the point. Plaintiffs argue that the defendants ought not to have handed over the rail receipt without receiving the full amount. It may equally well be that it was a matter

of mutual arrangement between the parties at the time. The transaction took place a very long time ago and in the absence of any evidence, even that of the plaintiffs themselves, or any cross-examination of the defendant No. 2 on this point, I am not prepared to draw inference that the defendants acted improperly in the matter. This objection also fails.

The fourth objection is that the balance of bags due from the defendants should have been charged to them at Rs. 75 per 100 bags instead of Rs. 50. The bags were received and sent in connection with many different consignments extending over a long period. The price varied greatly in different years, being less in the earlier years and greater in the later, and any rate allowed must necessarily be in the nature of an estimate. Most of the bags were received in the earlier years when the bags were cheap, and the learned Subordinate Judge has given good reasons for the rate he has allowed. The principal argument before me has been that the defendants on their side claimed a balance of bags against the plaintiffs and in doing so valued them at Rs. 60 per 100. This fact is not conclusive—most parties in litigation attempt to claim too much—and it was admitted in argument that the defendants' claim related to the time when the last transaction between the parties took place. I find no sufficient ground for disturbing the Subordinate Judge's finding.

The fifth objection is that interest should have been allowed on the value of the bags from the date when the last transaction between the parties took place. This claim was put forward in this Court for the first time. As long as accounts were not settled between the parties probably neither party exactly knew how many bags were due to be delivered. On the whole I see no reason to allow this item.

The sixth and the last objection relates to 343 maunds of grain which it is alleged the defendants received for sale on the plaintiffs' behalf and failed to sell. This point was considered by the learned Subordinate Judge under Issue No. 11. He found that the alleged deficiency included the weight of the bags and the allowance on account of *karda dhalta*, which together reduced the deficiency to 158 maunds. This deficiency is out of a total of 6853 maunds. The learned Subordinate Judge further finds that the weight has been calculated by the plaintiffs on the basis of the Railway receipts and that this weight is arrived at by weighing one or two bags out of a consignment and is, therefore, only approximate. There is also usually some shortage owing to loss in loading and unloading, loss in transit and damage by insects. He considered that a shortage of 158 maunds out of nearly 7000 maunds is not surprising. He is not prepared to accept the weights stated by the plaintiffs as absolutely accurate. The plaintiffs before me admit the force of this reasoning, but rely on certain letters of the defendants in which the weights of particular consignments are stated. These weights are in excess of the weights shown in the defendants' accounts. Thus in the case of Exhibit 28 the weight is 11 maunds 6 seers whereas in the corresponding entry in the accounts the weight is 9 maunds 38 seers. Exhibit 24 gives a weight of 36 maunds 27½ seers as against 30 maunds shown in the account. These are the only letters containing admissions of definite weights of grain. The deficiency in value on these two consignments is Rs. 29-3-0.

The defendants have cited three other letters, Exhibits 26, 29 and 31, in which the account was stated according to the number of bags and not weight. In the case of Exhibit 29 the deficiency alleged is trifling and has not been clearly established. In the case of Exhibit 26 the defendants calculate a minimum rate of grain of 2 maunds and claim Rs. 39 on 10 maunds. The price per maund in each case is stated in the letter. In the case of Exhibit 31 about which the defendant No. 2 was also cross-examined, there is a deficiency of 82 maunds valued at Rs. 312-6-0. The defendants could furnish no explanation of this deficiency. Adding up these items and neglecting odd annas the plaintiffs are entitled to Rs. 380-9-0. Some other items have been claimed by the plaintiffs but they are not supported by letters and they are not proved.

The result is that neglecting odd annas I decree the appeal to the extent of Rs. 968 and the cross-objections to the extent of Rs. 380. The parties will pay and receive costs in proportion to success and failure on both the appeal and the cross-objections.

Z. K. *Appeal partly allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL JURISDICTION NO. 28 OF 1920.

July 11, 1921.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Richardson.

RUNG LAL KALOORAM—APPELLANT

versus

KEDAR NATH KESRIWAL—RESPONDENT.

Stamp Act (II of 1899), s. 36—Arbitration—Submission unstamped—Award, validity of.

An award following upon an unstamped written agreement to refer the matter to arbitration cannot be questioned by any of the parties to the reference on the ground of absence of payment of stamp duty, by reason of the provisions of section 36 of the Stamp Act. [p. 846, col. 2.]

Appeal from the judgment of Mr. Justice Ghose, dated the 15th January 1920.

The Hon'ble Mr. *T. C. P. Gibbons*, Advocate-General and Mr. *S. N. Bannerjee*, for the Appellant.

Messrs. *Zorab* and *S. C. Bose*, for the Respondent.

JUDGMENT.

Sanderson, C. J.—This is an appeal from the judgment of my learned brother Mr. Justice Ghose.

The main object of the suit was to set aside an award which it was alleged by the plaintiffs was void, unenforceable and in no way binding upon them and they asked that the award should be cancelled.

The facts to which it is necessary for me to refer for the purpose of my judgment are as follows:—The plaintiffs and the defendant agreed to submit a dispute about some bales of goods to two persons. The agreement was in writing and it was signed by Rung Lal on behalf of the plaintiffs and by Goberdhone Khemkar on behalf of the defendant. The document is set out at page 24 of the paper-book. It was an informal document but it was not disputed in this Court that it was an agreement to refer the matter in dispute to the arbitration of the two individuals. These two persons made an award, and it was endorsed upon the document which contained the submission to arbitration. It was signed by the two arbitrators. That award was filed in pursuance of the provisions of the Arbitration Act. This suit was brought, as I have already said, for the purpose of having it declared that the award was void.

Several grounds were relied upon in the Court of first instance which have not been relied upon in this Court: and, the only ground upon which the learned Advocate-General has relied in this Court is that the agreement containing the submission to arbitration did not bear any stamp at all, and his argument is that inasmuch as it did not bear a stamp it was not open to the arbitrators to act upon it, that they had no jurisdiction to enter upon the arbitration and consequently had no jurisdiction to make an award; and that upon that ground the learned Judge ought to have decided in favour of the plaintiffs.

There is one matter to which I ought to refer which to my mind is incidental to the main matter; at the trial the learned Judge insisted upon the document in question being stamped. The learned junior Counsel who was appearing for the plaintiffs tendered the document as a piece of paper bearing the signatures of the arbitrators and pointing out that it was not stamped. Then the learned Judge insisted upon one of the parties stamping the document and paying the penalty. The result was that the plaintiffs under those directions paid the stamp duty and the penalty which amounted in all to Rs. 5-8, the amount of the stamp being 8 annas and the penalty Rs. 5. The learned Advocate-General urged that in this case inasmuch as the plaintiff were alleging that the award was invalid by reason of the submission bearing no stamp, the learned Judge ought not to have insisted on the document being

stamped. On this occasion, I do not intend to express any opinion as to whether the learned Judge was right on that point and for the purpose of my judgment I propose to assume that the learned Advocate-General's argument upon that point is correct and to assume that this stamping of the document in the Court before my learned brother Mr. Justice Ghose does not affect the point which he has argued in this Court, namely, that inasmuch as the document containing the submission when presented to the arbitrators did not bear a stamp, they had no jurisdiction to act upon it. The matter depends first upon the provisions of the Arbitration Act and from those provisions it is clear that "submission" means a "written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not."

In this case there is no dispute that there was a written agreement signed by or on behalf of the parties concerned and, therefore, so far as the Arbitration Act is concerned there was a good submission to arbitration upon which the arbitrators were entitled to act and to make an award. But it is in respect of the provisions of the Stamp Act that the point arises. By section 35 of the Indian Stamp Act, it is provided "No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer unless such instrument is duly stamped."

The first thing to notice about this section, in my judgment, is that there are two classes of persons indicated by this section—first, a person having by law or consent of parties authority to receive evidence and secondly, a public officer.

We are not concerned in this case with "public officer;" we are concerned with a person or persons having by consent of parties authority to receive evidence. The instrument in this case is not stamped and, therefore, under the provisions of the first part of section 35 it should not have been admitted in evidence by a person having authority to receive evidence or acted upon by such person. That section seems to me to imply that the instrument which is referred to in the section is one which in the first instance is to be received in evidence before it can be acted upon. Whether that be so or not, in my judgment in this case the submission to arbitration must have been put in evidence before the arbitrators, before they could act upon it. The submission—the agreement in writing—must be produced to the arbitrators and if they are not satisfied as to the execution of the document, it is necessary that the execution of the document should be proved before the arbitrators. In any event it seems to me clear that the submission in this case was a document which had to be put in evidence before the arbitrators. It was their duty to see that it was properly stamped. It was not stamped. If an objection had been taken at the time then the proviso to section 35 would have come into force, and upon payment of the stamp duty and the penalty the instrument would have been admitted in evidence in accordance with the proviso. That was not done. It is necessary, therefore, to refer to another section—section 36 which provides, "where an instrument has been admitted in evidence, such admission shall not, except as provided in section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped." The provisions of section 61 are not material to the question which arises in this case. The submission was, in my judgment, admitted in evidence by the arbitrators, and having been admitted in evidence by the arbitrators, it was not open to either of the parties to call in question such admission in the arbitration proceedings on the ground that the submission had not been duly stamped. The award, therefore, which was made upon the submission, was, in my judgment, a valid award. It was filed in accordance with the provisions of the Arbitration Act. In my judgment it is not now open to the plaintiffs who are parties to the submission, and who thereby agreed to the matter being referred to the arbitration

of the two arbitrators and who raised no objection to the agreement containing the submission being admitted in evidence, to rely upon the fact that the submission bore no stamp, for the purpose of showing that the award was invalid. It has to be remembered that the provisions in the Stamp Act were passed for the purpose of protecting the revenue and, in my judgment, the words, which have been relied upon by the learned Advocate-General of section 35, under the circumstances of this case and having regard to the proviso of section 35 and the terms of section 36 of the Stamp Act, have not the effect of rendering the award invalid.

For these reasons in my judgment the learned Judge's decision should be upheld and this appeal should be dismissed with costs.

Richardson, J.—I agree. The submission to arbitration (perfectly good submission under the Indian Arbitration Act, 1899) was chargeable under the Indian Stamp Act, 1899, with a duty of eight annas and should have been stamped accordingly. It bore no stamp. Nevertheless it was received and acted upon by the arbitrators. Apparently, their attention was not drawn to the point. They made their award. The awad was filed in Court and became enforceable as a decree under section 15 of the Arbitration Act.

The learned Advocate-General has contended that the submission was invalid because it was not duly stamped. He argues that the proceedings founded on the submission are thereby rendered wholly void and of no effect and that the plaintiffs are entitled to succeed in this suit on that ground alone.

To my mind, however, the terms of section 36 of the Stamp Act are sufficient to show, that no such inconvenient result is entailed and that the want of a stamp did not go to the jurisdiction of the arbitrator to make an award.

A failure to comply with the Stamp Act may doubtless entail a penalty under that Act. The nature and extent of any such penalty must depend on the relevant provisions according to their true construction. Speaking generally, however, the object of the Legislature appears to have been to secure the public revenue so far as it is reasonably practicable to do so, and *prima facie* it would seem highly reasonable that the whole of possibly expensive proceedings should be vitiated and thrown away by the want, as in this case, of an eight anna stamp.

The learned Advocate-General relies on the imperative language of section 35. If that section stood alone, there might be more force in the argument addressed to us but section 35 must be read with section 36.

Section 35 seems to be based upon the assumption that every "person having by law or consent of parties authority to receive evidence" knows the law and will apply it. On that assumption, such person is given no discretion. He is not to admit in evidence for any purpose or to act upon any instrument chargeable with duty, unless such instrument is duly stamped. That prohibition is subject to certain provisos, among which is proviso (*a*). Under that proviso, if the duty is paid, together with the prescribed penalty, the instrument is to be admitted "subject to all just exceptions." I am not very clear as to the meaning of these last words but nothing turns upon them in the present connection.

In the present case, if the arbitrators had known the law and had insisted, as they should have done, on the duty and penalty being paid, nothing could have been said and all would have been well. The deficiency in the document would have been cured.

But while proviso (*a*) affords an easy escape from the consequences of the prohibition in the first part of section 35, the prohibition is nonetheless on that account definite and positive. An imperative duty is apparently imposed on those who have authority to receive evidence, and if section 35 stood by itself, there might well be a question what the result would be if the duty were not observed. At this point, however, the effect of section 36 has to be considered.

The Legislature, as I understand the matter, did not forget that those who have authority to receive evidence might sometimes be ignorant of, or inattentive to, the requirements of the Stamp Law, or

that difficult and doubtful questions might arise as to the amount of duty chargeable. Such cases are met by section 36, under which "where an instrument has been admitted in evidence"—that is where the instrument has been admitted in fact, whether in total or partial neglect of the provisions of section 35—"such admission shall not, except as provided in section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped."

Under that provision if any penalty is to be exacted, it can only be exacted under section 61. The revenue is then protected, so far as it is protected by that section.

In my opinion, once an instrument is admitted in evidence in any proceeding, either under section 35 or under section 36, it is available in that proceeding for all purposes as if it had been properly stamped from the outset. The proceeding will go through to a valid termination and cannot afterwards be challenged for want of jurisdiction merely by reason of non-compliance with the Stamp Act.

Section 36 would be entirely nullified if on the conclusion of the proceeding in which the instrument is admitted, the proceeding could be set aside by a separate proceeding initiated by one of the parties on the sole ground that the person having authority to receive evidence had admitted or acted upon an unstamped or insufficiently stamped instrument.

Reading sections 35 and 36 together and with the other provisions in Chapter IV of the Act, under the heading "Instruments not duly stamped," I come to the conclusion that the Legislature did not intend that the admission of an instrument not duly stamped should go to the jurisdiction of the Judge or other person admitting it. To my mind the language of the Act, fairly interpreted, does not lead to that result but indicates the contrary. The revenue from stamps is sufficiently protected in other ways.

In the present suit, the learned Judge acted under section 35, proviso (*a*) and by his direction the plaintiff paid the prescribed penalty. The present suit cannot, I think, be regarded as a subsequent stage of the proceeding before the arbitrators, but it is not necessary now to consider whether the learned Judge was right in acting under section 35, or whether if so, he was right in making the plaintiff pay the penalty. If the section applies, possibly the defendant who relied on the submission should have paid the penalty rather than the plaintiff who seeks to set aside the arbitration. It is not in the view I take necessary to decide any such question or to consider whether there is any other provision in the Act under which the learned Judge might more appropriately have proceeded.

Assuming, however, that the learned Judge was at liberty to deal with the document as he did under section 35 (*a*) then without deciding the point I should be disposed to say that the document, having been admitted in the proceeding before him, could not be challenged in that proceeding for want of the proper stamp and for the purpose of that proceeding would fall to be treated as if it had been duly stamped from the outset. This, if correct, would be an additional reason why the appeal should fail.

I agree that the appeal should be dismissed with costs.

Appeal dismissed.

N. M.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 232 OF 1921.
July 18, 1922.

Present:—Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K. Mullick, KT.

MANBODH MISSIR—PLAINTIFF—APPELLANT

versus

BHAIRO MISSIR AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V 1908), O. VII, rr. 14, 18, O. XIII, r. 1—Documents which must

MANBODH MISSR v. BHAIRO MISSIR.

be produced at first hearing—Documents produced in answer to case set up by defendant, admissibility of.

Documents which must be produced by a plaintiff at the first hearing under O. XIII, r. 1, of the Civil Procedure Code, are all documents in the possession and power of the plaintiff on which he intends to rely and which have not already been filed in Court and all documents which the Court has ordered to be produced. The documents upon which he intends to rely must refer back to O. VII, r. 14 (2) of the Code which refers to the case where the plaintiff relies upon other documents than those mentioned in the first clause as evidence in support of his claim. Those documents which are already put in the list must be produced at the first hearing if they have not already been filed in Court and in addition all documents must also be produced which the Court has ordered the parties to produce at that time. [p. 851, col. 1.]

Documents produced by the plaintiff in answer to a case set up by the defendant fall, however, within clause (2) of r. 18 of O. VII of the Code, and need not have been entered in the list attached to the plaint, nor is it necessary to obtain leave of the Court in order that they might be received in evidence. [p. 851, col. 1.]

Appeal against the decision of the Sub-Judge, Shahabad, dated the 19th August 1920.

Messrs. *P. Lal, B. C. Sinha* and *Sunder Lal*, for the Appellant.

Messrs. *P. C. Rai* and *B. N. Mitter*, for the Respondents.

JUDGMENT.

Miller, C. J.—This is an appeal on behalf of the plaintiff from a decision of the Subordinate Judge of Shahabad, dated the 19th August 1920. The suit was instituted by the plaintiff against four defendants claiming that, as the next reversioner of the deceased husband of the defendant No. 4 he was entitled to a declaration that certain dispositions of the property of her husband made by the fourth defendant of which she was entitled to possession taking the interest of a Hindu widow, were not binding upon him as the reversioner, and were valid only during the lifetime of the fourth defendant. The plaint was filed on the 17th September 1917. No documents were filed with the plaint and no list of documents relied upon by the plaintiff in support of his case was attached to the plaint. On the 18th January 1918 the written statement of the defendent was filed and from that it appeared that the defendants were setting up a case that the plaintiff was not the nearest reversioner to the deceased husband of Sahodra, the defendant No. 4. To the plaint the plaintiff as part thereof had attached a genealogical tree showing that Mahesh, the husband of the fourth defendant was the son of Tirloke and the grandson of Juthan, Juthan being the great grand-father of the plaintiff. In the written statement it was admitted that Mahesh was the son of Tirloke but it was alleged that Tirloke was not the son of Juthan, the plaintiff's great grand-father, but the son of Basti, the brother of Juthan, and if that case could be made out, it would appear that the plaintiff was not the next reversioner to Mahesh after the death of Sahodra, his widow. On the day when the written statement was filed an order was made by the Munsif to put the case on the 29th January 1918 for settlement of issues and on that day the issues were settled and the hearing was fixed for the 6th March following. An order was also made at the same time that the parties were to file documents within two weeks. It is clear, therefore that the learned Munsif treated the day fixed for the hearing of issues as the first hearing of the suit and gave the parties two weeks' further time to file their documents. One point has been raised before us in this appeal as to whether where a day has been fixed for the settlement of issues only, and the issues are settled upon that day and nothing further done, that day can be considered as the first hearing of the suit. In the view we take of this case, howevere, it is unnecessary to decide that point. On the 6th March 1918, the day which had been fixed for hearing, certain documents were filed by the plaintiff. The hearing, however, did not take place on that day, it was adjourned from time to time, and in fact the case came on on the 12th May 1919.

At the trial the plaintiff's Pleader tendered for the purposes of having them proved the documents which he had filed on the 6th March 1918. These documents were rent receipts over 30 years old granted by the Court of Wards to Tirloke, the persen whose parentage was called in question in the suit by the defendants. The rent receipts which bear

the seal of the Court of Wards and purport to bear the signature of the Manager at that time described Tirloke as the son of Juthan, as the plaintiff contends, and not as the son of Basti which is the defendants' case.

The learned Munsif refused to allow these receipts to be proved on the ground that the parties were directed to file their evidence within two weeks of the 29th January 1918 when the issues were framed and the documents had not in fact been filed until the 6th March, the day fixed for the further hearing after the issues were settled. He did not consider at all what grounds there might have been for not having filed these documents earlier nor did he consider whether the documents were of such a nature that they might be forgeries, nor did he take into consideration any other question except the fact that they had been filed late and, therefore, on the defendants' objection they were not allowed to be proved in evidence.

The learned Munsif having decided the case against the plaintiffs an appeal went to the Subordinate Judge. The Subordinate Judge who only had oral evidence before him on the question of Tirloke's parentage said that on going through the oral evidence on both sides he did not find much to choose between them but in the end he agreed with the Munsif and he dismissed the appeal.

The only question which has been argued before us in this appeal is that the Munsif and the Subordinate Judge were wrong in refusing to admit this evidence. It is contended on behalf of the respondents that the documents in question were documents which, under the provisions of O. VII, r. 14 of the Civil Procedure Code, the plaintiff intended to rely upon as evidence in support of his claim, and, as such, ought to have been entered in a list annexed to the plaint and, unless that was done, they could not, under the provisions of rule 18 of the same Order, be afterwards received in evidence without the leave of the Court. It is contended on behalf of the Appellant, on the other hand, that by clause (2) of r. 18 of O. VII nothing in the rule applies to documents produced for cross-examination of the defendants' witnesses or in answer to any case set up by the defendants or handed to a witness merely to refresh his memroy. It is not contended that the documents came within the last category, *viz.*, those which might be handed to a witness merely to refresh his memory but it is contended that they were documents of such a character that they might be used for cross-examination of the defendants' witnesses or, if not, that certainly they were documents which were to be used in answer to a case set up by the defendants. If in fact they were documents of that description then it follows that the plaintiff was not under any obligation to enter such documents in a list and add the list to his plaint. In such a case the learned Munsif would be wrong in excluding the documents merely because they had not been entered in the list attached to the plaint originally. It is further contended that however that may be under O. XIII, r. 1, whether the documents were of the nature described or not, they ought to have been produced at the first hearing of the suit and not having been produced on that occasion the Court was perfectly justified in refusing them subsequently. As I have already said they were in fact produced on the 6th March, the issues having been settled in the previous January, and if the 6th March can be properly described as the first hearing then they were produced in time It is unnecessary, however, as I have already said, to determine that question because, in my opinion, the documents in the present case were documents of the description mentioned in the second clause of r. 18 of O. VII, that is, documents produced in answer to a case set up by the defendants. When the plaint was filed the plaintiff no doubt was setting up a case that he and Mahesh were respectively the great grand-son and grand-son of the same person and, therefore, he, in the circumstances, was the next reversioner and entitled to sue, but he did not know at that time, at all events there is nothing to suggest that he knew, that the defendants would dispute the parentage of Tirloke, the father of Mahesh and until that case was set up there appears to have been no reason why the plaintiff should rely upon the particular

documents in question in support of his case. He did not know the point at which the defendants would attack or which link in the chain of the genealogical tree the defendants might consider the weakest and up to that time it was not necessary for the plaintiff to produce any documents in support of the accuracy of the genealogical table upon which he was relying and, therefore, it appears to me that there was no necessity at the date of the plaint for him to enter the particular documents in the list and file them with the plaint. Once however the written statement was filed the case became different. A case was then set up by the defendants attacking the genealogical tree, which so far as we know, up to that time he had no reason to suspect was going to be attacked and it was then and then only that the necessity for producing these rent receipts, which went to show that the point taken by the defendants was not accurate, arose. It seems to me, in these circumstances, that the documents were clearly documents produced in answer to a case set up by the defendants within the second clause of r. 18 of O. VII and, therefore, it was not necessary to obtain the leave of the Court in order that they might be received in evidence. With regard to O. XIII, r. I, here again the documents which must be produced at the first hearing, assuming in this case that the first hearing was the date upon which the issues were settled, are described as all documentary evidence of every description in their possession and power on which they intend to rely and which has not already been filed in Court and all documents which the Court has ordered to be produced. The documents upon which they intend to rely must, I think, so far as the plaintiff is concerned, refer back to O. VII, r. 14, clause (2) which refers to the case where the plaintiff relies upon other documents than those mentioned in the first clause as evidence in support of his claim. Those documents which are already put in the list must be produced at the first hearing if they have not already been filed in Court and in addition all the documents must also be produced which the Court has ordered the parties to produce at that time. In my opinion, therefore, the learned Munsif was wrong in the circumstances of this case in not allowing the plaintiff an opportunity of proving the documents at the trial. The judgment and decree of the Munsif and of the Subordinate Judge will be set aside, the case will be remanded to the Trial Court to determine the issues after admitting the evidence if properly proved and considering it along with the other evidence in the case. The defendants will be allowed at the hearing to give any rebutting evidence that they may have to disprove the fact stated in the documents now in question. The costs of this appeal will abide the final result of the trial.

Mullick, J.—I agree.

Case remanded.

Z. K.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 105 OF 1920.

August 13, 1923.

Present:—Mr. Justice Das and Mr. Justice Macpherson.

JAGDISHWAR NARAYAN—DEFENDANT FIRST PARTY—APPELLANT

versus

MUHAMMAD HAZIQ HUSSAIN AND OTHERS—PLAINTIFFS AND *Saiyed* MUHAMMAD ABDUL AZIZ AND OTHERS—DEFENDANTS SECOND PARTY—RESPONDENTS.

Bengal Land Revenue Sales Act (XI of 1859).

JAGDISHWAR NARAYAN v. MUHAMMAD HAZIQ HUSSAIN.

ss. 2, 3, 6, 33—Estate, when can be put up for sale —Collector, duty of—Suit to set aside revenue sale —Plaintiff, what must show—Grounds not taken before Commissioner, whether can be urged in suit— Jurisdiction, meaning of—Existence and exercise of jurisdiction, distinction between.

Under sections 2 and 3 of the Bengal Land Revenue Sales Act a Collector has no power to put up an estate for sale unless there is an arrear of revenue in respect of that estate and unless the latest date of payment fixed by the Board of Revenue has expired and the default has not been made good. [p. 854, col. 1.]

Whenever a person seeks to have a revenue sale set aside on the ground that there was no authority in the Collector to sell an estate, having regard to the fact that the latest date fixed for payment by the Board of Revenue had not expired at the date when the property was put up for sale, he should, in order to enable the Court to decide the point, give the dates of the revenue *kists* according to the original settlement and *kistbandi*. [p. 854, col. 2.]

A sale is a sale made under the Bengal Land Revenue Sales Act, within the meaning of that Act, when it is a sale for arrears of Government Revenue, held by the Collector or other officer authorised to hold sales under the Act, although it may be contrary to the provisions of the Act either by reason of some irregularity in publishing or conducting the sale, or in consequence of some express provision for exemption having been directly contravened. [p. 855, col. 2.]

When the validity of a sale for arrears of revenue is impeached it is of the utmost importance that all questions arising in connection therewith, should be determined speedily, and when the sale has once been confirmed by the Commissioner, the purchaser should not be exposed to the danger of having his sale set aside on new grounds. [p. 855, col. 2.]

Where a sale for arrears of revenue has been held contrary to the provisions of the Bengal Revenue Sales Act, section 33 of the Act would constitute a bar to a suit brought in a Civil Court to set aside the sale upon grounds of objection which were not declared and specified in an appeal to the Commissioner. [p. 855, col. 2; p. 856, col. 1.]

Gobind Lal Roy v. *Ramjanam Misser*, 21 C. 70; 20 I. A. 165; 17 Ind. Jur. 536; 6 Sar. P. C. J. 356; 10 Ind. Dec. (N. S.) 679 (P. C.), followed.

Jurisdiction, in relation to the proceedings of a Court, means the authority of a Court to decide a particular cause or matter. Where the authority exists, the proceedings are binding on the parties until set aside by some process known to the law. They cannot be set aside or disregarded in a collateral proceeding. [p. 858, col. 1.]

There is a fundamental distinction between existence of jurisdiction and exercise of jurisdiction. Those proceedings only can be declared null and void and, therefore, disregarded which have been conducted by a Court not having an authority to conduct them; but where the complaint is as to the mode in which the jurisdiction has been exercised, the appropriate procedure provided for the removal of the grievance must be pursued if the complainant is to have any remedy for the injury done or supposed to be done to him. [p. 858, cols. 1 & 2.]

Appeal from a decision of the Subordinate Judge, Monghyr, dated the 31st January 1920.

Messrs. *P. N. Sinha* and *N. C. Ghosh*, for the Appellant.

Messrs. *S. M. Niamatullah*, *Jagannath Prasad* and *M. S. Das*, for the Respondents.

JUDGMENT.

Das, J.—This was a suit by the plaintiffs-respondents for setting aside a revenue sale held on the 24th September 1917. The facts are these. An estate known as Chak Maharuddin Khatik is recorded as No. 3309 on the *Touzi* of the Collectorate of Monghyr with a Government revenue of Rs. 129-13-0. There is no dispute before us that certain separate accounts were opened in respect of shares in this estate, and that, after excluding the shares for which separate accounts had been opened, the residue of the estate bore a *sudder jama* of Rs. 80-9-0. I ought to mention that it was alleged by the plaintiffs in their plaint that the *sudder jama* of the *ijmali* share should have been stated to be Rs. 79-6-0 and that the figure, Rs. 80-9-0, was arrived at by a wrong calculation. This position has been abandoned before us and we must take it as admitted that the residue of the estate bore a *sudder jama* of Rs. 80-9-0. On the 5th August 1917 the residuary share was advertised for sale "for arrears of revenue and other demands which by law are realisable as arrears of land revenue." The sale took place, as I have mentioned, on the 24th September 1917, and at that sale defendant No. 1, the appellant before us, became the purchaser of the share. The plaintiffs who are interested in the residuary share preferred an appeal to the Commissioner of Revenue under section 2 of Act VII of 1868. They alleged various grounds of objection, all

of which are now admitted to be wholly untenable. The appeal was rejected, and the suit, out of which this appeal arises, was thereupon instituted by the plaintiffs. The grounds of objection to the sale urged by the plaintiffs in their plaint are as follows :—

(1) The *sudder jama* of the residuary share being Rs. 79-6-0 there was no arrear of land revenue for which the residuary share could have been put up for sale. It may be mentioned that the arrear to recover which the property was sold was stated in the sale notification to be Rs. 1-11-9.

(2) Notice was not served according to the provisions of section 6 of Act XI of 1859.

(3) The name of the *mahal* and the details of the revenue in arrear were wrongly entered in the notice.

(4) Notice as provided by section 7 of Act XI of 1859 was not served.

(5) The sale was liable to be set aside on the ground that the father of defendant No. 1 who was a co-sharer and whose duty it was to pay the Government revenue, deliberately defaulted in doing so in order to enable him to purchase the share and he did purchase the share in the name of his son, defendant No. 1.

(6) The share was sold at a gross undervalue and the plaintiffs have sustained substantial injury by reason of the irregularities complained of.

The learned Subordinate Judge, who heard the case at the first instace, had no difficulty whatever in rejecting each and every ground set forth as a ground of attack in the plaint; and in this Court no attempt has been made to impugn the correctness of the decision of the learned Subordinate Judge on these points. But while deciding against the plaintiffs on each and every point raised by them in their plaint, the learned Subordinate Judge has set aside the sale on two grounds; first, on the ground that there was no arrear of revenue for which the sale could be held on the 24th September 1917, and, secondly, on the ground that "the entire residuary share was neither described in the notice under section 6 nor sold at the revenue sale on the 24th September 1917" and that, as the Collector had no jurisdiction to split up the unit in arrear and to offer for sale something less than that unit, the whole sale was without jurisdiction and should be set aside.

So far as the first question is concerned, I am unable to agree with the decision of the learned Subordinate Judge. The process of reasoning employed by the learned Subordinate Judge is as follows: the share in question was sold to recover the arrears in respect of the June *kist* but, so it is argued by the learned Subordinate Judge, if the *kist* or instalment was payable in June the revenue remaining unpaid could not be considered an arrear of revenue until the 1st of July. Now the Government revenue becoming an arrear on the 1st July 1917 was not payable under the rules framed by the Board of Revenue until the 28th of September, and, that being so, the share could not be sold on the 24th September 1917. The argument assumes that the term "June *kist*" as employed by the Board of Revenue means the *kist* payable in June according to the original settlement and *kistbandi* of the *mahal*. Exhibit B, the copy of Touji Ledger, shows that the Government revenue is payable in four *kists* in the following manner :—

First *kist*, Rs. 14-15-0 payable on the 7th June every year.

Second *kist*, Rs. 20-1-0 payable on the 28th September every year.

Third *kist* Rs. 20-2-0 payable on the 12th January every year.

Fourth *kist*, Rs. 24-15-0 payable on the 28th March every year.

There is no dispute before us that the share in question was sold to recover an arrear payable on the 7th June 1917 and the whole question before us is whether the term "June *kist*" means the revenue *kist* payable in June according to the original settlement and *kistbandi* of the *mahal* under section 2 of Act XI of 1859, or whether it means the *kist* of which the latest date for payment under section 3 of the same Act is the 7th June. The argument before us assumes that the dates for payment of the Government

revenue according to the original settlement and *kistbandi* of the *mahal* under section 2 of the Act are 7th June, 28th September, 12th January and 28th March respectively; and it is indeed remarkable that these are the dates fixed as the latest dates for payment under section 3 of the Act. There is no difficulty in understanding the scheme of the Bengal Land Revenue Sales Act, 1859. Section 2 defines an "arrear of revenue" and provides that Government revenue does not become an arrear until the month following that on which, according to the original settlement and *kistbandi*, the Government Revenue is payable. It provides, in other words, that if the Government revenue is payable in June according to the original settlement and *kistbandi* of the *mahal* it does not become an arrear of revenue until the 1st of July. Section 3 gives power to the Board of Revenue to determine upon what dates all arrears of revenue and all demands which by the Regulations and Acts in force are directed to be realized in the same manner as arrears of revenue, shall be paid up in each district under their jurisdiction, in default of which payment the estates in arrear in those districts shall be sold at public-auction to the highest bidder. A perusal of sections 2 and 3 makes it perfectly clear that the Collector should not put up an estate for sale unless there is an arrear of revenue in respect of that estate and unless the latest date of payment fixed by the Board of Revenue has expired and the default has not been made good. There is no dispute before us that the Board of Revenue under the jurisdiction conferred on it by section 3 of the Act has fixed the 7th June, 28th September, 12th January and 28th March respectively as the latest dates for payment under section 3 of the Act. It is, in my opinion, quite impossible to take the view that the 7th June which is the latest date fixed for payment by the Board of Revenue under section 3 of the Act, is also the date upon which the *kist* or instalment was payable for June according to the original settlement and *kistbandi* of the *mahal*. The coincidence, in my opinion, would be a remarkable one if the arguments advanced on behalf of the plaintiffs are to be accepted. According to them the dates of payment according to the original settlement and *kistbandi* of the *mahal* under section 2 of the Act are identical with the latest dates of payment fixed by the Board of Revenue under section 3 of the Act. There is, however, no evidence before us in what manner the Government revenue was payable in respect of this estate under the original settlement and *kistbandi* of the *mahal*. It is certainly remarkable that the plaintiffs should not have alleged in their plaint that the 7th June was the date fixed for payment according to the original settlement and *kistbandi*; it is still more remarkable that they have not alleged that the Government revenue was not in arrear until the 1st of July and that the estate could not be sold until after the 28th of September. That was not the ground specified by them in their appeal to the Commissioner and I find it quite impossible to support the judgment of the learned Subordinate Judge on this point. Whenever a person seeks to have a revenue sale set aside on the ground that there was no authority in the Collector to sell an estate having regard to the fact that the latest date fixed for payment by the Board of Revenue had not expired at the date when the property was put up for sale, he should, in order to enable the Court to decide the point, give the dates of the revenue *kists* according to the original settlement and *kistbandi*. In my opinion, the learned Subordinate Judge has fallen into this error that he has regarded the revenue *kist* as falling due on the 7th June whereas the fact is that the 7th June is the latest date for payment of previous arrears. That being so, the Collector had complete jurisdiction to sell the property on the 24th September.

Assuming that I am wrong in the view which I have taken, the further question which arises is, has the Court any power to set aside the sale on the ground that the Collector should not have put up the property for sale on the 24th September? Section 33 of the Act provides as follows: "No sale for

arrears of revenue or other demands realizable in the same manner as arrears of revenue are realizable, made after the passing of this Act, shall be annulled by a Court of Justice, except upon the ground of its having been made contrary to the provisions of this Act, and then only on proof that the plaintiff has sustained substantial injury by reason of the irregularity complained of; and no such sale shall be annulled upon such ground, unless such ground shall have been declared and specified in an appeal made to the Commissioner under section 25 of this Act; and no suit to annul a sale made under this Act shall be received by any Court of Justice, unless it shall be instituted within one year from the date of the sale becoming final and conclusive as provided in section 27 of this Act: and no person shall be entitled to contest the legality of a sale after having received any portion of the purchase-money.

"Provided, however, that nothing in this Act contained shall be construed to debar any person considering himself wronged by any act or omission connected with a sale under this Act from his remedy in a personal action for damages against the person by whose act or omission he considers himself to have been wronged." It may be assumed that the act of the Collector in putting up the property for sale on the 24th September was contrary to the provisions of the Act; but if it was, there is a complete procedure indicated in section 30 which the plaintiffs should have followed before seeking their redress in the Civil Court. There was a considerable divergence of opinion on the question whether section 33 barred a suit in the Civil Court where the act of the Collector amounted not only to an irregularity but to an illegality. It seems to me that that question has been conclusively determined by the Judicial Committee in the case of *Gobind Lal Roy* v. *Ramjanam Misser* (1). Section 17 of the Act declares that "no estate held under attachment by the Revenue Authorities otherwise than by order of a judicial authority shall be liable to sale for arrears accruing whilst it was so held under attachment." In the case before their Lordships of the Judicial Committee the estate was sold for arrears which accrued while it was subject to an order issued by the Collector under the Cess Act of 1880 for the levy of Road Cess in arrear. The order under the Cess Act of 1880 forbade the payment of rent to any person but the Collector until the amount due for Road Cess was satisfied and their Lordships had no difficulty in coming to the conclusion that the order issued by the Collector under the Cess Act was an attachment both in form and in substance and an attachment within the letter and meaning of section 17 of Act XI of 1859. That being so, their Lordships had no difficulty in holding that the Government sale was contrary to the provisions of section 17 and that the sale was wholly illegal. Having come to that conclusion their Lordships had to consider whether section 33 of the Act was a bar to the suit which had been instituted by the aggrieved party for setting aside the sale, and they expressed their opinion in the following words:—"having regard to the scheme of the Act and the express direction contained in section 33, we are of opinion that in every case where a sale for arrears of revenue is impeached as being 'contrary to the provisions' of Act XI of 1859, no grounds of objection are open to the plaintiff which have not been declared and specified in an appeal to the Commissioner" and their Lordships continued as follows:—"In the opinion of their Lordships a sale is a sale made under the Act XI of 1859 within the meaning of that Act, when it is a sale for arrears of Government revenue, held by the Collector or other officer authorized to hold sales under the Act, although it may be contrary to the provisions of the Act either by reason of some irregularity in publishing or conducting the sale, or in consequence of some express provision for exemption having been directly

(1) 21 C. 70; 20 I. A. 165; 17 Ind. Jur. 536; 6 Sar. P. C. J. 356; 10 Ind. Dec. (N. S.) 670 (P. C.).

contravened" and their Lordships concluded with the following pregnant observations:—

"Their Lordships desire to add that in their opinion it would have been most unfortunate if they had been compelled to adopt the construction placed upon the Act by the Courts in India. Sales for arrears of revenue are of constant occurrence; anything which impairs the security of purchasers at those sales tends to lower the price of the estate put up for sale. It is, therefore, of the utmost importance in the interest of the revenue paying population of India that all questions that can arise as to the validity of a sale for arrears of revenue should be determined speedily, and that when the sale has once been confirmed by the Commissioner, the purchaser should not be exposed to the danger of having his sale set aside on new grounds." That was a sale held in direct contravention of the provisions of section 17 of the Act. The utmost that can be urged in this case is that the sale is in direct contravention of the provisions of sections 3 and 6 of the Act. In my opinion, the utmost that can be said is that the sale has been held contrary to the provisions of the Act. That being so, section 33, in my opinion, constitutes a bar to the suit inasmuch as the objection was not declared and specified in the appeal made to the Commissioner.

The other question upon which the learned Subordinate Judge has set aside the sale is of considerable difficulty and is, in my opinion, concluded by the decision of the Full Bench of this Court in the case of *Mahant Krishna Dayal Gir* v. *Syed Abdul Gaffur* (2). The learned Subordinate Judge was quite right in following the decision and as that decision is binding on us in this Court, we must hold that the sale was liable to be set aside on the ground urged by the plaintiffs before the learned Subordinate Judge though neither declared or specified in the appeal to the Commissioner, nor taken in the plaint filed in this suit. But it has been argued before us that the case of *Mahant Krishna Dayal Gir* v. *Syed Abdul Gaffur* (2) was wrongly decided and as we were asked to invite the Full Court to consider the correctness of that decision, I think that it is my duty to express my opinion on that case. I have dealt with the whole question in an order of reference which I have prepared for the learned Chief Justice under Chapter V, rule 6 of the Rules of this Court and all that I need do is to make that order a part of this judgment.* The learned Chief Justice has declined to appoint a Special Bench to re-consider the decision of the Full Bench on the ground that as this case is likely to go to the Privy Council it is unnecessary to put the parties to the costs of a second hearing before a Special Bench of this Court. Speaking with the utmost deference, I think that it was for the Court as a whole and not for the learned Chief Justice to decide whether a particular Full Bench decision should be considered by this Court in a Bench specially constituted for that purpose. Rule 1, Chapter 5, of the Rules of this Court deals with a reference to a Full Bench and gives complete power to the learned Chief Justice to decide whether any case should be referred to a Full Bench where a Division Bench does not differ from another Divisional Bench upon a point of law or usage having the force of law, but desires that the case should be referred to a Full Bench. Rule 6 deals with a reference to the Special Bench and runs as follows:— "Every decision of a Full Bench shall be treated as binding on all Division Benches and Judges sitting singly, upon the point of law or usage having the force of law determined by the Full Bench, unless it is subsequently reversed by a Bench, specially constituted, consisting of such number of Judges as in each case shall be fixed by the Court, or unless a contrary rule is laid down by the Judicial Committee of the Privy

(2) 40 Ind. Cas. 13; 2 P. L. J. 402; 2 P. L. W. 289.

*His Lordship did not make the actual order of reference a part of the judgment, but he has incorporated the substance of that order in it.—[*Ed.*].

Council." It will be noticed that the rule does not say how the decision of a Full Bench should come before a Bench specially constituted for the purpose. But it does give the power to Court, and not to the learned Chief Justice, to determine the question as to the number of Judges that should constitute a Special Bench. It is, in my opinion, only right and proper that the Court as a whole should express an opinion whether it ought to re-consider the decision of a Full Bench. The learned Chief Justice having declined to refer the matter to a Special Bench, I must hold that I am conclusively bound by the decision of the Full Bench in the case referred to; but I propose to give my reasons for suggesting, with all respect, that the decision of the majority of the Judges in that case is not correct and that the opinion of Chapman, J., who was in the minority should have prevailed. The facts necessary to remember for the determination of the point are these: The residuary share consists of 158 *bighas* 5 *kanals* 10 *dhurs* of land in eleven different *moujas*, including 2 *bighas* 15 *cuttahs* 12 *dhurs* in *mouza* Salempur Khadadad. The sale Notification under sections 6 and 13 of Act XI of 1859 correctly stated the *touji* number of the estate, the *sudder jamma* of the whole estate, and the *sudder jamma* of the residuary share put up for sale; and it described the property to be sold as follows: "The shares have been noted in the reverse. No share other than the *ijmali* share specified herein shall be sold." "The shares noted in the reverse" give the total area included in the residuary share as 156 *bighas* 7 *cuttahs* 17 *dhurs*; and it is admitted that the description is correct in every particular, except as to *mouzah* Salimpur Khadadad, the area in which *mouzah* is erroneously stated to be 17 *cuttahs* 19 *dhurs*, whereas it actually was 2 *bighas* 15 *cuttahs* 12 *dhurs*. It will be noticed that an area of 1 *bigha* 17 *cuttahs* 13 *dhurs* was left out of the sale Notification out of the total area of 158 *bighas* 5 *cuttahs* 10 *dhurs* included in the residuary share.

Although Mr. Purnendu Narain Sinha on behalf of the appellant (the auction-purchaser) at first contended that the area of Salempur Khadadad included in the residuary share was correctly stated in the sale Notification, he ultimately accepted the finding of the learned Subordinate Judge on this point. It must follow, therefore, that the area in one of the villages was not properly described in the sale Notification. The question at once arises whether the misdescription affected the existence of the jurisdiction of the Collector to sell the share in question, or whether it merely affected the exercise of his jurisdiction. If the conclusion follows that there is an entire absence of jurisdiction in the Collector to sell a share unless he describes it correctly and with sufficient clearness, then I must hold that the sale was entirely void and did not operate to convey the share to the defendant No. 1. If, on the other hand, I am forced to the conclusion that the error on the part of the Collector did no more than affect the exercise of his jurisdiction, and not the existence of it, then it must follow that there was an irregularity in the conduct of the sale which will not entitle the Civil Court to set aside the sale unless the terms of section 33 of Act XI of 1859 have been complied with. I have cited that section in connection with the other question which I have discussed; and it will be noticed that the conditions which must be satisfied before a Civil Court will assume jurisdiction to annul a revenue sale are these; first, the Court must be satisfied that the sale was made contrary to the provisions of Act XI of 1859; secondly, there must be proof that the plaintiff has sustained substantial injury by reason of the irregularity complained of; thirdly, the ground of attack must have been declared and specified in an appeal to the Commissioner under section 2 of the Bengal Land Revenue Sales Act, 1868; and fourthly, the suit must be instituted within one year from the date of the sale becoming final and conclusive as provided in section 27.

It may be assumed in this case that the sale was made contrary to the provisions of Act XI of 1859, and it may also be assumed that the suit was

instituted within the time allowed by law. But there is no proof in this case that the plaintiffs have sustained substantial injury by reason of the irregularity complained of; and, what is more important, although the plaintiffs presented an appeal to the Commissioner under the provisions of section 2 of the Act of 1868, they did not in that appeal declare and specify the grounds upon which they have succeeded in the Court below. If it is relevant to enquire into the actual or assumed grievance on the part of the plaintiffs, it is certainly remarkable that it did not strike them to formulate their grievance in their appeal to the Commissioner nor to specify it in their plaint as a ground for annulling the sale. I think that it is abundantly clear that, if there was an irregularity on the part of the Collector, and not an entire absence of jurisdiction in the Collector to put up the share for sale, section 33 of Act XI of 1859 constitutes a complete bar to the maintainability of the suit.

I apprehend that there is no difference of opinion on this point. The difference of opinion arises with reference to the question whether the error committed by the Collector deprived him of the jurisdiction to put up the share for sale.

Now, whatever controversy there may have existed as to the meaning of the term 'jurisdiction,' I think that the recent Full Bench decision of our Court in the case of *Raj Kumar Mahton* v. *Ram Khelawan Singh* (3) has put the matter beyond doubt or speculation. Jurisdiction, in relation to the proceedings of a Court, means the authority of a Court to decide a particular cause or matter. Where the authority exists, the proceedings are binding on the parties until set aside by some process known to the law. They cannot be set aside or disregarded in a collateral proceeding. I think that there is a fundamental distinction between existence of jurisdiction and exercise of jurisdiction, and that those proceedings only can be declared null and void and, therefore, disregarded which have been conducted by a Court not having any authority to conduct them; but that, where the complaint is as to the mode in which the jurisdiction has been exercised, the appropriate procedure provided for the removal of the grievance must be pursued if the complainant is to have any remedy for the injury done or supposed to be done to him.

In my opinion, there was complete authority in the Collector to put up the residuary share for sale on the 24th September 1917. I hold, on the evidence, that there was an arrear of revenue within the meaning of that term as defined in section 2 of the Act of 1859, and that the latest date fixed by the Board of Revenue for the payment of the arrear had expired before the Collector issued the Notification for sale under section 6 of the Act. I further hold, on the evidence, that all the circumstances existed which entitled the Collector to put up the residuary share for sale on the 24th September 1917 in respect of an arrear of the so callad June *kist*, that is to say an arrear "the latest date of payment" of which was 7th June. That being so, what authority is there for suggesting that the sale was null and void and that the plaintiffs are entitled to recover their shares from the auction purchaser?

The argument is put on the terms of section 6 of the Act of 1859 which provides that the Collector shall issue notifications "specifying the estates or shares of estates which will be sold." The argument is this: it was not the intention of the Collector, so it was argued, to put up the residuary share as such for sale without any specification of the interests that made up the residuary share, but that it was his intention to sell the specific properties "noted in the reverse." and that, as the area for sale in one of the villages was stated to be 17 *cuttahs* 19 *dhurs* whereas its actual area within the residuary share was 2 *bighas* 15 *cuttahs* 12 *dhurs*, there was, first of all, no sale in respect of that which was not put up for sale, namely, the difference between 2 *bighas* 15 *cuttahs* 12 *dhurs* (the actual area of the residuary share of *mouzah* Salempur Khadadad) and 17 *cuttahs* 19 *dhurs* (the

(3) 64 Ind. Cas. 337 1 Pat. 901 (1922) Pat. 171 3 P. L. T. 80; (1922) A. I. R. (Pat.) 44.

area therein which was actually notified for sale) and secondly, the whole sale must be disregarded as null and void, as the Collector had no anthority to split up the unit in arrear and to offer for sale something less than that unit.

It may be conceded that the arguments advanced on behalf of the respondents are completely covered by the decision of the majority of the Judges in the Full Bench case of *Mahant Krishna Dyal Gir* v. *Syed Abdul Gaffur* (2). Now the decision of the Full Bench is based on the view that "if the notification under section 6 is not according to law, but, nevertheless a sale is held, the sale is void and a nullity for want of jurisdiction." No authorities are quoted in support of this proposition, and none have been cited in the arguments before us. We have investigated the matter for ourselves and have not been able to discover any authority in support of the proposition upon which the decision of the Full Bench rests. It seems to me that the issue of a Notification is an exercise of jurisdiction, and, however contrary to law that jurisdiction may have been exercised, the exercise of it in a manner not warranted by law could hardly have affected the existence of the jurisdiction to issue the sale Notification under section 6 of the Act and to put up the estate for sale. In my opinion, the argument is directly negatived by the terms of section 33 of the Act which provides an appropriate procedure for the removal of a grievance where the sale is made "contrary to the provisions of this Act," that is to say, Act XI of 1859.

The facts present in the Full Bench case were these. The residuary share of a revenue paying estate bearing *Touzi* No. 4601 was put up for sale under the provisions of Act XI of 1859. The residuary share included many villages including Khaira Khurd and Sao Khurd, in each of which the plaintiff had an eight annas share. The Notification under section 6 clearly mentioned that the residuary share having a *sudder jamma* of Rs. 685-11-0 was going to be sold; but the difficulty arose by reason of the fact that the Collector gave a list of 38 villages as constituting the residuary share; but omitted from the list the eight annas share of the plaintiff in Sao Khurd, and his five annas nine pies (out of eight annas) share in Khaira Khurd. The plaintiff appealed to the Commissioner out of time, and his appeal was, on that ground rejected by the Commissioner. The case was argued before the Full Bench on the footing that there was no appeal by the plaintiff to the Commissioner. The questions which were debated before the Full Bench were first, what was it that was actually put up for sale and in fact sold by the Collector; and secondly, if, what was sold was, not the residuary share as such, but the different villages which made up the residuary share, whether, having regard to the fact that the plaintiff's entire share in one village and portion of his share in another village were not included in the list, there was any jurisdiction in the Collector to split up the unit in arrear, as, in effect, he must have done, and to offer for sale something less than that unit. The first question turned upon the construction of the sale Notification. The learned Judges constituting the majority thought that there were two descriptions by which the estate was sold, first a general description, the description of the estate as a residuary estate, and secondly a description by the enumeration of the subject-matter to be conveyed, and they came to the conclusion that the latter description should prevail over the former, especially as the list of the *mouzas* contained in the notification was perfectly self-contained and clear, and the term, *'ijmal,'* used in the sale Notification was a relative term and was not a complete and a distinct description of a subject. They considered that the subject-matter described by the term, *'ijmal,'* was uncertain whereas the subject-matter described by the list of villages was definite and certain, and that, as the certain must prevail over the uncertain, the description of the subject-matter by the list of villages should be regarded as the leading description.

I am doubtful whether we are at liberty to apply cases of the English Courts on the construction of Wills and deeds to the construction of a sale Notification issued by the Collector under

statutory power. But the success of the whole argument must depend on whether the subject-matter described as *ijmal* or the residuary share is so uncertain as is supposed by the learned Judges constituting the majority in the Full Bench case. I am quite willing to conceded that the term residue or residuary share is a relative term and varies from time to time; for it means what is left after excluding from the whole certain specific shares as to which separate accounts have been opened. But I assert that it is perfectly definite and capable of ascertainment at a given point of time, as, for instance at the date of the issue of the sale Notification.

If the entirety is known and ascertained, and if the separate shares are knowable and ascertainable as, of course, they are, the residue is arrived at by excluding from the entirety the specific separate shares. Now there is a well-known maxim which says that that which is capable of being made certain is certain. How is it possible, then, to suggest that a residuary share is not just as definite and certain as Whiteacre or Blackacre? I am quite willing to concede that unless the residue is described in detail, it is impossible for the intending purchasers to know what is being advertised for sale; and there is such manifest injustice in such a case that provided the appropriate procedure pointed out in the Act is adopted, the Court will subject to the other provisions of the Act, set aside the sale. But the sale will be set aside, not because the estate could not be sold as a residuary estate, but because there is obvious prejudice to the interest of the defaulting proprietor. It is one thing to say that a residuary share as such can under no circumstances be sold; it is another and a different thing to say that a sale of a residuary share as such without specification of what it consists of is an irregularity and will be set aside by the Court, provided the plaintiff establishes that he has sustained substantial injury by reason of such irregularity, and provided he has followed the appropriate procedure indicated in section 33 of the Act. I am of opinion that, at any given point of time, the residuary share is a perfectly definite and a certain subject and is capable of being sold as a definite and certain subject, though doubtless a sale of a residuary share as such without specification of what it consists of is liable to be set aside in the circumstances mentioned in section 33 of the Act.

In regard to the other description, namely, the description by the list of villages, it was confessedly inaccurate; and we know of no authority of the English Courts which allows a confessedly inaccurate description to be regarded as a leading description. In my opinion, the subject-matter described as *'ijmal'* was certain and definite, on the principle that that which is capable of being rendered certain and definite is in fact certain and definite, whereas the subject matter described by the list of the villages was admittedly inaccurate and incorrect. That being so, the description of the subject-matter by the term *'ijmal'* should have been regarded by the learned Judges as the leading description, especially, as the consequence of accepting the other description as the leading description was that the learned Judges were compelled to hold that the entire transaction was null and void. Cases are not wanting where the Courts have had to consider which of the two descriptions by which properties have been conveyed should be regarded as the leading description. These cases are not easy to reconcile and are hardly of any assistance in construing a sale Notification under section 6 of the Act. But, if the English cases are to be referred to; it is necessary to point out that it is always the anxious endeavour of the Courts of Law to uphold a transaction rather than to disregard it as null and void; and that, for this reason, where the words used are capable of two constructions, such construction is adopted as tends to uphold the deed. "A deed shall never be void where the words may be applied to any intent to make it good." I know of no cases where a description has been deliberately adopted as a leading description, and then the transac-

tion evidenced by the deed has been wholly disregarded as null and void.

In my opinion, the decision of the Privy Council in the case of *Ravaneshwar Prasad Singh* v. *Baijnath Ram Goenka* (4) impliedly negatives the view of Mullick and Atkinson, JJ., in the Full Bench case. That was a case where an *ijmal* share was put up for sale, but the sale Notification distinctly stated that the *ijmal* share could not be specified. That case was much stronger from the point of view of the defaulting proprietor than the case before the Full Bench; and, if the point was rightly decided by the Full Bench, the Privy Council should have held that the sale was a nullity and that it did not operate to convey the residuary share to the auction-purchaser. But that was not the view of the Judicial Committee. Their Lordships certainly set aside the sale, but only on the ground that the requirements of the law had not been complied with and that the plaintiffs, by reason of the *irregularity* had sustained substantial injury. That was a case in which the plaintiffs proceeded under the Act itself and adopted the procedure indicated in section 33 of the Act; and it is worthy of note that their Lordships examined the evidence to see whether the plaintiffs had sustained substantial injury by reason of the fact of the Collector putting up the residuary estate for sale without any specification whatever, an act which they deliberately described as an 'irregularity.'

In my opinion, the question was correctly decided by Chapman, J.

The next question is whether, assuming that the estate was sold by the description of the shares "as noted in the reverse," there is any authority for the view that the whole sale is a nullity, because a small area included in the revenue unit was, by mistake, not specified in the sale notification? If it be held that the subject-matter was sold, not as described by the term '*ijmal*' but as described by the list of villages, it must follow that that which was not specified in the list was not sold and did not pass. But, with all respect, I am unable to take the view that the sale, though it purported to pass the areas mentioned in the sale Notification, did not in law pass these areas. The conclusion of Mullick and Atkinson, JJ., is based on the view that the Collector has no jurisdiction to split up the unit in arrear and to offer for sale something less than that unit. In my opinion, the question effects the exercise of jurisdiction, and not the existence of it. The Collector was the only person who could decide what were the different items of properties comprised in the revenue unit in arrear. He did decide it, and, in pursuance of statutory authority put up for sale that unit, expressed in terms of *bighas* and *cullahs* in different villages. It is true that in deciding that question, he made a mistake, but if he did make a mistake and if the plaintiffs have sustained substantial injury by reason of that mistake, there is a procedure indicated in the Act of which they could have taken advantage for the removal of their grievance. In my opinion there is no question of want of jurisdiction involved in the act of the Collector.

This is my opinion on the question raised by the Full Bench decision of this Court. But that decision is binding on this Court, and, in accordance therewith, I must hold that the sale was rightly set aside by the learned Subordinate Judge. This appeal accordingly fails and must be dismissed with costs.

Macpherson, J.—I agree that this appeal must be dismissed with costs.

I am of the same opinion as my learned colleague and for the reasons set out by him that each of the two grounds on which the learned Subordinate Judge decreed the suit is wrong in law. But his decree cannot be set aside by this Division Bench as we are bound by the decision of the majority of the Full Bench in *Mahant Krishna Dayal Gir* v. *Syed Abdul Gaffur* (2) in respect of the second ground.

(4) 28 Ind. Cas. 699; 42 C. 897; 2 L. W. 355; 19 C. W. N. 481; 17 M. L. T. 321; 21 C. L. J. 412; 13 A. L. J. 501; 28 M. L. J. 583; 17 Bom. L. R. 442; (1915) M. W. N. 559; 42 I. A. 79 (P. C.).

KALI DIN v. MADHO.

Personally I am of opinion that the view of Chapman, J., should have prevailed in that case, and the reasons given by him for his decision appear to me conclusive.

Appeal dismissed.

K. S. D.
W. C. A.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 458 OF 1921.
November 23, 1922.
Present :—Mr. Justce Stuart.
KALI DIN—DEFENDANT—APPELLANT
versus
MADHO AND OTHERS—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 55 (2), applicability of—Sale—Vendor describing himself as owner—Covenant as to title—Notice—Registration, effect of—Res judicata *between co-defendants.*

Where a person sells property describing himself as owner thereof, he must be deemed to contract with the purchaser that he has full proprietary title in the property and section 55 (2) of the Transfer of Property Act will be applicable to the case, unless it is shown that the benefit of the rule has been lost to the purchaser by fraud, notice, waiver or express or implied contract.

Registration of a document does not necessarily amount to notice, and the question must be determined upon the merits in each individual case: *Tilakdhari Lal* v. *Khedan Lal*, 57 Ind. Cas. 465; 47 I. A. 239; 39 M. L. J. 243; (1920) M. W. N. 591; 2 U. P. L. R. (P. C.) 139; 22 Bom. L. R. 1319; 18 A. L. J. 1074; 25 C. W. N. 49; 28 M. L. T. 226; 32 C. L. J. 479; 13 L. W. 161; 2 P. L. T, 101; 48 C. 1 (P. C.), followed.

A decision will not operate as *res judicata* between co-defendants unless it is shown that the interests of the co-defendants were at variance and there actually was a decision in favour of one as against the other.

Harbans v. *Ram Kumar Naik*, 54 Ind. Cas. 974; 18 A. L. J. 126; 2 U. P. L. R. (A.) 46, referred to.

Appeal from a decree of the Additional Sub-Judge, Banda, dated the 16th of February 1921.

Mr. *H. K. Kaul* for Dr. *K. N. Katju*, for the Appellant.
Mr. *K. R. Dang*, for the Respondents.

JUDGMENT.—The facts of the suit out of which this appeal arises are these :—

On the 3rd of March 1884 a certain Gaya Din purchased a small property in the Hamirpur District from the Hindu widows Lachmin Kuer and Radha Kuer. On the 19th February 1890 Gaya Din transferred that property to Bhup Singh and Sheo Lal for Rs. 475. Lachmin Kuer died before 1905. Radha Kuer died in 1905. In 1917 Ram Lal, claiming to be the heir to the property by reversion, instituted a suit against Gaya Din's successors-in-interest and the successors-in-interest of Bhup Singh and Sheo Lal. In that suit it was decided that the present plaintiffs-respondents who are the successors-in-interest of Bhup Singh and Sheo Lal were not *bona fide* purchasers for value and the suit was determined in favour of Ram Lal. The plaintiffs-respondents then instituted the present suit against Kali Din son of Gaya Din for the return of the purchase-money paid to Gaya Din by their predecessors-in-interest. The Trial Court has given them a decree which has been upheld by the lower Appellate Court. The defendants appeal here. The points for decision are these :—

(1) Did the terms of the sale-deed of the 19th of February 1890 entitle the vendee to the protection of the

provisions of section 55 (2) Act IV of 1882?

(2) Was the suit time-barred?

(3) Is the suit barred by *res judicata*?

(4) Does the decree offend as being against property which is not liable?

On the first point I have to look at the terms of the deed. Gaya Din describes himself therein as the owner (*malik*) in possession of the property transferred. He nowhere suggests that he has obtained his title from Hindu women. The deed is silent on the subject. The interest which he professes to transfer is clearly full proprietary title. Under section 55 (2) he must have been deemed to have contracted with the buyers that he had full proprietary title in the property. Section 55 (2) will, therefore, apply unless it be shown that the benefit of the rule was lost to the purchasers by fraud, notice waiver or express or implied contract. There is no suggestion of fraud, waiver, or express or implied contract and the only suggestion of notice is the implied notice contained in the registration of the deed of the 3rd March 1884 under which the two widows transferred the estate to Gaya Din. Prior to 1920 it might have been argued with some force, in view, of the decisions of this Court that the mere registration of the sale-deed by the widows was sufficient notice to a purchaser from Gaya Din that Gaya Din had only title to the property, under a transfer which could be avoided by subsequent reversioners unless it were shown to have been made for legal necessity. But the decision of their Lordships of the Privy Council in *Tilakdhari Lal* v. *Khedan Lal* (1) which was delivered on the 2nd July 1920, has interpreted the law as to notice in accordance with the view previously held by the Calcutta High Court, and has declared that the law as to notice in India in so far as registration of deeds of title can be considered to be implied notice does not differ materially from the law to notice in England. It is not laid down in that decision that notice can never be imputed from the fact that a document is to be found upon the Indian register of deeds. It lays down that the question must be determined upon the merits in each individual case. And as I read the decision of the Courts below in this instance notice could not be imputed from the mere fact that the deed of the 23rd March 1884 was registered. It would be difficult to hold otherwise when re-collection is had of the present backwardness of the inhabitants of the Hamirpur District and the fact that in the year 1884 they were in a very much less advanced condition of mentality than they are at present. The question as to whether the suit is time-barred has not been argued in appeal and on the findings of the Courts below the suit was clearly not time-barred.

With regard to the question of *res judicata* I agree with the Courts below that there was no *res judicata* in the matter. The plaintiffs-respondents and the defendant-appellant were co-defendants in the previous suit but their interests were not at variance and the decision in the previous suit was in no way a decision between them as parties. It is not, of course, impossible for a Court to arrive at a decision as between co-defendants which will operate as *res judicata* in subsequent porceedings. Such a decision is discussed in *Harbans* v. *Ram Kumar Naick* (2). But in that case the interests of the co-defendants were at variance and there actually was a decision in favour of one as against the other.

In regard to the last point, Gaya Din being dead the decree has been passed against such assets of Gaya Din as have come into the hands of the defendant. There is nothing objectionable in this. If an attempt is made to execute the decree against inalienable property the defendant-appellant will be at liberty to object to such execution.

(1) 57 Ind. Cas. 465; 47 I. A. 239; 39 M. L. J. 243; (1920) M. W. N. 591; 2 U. P. L. R. (P. C.) 139; 22 Bom. L. R. 1319; 18 A. L. J. 1074; 25 C. W. N. 49; 28 M. L. T. 224; 32 C. L. J. 479; 13 L. W. 161; 2 P. L. T. 101; 48 C. I (P. C.).

(2) 54 Ind. Cas. 974; 18 A. L. J. 126; 2 U. P. L. R. (A.) 46.

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I, therefore, dismiss this appeal with costs which include fees on the higher scale.

Z. K.

Appeal dismissed.

RANGOON HIGH COURT.

CIVIL REVISION No. 87 OF 1922.

September 4, 1923.

Present:—Mr. Justice Po Han.

SAN YEIK—APPELLANT

versus

THE MUNICIPAL COMMITTEE OF PEGU—RESPONDENT.

Burma Municipal Act (III of 1898), s. 42 A—License to sell pork—Failure of licensee to produce stamp-paper—Cancellation of license—Damages, suit for—Good faith.

Plaintiff was a licensee of the defendant Municipality for slaughtering pigs and selling pork. He was called upon by the Municipality to produce stamp paper for executing the license, which he failed to do. The Municipality thereupon cancelled his license and served a notice upon him as the result of which he was prevented from slaughtering pigs and selling pork for two days. He sued the Municipality for damages:

Held, (1) that in the absence of any bye-law or other authority empowering the Municipality to cancel the plaintiff's license simply because he had committed default in producing the stamp paper, the action of the Municipality amounted to a breach of contract for which the plaintiff was entitled to recover damages; [p. 865, col. 1.]

(2) that under the circumstances of the case the Municipality were not protected by section 42A of the Burma Municipal Act. [p. 865, col. 1.]

Civil revision against a decree of the District Court, Pegu, in Civil Appeal No. 17 of 1922.

Mr. *Das*, for the Appellant.

Mr. *Thein Maung*, for the Respondent.

JUDGMENT.—The appellant-plaintiff sued the Municipal Committee of Pegu to recover damages for loss suffered by the plaintiff on account of the defendant's action which prevented plaintiff from slaughtering pigs and selling pork for two days, although the plaintiff was admittedly the licensee and had the right to slaughter pigs and sell pork on those two days. The plaint recited several other complaints which are not necessary to be discussed for purposes of this application.

The defence was that beyond withholding the plaintiff's permit nothing further was done concerning plaintiff's right to slaughter and sell, that the action taken by the defendants was just, lawful, and done in good faith and that section 42A of the Burma Municipal Act was a bar to the suit.

The Township Court found that the defendants prevented the plaintiff from slaughtering pigs and selling pork for two days, that the defendant's action was illegal, that the plaintiff was entitled to damages, and that the amount should be Rs. 250.

The District Court found that the plaintiff's suit was not maintainable being barred by section 42 of the Burma Municipal Act. The learned Judge was influenced by the consideration of the fact that the plaintiff sold pork at Rs. 1-8 per viss after having agreed to a condition of the license or lease that the price must not exceed Rs. 1-4 per viss. He argued that when the Municipality tried to stop the plaintiff from doing so it cannot be said that the Municipality acted maliciously and not in good faith. It was further found that section 39 of the Burma Municipal Act required the contract to be in writing and the defendant must have had that section in view when the plaintiff was called upon to furnish the stamp paper.

In the application for revision it is urged that the District Court acted illegally and with material irregularity in applying its mind to the question of the price of pork inasmuch as the sole reason for stopping the slaughter and sale was non-production of stamp paper and unconnected with the price of pork.

PARSOTIM DAS *v.* FIRM JANGLI SAO.

I agree with this contention because Maung Tun Aung who represented the Municipality at the trial admitted the sole reason to be so. In considering the operation of section 42A of the Act I do not think the question of the price of pork is relevant. The relevant matters are that the Municipality called upon the plaintiff to produce stamp paper to execute the lease or license, that the plaintiff did not take any notice of it, his reason being that he had already acquired the right of the license or lease four or five months before that. The Municipality then issued notice to him which had the effect of preventing him from slaughtering pigs or selling pork for two days. The sole reason for issuing that notice was the plaintiff's failure to furnish stamp paper.

The plaintiff was admittedly the licensee. No bye-law or other authority can be shown which empowers the defendant Municipal Committee to cancel the license simply because the licensee commits default in producing stamp paper, or to issue a notice to the licensee the effect of which was stopping the exercise of his right for two days.

The defendant's action in preventing the plaintiff from slaughtering pigs or selling pork for two days amounted to a breach of contract and the plaintiff was entitled to claim damages. It cannot be said that the defendant acted lawfully or with due care and caution when no authority can be shown to the effect that for non-production of stamp paper the plaintiff can be prevented from slaughtering pigs or selling pork. Section 42 A of the Act does not protect the defendant in these circumstances. The suit is maintainable.

With reference to the amount of damages it is for the plaintiff to prove it strictly. He is clearly entitled to two days premium and rent. According to his own figure the amount works out to Rs. 35-6. His claim for loss of profits is reasonable. His figure works out to Rs. 13-6-0. To get the resolution set aside he had to get professional assistance from a lawyer. This was not unreasonable but what be actually spent is no criterion. As between party and party Rs. 34 appears sufficient and reasonable cost. There is no proper proof of the cost of his establishment. Nor is it clear if any expenditure on this head can properly be considered as loss caused to him by the defendant's action. There is no proof that he suffered in reputation, and it is difficult to see how any question of injury to his reputation can be attributed to defendant's breach of contract.

The plaintiff is entitled to recover Rs. 82-12 as damages for breach of contract.

The decrees of the lower Courts are set aside there will be a decree in plaintiff's favour for Rs. 82-12 with costs throughout.

Appeal allowed.

Z. K.

PATNA HIGH COURT.

CIVIL REVISION No. 185 OF 1922.

November 13, 1922.

Present:—Justice Sir John Bucknil, KT.

PARSOTIM DAS—PETITIONER

versus

FIRM JANGLI SAO AND ANOTHER—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), s. 25—Evidence not examined satisfactorily—High Court, power of, to interfere in revision.

Where, on the face of a decision of a Small Cause Court Judge, it appears that the evidence of a party has not been satisfactorily examined, for instance, where the Judge in his summary of the evidence states that the party had examined only one witness whereas, as a matter of fact, another witness was also examined whose evidence makes the position of the party infinitely stronger, the High Court should exercise its powers of interference in revision. [p. 866, col. 2.]

Mr. *Kulwant Sahai* for Mr. *Sunder Lal*, for the Petitioner.

Mr. *Bimala Charan Sinha*, for the Opposite Party.

JUDGMENT.—This is an application made under the provisions of section 25 of the Small Cause Courts Act. The matter is a very trifling one but the circumstances are perhaps somewhat unusual; and

although it is with very great reluctance that this Court interferes with the findings of a Small Cause Court yet there are occasions, and this may be one, when it seems to be that one should do so.

The circumstances are extremely simple. The plaintiff claims some money for goods sold and delivered. The articles sold were cloth. The plaintiff says that the defendant has signed an account-rendered statement in a *bahi* and he produced this *bahi* himself purporting to have been signed by the defendant in the manner indicated showing a balance in his (the plaintiff's) favour of between three and four hundred rupees. The defendant, however, denies his signature in this *bahi* and seems to have been able to satisfy the Judge to that effect by showing to the Judge certain signatures which are admitted to be his own and that the signature on the *bahi* was unlike these genuine signatures of his own, and thus persuaded the Judge to come to the conclusion which he did that the plaintiff had not succeeded in proving his case satisfactorily. But in his decision it certainly would appear that the Small Cause Court's Judge had accidentally, perhaps, omitted to consider the evidence which was adduced by the plaintiff in support of his allegation that the defendant had in fact put his hand on an account-rendered showing the balance, which I have already mentioned, in his favour. The plaintiff, according to the record, examined two witnesses. The first of these was quite clear as to the position; he says definitely that the defendant, about three years ago, had signed this *bahi* in his (the witness') own presence. In this way the evidence of the plaintiff was strongly corroborated. Now the Small Cause Court's Judge in his summary of the evidence states that the plaintiff examined one witness only who had said that the defendant had signed the acknowledgment. Apparently the Small Cause Court's Judge must have overlooked the fact that in addition to the witness, the gist of whose testimony I have already given, there was another witness, who also diposed that the defendant in fact signed the *bahi*. It would seem from the fact that the Small Cause Court's Judge merely states that the plaintiff had called but one witness who simply said that the defendant had signed the *bahi* in question that he was referring to the second witness and had by mistake overlooked the fact that there was a far more important witness who had been called on behalf of the plaintiff and who had stated definitely that the *bahi* had been signed by the defendant and in his (that witness') own presence. The position, therefore, of the plaintiff was infinitely stronger than would appear from the expressions which are used in Small Cause Court's Judge decision, I think that on the face of the decision, the evidence of the plaintiff has not been sufficiently considered. I should be loth to come to any conclusion upon the matter myself. I think this is an instance in which it is necessary that the powers of this Court should be exercised and that the case should go back for rehearing preferably not before the same Small Cause Court's Judge who has already dealt with the matter. The costs will abide the event.

Case sent back.

N. K.

RANGOON HIGH COURT.

CIVIL REVISION NO. 11 OF 1923.

September 7, 1923.

Present:—Mr. Justice Po Kan.

Sheik ABDULLA—APPELLANT

versus

M. V. R. S. FIRM AND ANOTHER—RESPONDENTS.

Arbitration—Reference to five arbitrators—Majority award binding—Two arbitrators ailing to act—Award by remainder, whether valid—Limitation Act (IX of 1908), Sch. I, Art. 158—Objections to award—Limitation, operation of.

The parties to a case referred their dispute to the arbitration of five arbitrators and agreed to abide by the award of the majority of them. Two of the arbitrators did not take part in the arbitration proceedings and the remaining three made an award and filed it in Court;

Held, (1) that the intention of the parties was that all the five arbitrators should take part in the arbitration and should there be any difference of opinion among them the opinion of the majority should prevail, and that they did not intend that

if only a majority of the arbitrators acted and made an award the award would be binding; [p. 867, col. 1.]

(2) that, therefore, the award was invalid and was not binding on the parties. [p. 869, col. 1.]

Guruthippa v. *Narasingappa*, 7 M. 174; 2 Ind. Dec. (N.S.) 707, *Thammiraju* v. *Bapiraju*, 12 M. 113; 4 Ind. Dec (N.S) 428, *Ram Narain Roy* v. *Baij Nath Malla*, 29 C. 36, relied on.

Under Article 158 of Schedule I to the Limitation Act, time for filing objections to an award runs from the date of filing the award in Court and notice of such filing being given to the parties. [p. 867, col. 2; p. 868, col. 1.]

Civil revision against an order of the District Court, Tourgco, in Civil Regular No. 11 of 1932.

JUDGMENT.—The appellant was first defendant in the lower Court, the second respondent was the second defendant and the first respondent was plaintiff. Pending their suit they made a joint application to refer their dispute to the arbitration of five arbitrators and they agreed to abide by the award of the majority of them. The Court referred the matter to the five arbitrators named in the joint application.

Two out of those five did not take part in the arbitration proceedings. The remaining three arbitrators made the award and filed it in Court. The appellant filed objections one of which was that the award was invalid because two of the arbitrators did not act.

The lower Court found against the present applicant who made this application to revise the order of the lower Court.

The main point urged on applicant's behalf is that the award was invalid as two of the arbitrators did not act at all. By their joint application the parties agreed that the award of the majority of the arbitrators was to prevail after nominating five arbitrators. The intention of the parties, it appears to me, was that all the five arbitrators were to take part in the arbitration and should there be any difference of opinion among them the opinion of the majority was to prevail. I do not think that they ever meant that if at least three out of the arbitrators acted they would be satisfied. In this view of the reference each party was entitled to have the benefit of the opinion and decision of all the five arbitrators and not only some of them. From the fact that the three arbitrators who actually made the award happened to hold the same opinion it cannot be assumed that even if the other two had acted the opinion of the former three would not have been affected. It is not impossible that a discussion among all the five might have produced a different award. The cases of *Thammiraju* v. *Bapiraju* (1) and *Ram Narain Roy* v. *Baij Nath Malla* (2) lay down that when one or more of the arbitrators did not act and the rest only made the award there was misconduct on the part of the arbitrators and the award was invalid. There was no provision in the reference in those two cases that the award of the majority should prevail. In *Gurupathappa* v. *Narasingappa* (3) it was held that where the parties agreed to refer a suit to arbitration but provision was made that a decision by the majority of the arbitrators should be binding and two of the arbitrators withdrew, the decision by the majority was invalid. The body of the judgment in that ruling on page 175 specially mentions that "there was no provision in the order of reference that the decision should be with a majority, either including the *uttara panchayattar* or not including."

In the present case the first paragraph of the joint application stated that the parties *agreed to have the five arbitrators* named in the application and they prayed that the matter might be referred to the arbitrators named to be decided by them and not by a majority of them. The use of the phrases "the award of the majority will prevail" and "will abide by the award of the majority" does not appear to mean that the parties would be satisfied if the majority of the five arbitrators acted. I think the applicant meant that if the arbitrators should not be unanimous the opinion of the majority was to prevail.

Therefore, as two out of the five arbitrators did not act the award made by the other three only was invalid. The learned Counsel for the respondent raised the question of limitation on the ground, that no application was filed by the applicant to set aside the award in the lower Court within ten days of the filing of the award

(1) 12 M. 113; 4 Ind. Dec. (N.S.) 428.
(2) 29 C. 36.
(3) 7 M. 174; 2 Ind. Dec. (N.S.) 707.

in Court. Under Art. 158, Limitation Act, time runs from the date of filing the award in Court and notice of such filing given to the parties. In this case it is not at all clear whether the applicant was given or received notice of the filing of the award before the 6th September when the Court called for application, if any, to set aside the award. It seems clear that the applicant cannot be considered to have received any such notice nor can any such notice be considered to have been given him until the 9th September. He filed his objections on the 15th September. This amounts to filing an application to set aside the award within time.

The appeal is allowed. The order of the lower Court accepting the award and the decree thereon are set aside.

The case is remanded to the lower Court to be disposed of according to law.

The respondents will pay costs of this application.

Z. K. *Revision allowed.*

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION.

April 18, 1923.

Present:—Mr. Justice Greaves.

GLADSTONE WYLLIE & Co.

versus

JOOSUB PEER MAHOMED & Co.

Arbitration Act (IX of 1899), s. 15—Civil Procedure Code (Act V of 1908), O. XXI, r. 16—Assignment of award—Execution—Procedure.

Inasmuch as under section 15 of the Arbitration Act, an award when filed is enforceable as a decree, all the provisions of the Code of Civil Procedure applicable to the execution of decrees, apply to an award so filed. [p. 869, col 2.]

Where a person in whose favour an award has been made assigns it to a third person, such assignee is entitled under r. 16 of O. XXI of the Civil Procedure Code, to execute the award against the person against whom it was made. [p. 869, col. 2.]

Mr. *A. N. Chaudhuri*, for the Assignee.

Mr. *A. K. Roy*, for Messrs. *Joosub Peer Mahomed & Co.*

JUDGMENT.—This is an application by the assignees of an award for the execution of the award. The award was made in favour of Messrs. Gladstone Wyllie & Co. It was duly filed and was, therefore, capable of execution as a decree under the provisions of section 15 of the Indian Arbitration Act. In execution thereof Messrs. Gladstone Wyllie & Co. attached certain properties of Messrs. Joosub Peer Mahomed & Co.

The attachment was ultimately withdrawn upon certain terms which are set out in the copy of a letter addressed by Messrs. Gladstone Wyllie & Co. to Messrs. Joosub Peer Mahomed. By these terms the amount of the award was payable in certain sums therein mentioned and, in default of any instalment not being paid, Messrs. Gladstone Wyllie & Co. reserved to themselves the right to proceed with the execution proceedings for the balance of the full amount due under the award. Certain payments were made in pursuance of this arrangement and ultimately, I think sometime in January or February of this year, the award was assigned by Messrs. Gladstone Wyllie & Co. to the present applicants who now seek to enforce it for the balance of the whole amount of the award.

Three points are raised on behalf of Messrs. Joosub Peer Mahomed & Co. First, it is said that the assignment is not proved. Secondly, it is said that the arrangement is not correctly set forth, and thirdly, certain points arising on the Civil Procedure Code are relied on as reasons why the order sought should not be made.

So far as the first point is concerned it seems to me that upon the evidence before me the assignment is amply proved and, so far as the second point is concerned, I am satisfied that the arrangement put forward by the present applicants is in fact the arrangement that was arrived at between Messrs. Gladstone Wyllie & Co. and Messrs. Joosub Peer Mahomed as terms upon which the attachment should be withdrawn. The third point remains. What is said is this that the provisions of O. XXI, r. 16, are not applicable in a matter of this nature inasmuch as this is not the Court which can be said to have

passed the decree, and reliance is placed upon the case of *Tribhuwandas Kaliandas Gajjar* v. *Jibanchand Lallubhai* (1), where the learned Chief Justice of Bombay refused to grant a stay under O. XXI, r. 29, in respect of the execution of an award filed in Court, on the ground that the applicant was not the holder of a decree of Court and was, therefore, not entitled to a stay under the provisions of O. XXI, r. 29. Reliance was further placed on a passage in *Baijnath* v. *Ahmed Musaji* (2), where Sir Lawrence Jenkins states that when an award is filed the result is not that there is suit in which a decree has been passed but that there is an award which shall be enforceable as though it were a decree. And lastly, reliance was placed on the case of *E. D. Sascon* v. *Ramdutt Ramkissen Das* (3), where the present Lord Chancellor, in delivering the opinion of the judicial Committee, stated that section 15 of the Arbitration Act does not enact that the award when filed is to be deemed to be a decree of the Court but only that it is to be enforceable as if it were a decree.

As against this, I was referred to the provisions of O. XXI, r. 50, sub-section 2 of the Civil Procedure Code and to a decision in *Purusottum Das Narain Das* v. *Louis Dreyfus & Co.* (4), where the learned Judge refused to accede to the argument that he could not go into the matters to which O. XXI, r. 50, sub-clause 2 relates on the ground that the award when filed was not a decree for the purpose of that sub-section, and I was further referred to a decision in Chambers by myself in which I apparently arrived at the same conclusion.

On behalf of Messrs. Joosub Peer Mahomed & Co., it is said that although the decision under O. XXI, r. 50, sub-clause 2, may be correct, it does not cover a case arising under O. XXI, r. 16, which does not relate to actual proceedings for enforcement of a decree as do the provisions of O. XXI, r. 50, sub-clause 2. I am afraid I cannot assent to this argument. I think that when under the provisions of the Indian Arbitration Act (section 15) the Legislature provided that an award on being filed was enforceable as if it were a decree of the Court, it intended that all the provisions of the Code of Civil Procedure applicable to the execution of decrees should apply to an award so filed, and if it is necessary to say which is the Court which passed the decree within the meaning of O. XXI, r. 16, I think that for purposes of execution after the award is filed and is capable of execution as a decree this Court must be deemed to be the Court which passed the decree for the purposes of these sections in the Civil Procedure Code.

The result is that the objections raised on behalf of Joosub Peer Mahomed & Co., in my opinion fail and I must make the order that is sought. Let a warrant issue. The applicant is entitled to the costs of this application. I stay execution for a week. If Joosub Peer Mohamed & Co. pay in the amount of the award by then, there will be liberty to the applicants to withdraw same on giving security.

Application allowed.

W. C. A.

(1) 8 Ind. Cas. 179; 35 B. 196 at p. 198; 12 Bom L. R. 860.
(2) 18 Ind. Cas. 978; 40 C. 219 at p. 230; 17 C. W. N. 395.
(3) 70 Ind. Cas. 777; 50 C. 1; 37 C. L. J. 336; 44 M. L. J. 758; 27 C. W. N. 660; (1923) M. W. N. 372; 18 L. W. 537; (1922) A. I. R. (P. C.) 374.
(4) 56 Ind. Cas. 325; 47 C. 29.

LAHORE HIGH COURT.

CIVIL MISCELLANEOUS NO. 522 OF 1922.

June 1, 1923.

Present:—Mr. Justice Harrison and Mr. Justice Zafar Ali.

NEKI AND OTHERS—PLAINTIFFS—PETITIONERS

versus

CHHAJJU RAM AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 109—Application for leave to appeal to His Majesty in Council—Review of judgment—Judgment on review set aside—Original judgment restored—Application for leave, whether can be continued.

NEKI *v.* CHHAJJU RAM.

An application for leave to appeal to the Privy Council against a judgment of the High Court was presented within time. On the same date an application for review of judgment was filed. The latter application was accepted and an order was passed on the former application that as the application for review had been accepted there was no necessity to go on with the application. Eventually the judgment passed on review was set aside by the Privy Council on the ground that it was passed without jurisdiction, and the previous judgment was restored. It was then sought to obtain a certificate on the basis of the application for leave to appeal to His Majesty in Council:

Held, that the order passed on the application did not amount to a dismissal and that the application had remained suspended, and that the original judgment having been restored the application could be proceeded with.

Petition in continuation of the petition (Civil Miscellaneous No. 248 of 1918 for leave to appeal to His Majesty's Privy Council from the judgment and decree of Mr. Justice Scott-Smith and Mr. Justice Leslie Jones passed in Civil Appeal No. 2789 of 1914) praying that the said application may be heard and disposed of as if no review had been accepted and that the decree of this Hon'ble Court dated the 3rd November 1917 may be permitted to be appealed from to the Privy Council.

Pandit *Sheo Narain*, R. B., and Mr. *Manohar Lal*, for the Petitioners.

Bakhshi *Tek Chand* and Dr. *G. C. Narang*, for the Respondents.

ORDER.—This is an application asking for orders to be passed on a petition for leave to appeal to the Privy Council from a decree dated the 3rd of November 1917.

The facts are that on that date an appeal was accepted and the suit as instituted was dismissed by the order of a Division Bench. An application for leave to appeal to the Privy Council was duly presented within time and on the same day an application for review was made. This latter application was accepted and eventually the original order passed on the 3rd of November 1917 was reversed and the suit was decreed in full. From this order passed in review an appeal was presented to the Privy Council urging that the review was not competent and further that on the merits the original order passed by the Division Bench on 3rd November 1917 was correct. On the 27th February 1922 their Lordships of the Privy Council held that the review was not competent, that r. 1 of O. XLVII had been misunderstood and that, therefore, the judgments given by the two Division Benches were to be set aside and that of the Bench of the Chief Court which passed the order of the 3rd November 1919 was to be restored "so that the suit will stand dismissed."

Counsel for the respondents contends that this finding or rather the order in Council which followed upon it embodies the original decree passed on the 3rd of November 1917 and, therefore, there can now be no question of appealing to the Privy Council. He also contends that in spite of the fact that their Lordships set aside the whole of the proceedings in review and thereby restored the original order passed by the first Bench, it would have been competent to the present appellants appearing as respondents to ask for an order on the merits reversing that decree and upholding the order passed on review and this in spite of the fact that there was no appeal before their Lordships from this first decision.

With this view we cannot agree. The order of the Privy Council merely dealt with the competency of the review application and the legality of the orders passed. Once it had been held that the review proceedings were bad the clock was merely put back and the position as explained in their Lordships' order was that the original judgment was restored and the suit stood dismissed. From that judgment or rather from the decree which followed upon it the present petitioner wished to present an appeal. His application was presented within time. We do not agree with the contention that the order of the 22nd July 1918 stating that "the application for review has been accepted, and there is no necessity to go on with the application" is tantamount to an order of dismissal, and we find that this application is still alive and has merely been in a state of suspended animation during this long period. It is not contended that the petitioners had not fulfilled the necessary conditions and were not entitled to the certificate which they sought.

We, therefore, accept the application and direct that the certificate be granted. The costs of the petitioner at this hearing will be paid by the respondents, Counsel's fee Rs. 120.

Application accepted.

Z. K.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL NO. 262 OF 1922.

May 1, 1923.

Present:—Mr. Justice Walsh and Mr. Justice Kanhaiya Lal.

MAHAMMAD HADI—JUDGMENT-DEBTOR—APPELLANT

versus

DEBI PRASAD AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Limitation Act (IX of 1908), s. 15, Sch. I, Art. 182—Execution of decree—Stay of execution—Proceeding struck off—Right to revive proceeding—Limitation.

Where execution of a decree is stayed at the instance of a stranger and a pending execution proceeding is consequently struck off, the right of the decree-holder to continue the proceeding struck off is revived from the date on which the stay order is cancelled or becomes inoperative.

Qamar-ud-din v. *Jawahir Lal*, 27 A. 331; 32 I. A. 102; 2 A. L. J. 397; 1 C. L. J. 381; 9 C. W. N. 601; 15 M. L. J. 258; 7 Bom. L. R. 433; 8 Sar. P. C. J. 810 (P. C.), relied on.

Execution first appeal against the decision of the Sub-Judge, Jaunpur, dated the 10th February 1923.

Mr. *S. A. Haider*, for the Appellant.

Mr. *K. N. Katju*, for the Respondents.

JUDGMENT.—There is no force in this appeal. On the 29th of January 1917 a decree was obtained under section 90 of Act IV of 1882. The application for execution, with which we are at present concerned, was made on the 15th of April 1912, for the attachment and sale of certain property. An attachment followed but before the property could be sold the Court executing the decree found upon enquiry that the description of the property attached did not tally with the description given in certain Revenue Records. The decree-holder was called upon to explain the discrepancy but he did not turn up. His application was, therefore, dismissed for default on the 25th of July 1913. On the 7th of August 1913 a fresh application was made for execution with a request that the previous execution proceedings should be sent for and the sale of the property attached proceeded with. On the 19th of September 1913 another application was filed by the decree-holder asking that the order of the 25th of July 1913, should be formally set aside under O. IX, r. 4 of the Code of Civil Procedure and the previous execution proceedings restored to the file. An order followed restoring the case to the file and the execution was proceeded with, with the result that some property was sold and a portion of the decretal money was realised. Meanwhile a suit was brought by a lady, named, *Musammat* Mohani Bibi, claiming title to certain other property which had been attached and proclaimed for sale. At the instance of the lady the execution of the decree in question was stayed and the sale was postponed, pending the determination of her suit. On the 23rd of May 1914 the execution proceedings were struck off. In March 1919, the suit of the lady was dismissed and the embargo on the execution of the decree and the sale of the property, which formed the subject-matter of dispute in that suit, was removed. The present application for execution was filed soon afterwards on the 28th of January 1919, and has been held by the Court below to be within time.

It is argued on behalf of the judgment-debtors that the application of the 19th of September 1913 ought to be left out of account, because O. XI, r. 4 of the Code of Civil Procedure was inapplicable to an execution proceeding. But the order which was passed on that application was an order binding on the parties, and it is now no longer open to the judgment-debtors against whom that order was passed presumably after notice, to question the validity of that order. In pursuance of that order the previous execution proceeding which had been struck off for default was

revived, and various steps were taken by the decree-holder to obtain satisfaction of his decree till a stay order was obtained by *Musammat* Mohani Bibi in the suit, to which a reference has already been made. From the date of the removal of the embargo by the said order the right of the decree-holder to continue the previous execution proceeding which was struckoff, on the 23rd of May 1914, revived and on the analogy of the decision in *Qamar-ud-din* v. *Jawahir Lal* (1) the present application for execution has been rightly held to be not barred by time. We dismiss the appeal accordingly with costs including fees in this Court on the higher scale.

Appeal dismissed.

Z. K.

(1) 27 A. 334; 32 I. A 102; 2 A. L. J. 397; 1 C. L. J. 381; 9 C. W. N. 601; 15 M. L. J. 258; 7 Bom. L. R. 433; 8 Sar. P. C. J. 810 (P. C.).

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2010 OF 1919.

April 3, 1923.

Present:—Mr. Justice Broadway and Mr. Justice Moti Sagar.

BALAK RAM—PLAINTIFF—APPELLANT

versus

MUHAMMAD SAID—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), ss. 45, 47—Handwriting, comparison of—Appeal, second—Finding of fact based on comparison of handwriting, legality of.

Comparison of signatures is one of the modes of proving handwriting and although, where there is no other evidence corroborative of such comparison, such proof would be regarded as hazardous and inconclusive, it cannot be regarded as an error in law to base a conclusion on such proof alone, and a Court of second appeal would have no power to set aside a finding based on such comparison. [p. 873, col. 1.]

Pasupuletti Venkamma v. *Shaik Hamid*, 14 Ind. Cas. 741; 11 M. L. T. 421, relied on.

Second appeal from a decree of the District Judge, Shahpur, dated the 26th May 1919.

Bakhshi *Tek Chand* and Lala *Fakir Chand*, for the Appellant.

Messrs. *Abdul Aziz* and *Mul Chand*, for the Respondent.

JUDGMENT.—On the 10th of August 1907 the defendant, Muhammad Said executed a deed of mortgage for Rs. 2,260 in favour of one Sukh Dial, father of the present plaintiff, Balak Ram. It was stipulated that no interest would be paid for the first year but that after the expiry of that period if redemption was not effected the defendant would be liable to pay interest and compound interest at the rate of 12 per cent. per annum. Sukh Dial died in October 1910 and the plaintiff, alleging himself to be the adopted son of the deceased, brought this suit for the recovery of Rs. 3,662-1-3 on the foot of this mortgage after giving credit to the defendant for Rs. 1,100 alleged to have been realised before the institution of the suit. The defendant admitted the execution of the mortgage, but denied the right of the plaintiff to maintain the suit, and contended that the latter was not the adopted son of the deceased. He further pleaded that the mortgage-debt had been discharged in full. The following issues were framed.—

(1) Was plaintiff the adopted son of Sukh Dial deceased?

(2) Did defendant pay off the mortgage debt in full?

(3) What amount of principal and interest was due to plaintiff?

The Trial Court found in favour of the plaintiff on all these issues, and passed a decree in his favour for Rs. 3,712-15-0 which was the amount found due from the defendant on the date the suit was decreed. Against this decree an appeal was preferred by the defendant to the District Judge who upheld the finding of the Trial Court on the question of the plaintiff's adoption by Sukh Dial, but came to a contrary finding on Issue No. 2 relating to the discharge of the mortgage-debt in question. The receipts produced by the defendant in proof of the discharge of the mortgage-debt were found to be genuine, and the result of this finding was that the plaintiff's suit was dismissed in its entirety.

BALAK RAM v. MUHAMMAD SAID.

The plaintiff has now come up in second appeal to this Court and it has been contended that although a decision on the question of the genuineness of the receipts is a decision on a question of fact, nevertheless it can be examined in second appeal inasmuch as reliance has been placed on evidence that is inadmissible. It appears that the defendant produced five receipts (D-1 to D-5) in support of the various payments alleged to have been made by him to the plaintiff. Some of these receipts are alleged to be in the handwriting of Sukh Dial deceased himself while others are alleged to bear only his signature. The plaintiff did not admit that these receipts were genuine and alleged that they were forgeries. To prove these receipts the defendant produced certain witnesses who professed to be well versed in Hindi reading and writing and stated, after a comparison of the signatures on these receipts with some of the admittedly genuine signatures of the deceased, that they bore a clear resemblance to each other and that they appeared to have been made by one and the same person. The learned District Judge believed these witnesses and, holding that the receipts were genuine, came to the conclusion that the mortgage debt had been discharged in full. Mr Tek Chand's contention is that the witnesses produced to prove the signatures of the deceased on the various receipts in question were not experts within the meaning of sections 45 and 47 of the Indian Evidence Act, and that, therefore, their evidence was inadmissible. With this contention we are unable to agree. As pointed out in *Pasupuletti Venkamma* v. *Shaik Hamid* (1) comparison of signatures is one of the modes of proving hand-writing and although, where there is no other evidence, such proof would be regarded as hazardous and inconclusive, it cannot be regarded as an error in law to base the conclusion on such proof alone, and a Court of second appeal would have no power to set aside a finding based on such comparison. We, therefore, think that there is no force in the contention of Bakhshi Tek Chand and hold that the finding arrived at by the learned District Judge as to the genuineness of the receipts cannot be assailed in this appeal.

Next it is argued that even if the plaintiff is precluded from contesting the finding as to the discharge of the principal debt secured by the mortgage-deed in second appeal, there is no valid reason why the plaintiff's claim as to interest should not have been decreed. The mortgage-deed, as already observed, was executed on the 10th August 1907, and the payments are alleged to have been made on various dates commencing from the 8th March 1909 to the 27th July 1909. It is urged that according to the terms of the mortgage-deed, the plaintiff is entitled to recover interest and compound interest at the rate of 12 per cent. per annum from the 10th August 1908, to the date on which the final payment was made. The total amount of the interest and compound interest due is stated to be Rs. 564. Mr. Mul Chand for the respondent does not dispute the correctness of this figure, and we are of opinion that the plaintiff is certainly entitled to this sum.

We accordingly accept the appeal and, in modification of the order of the District Judge, decree the plaintiff's suit to the extent of Rs. 564 with proportionate costs throughout. The sum decreed will be a charge upon the property mortgaged, and the plaintiff will also be entitled to future interest at the contract rate, namely, 12 per cent. per annum from the date of the institution of the suit till realisation.

Z. K.

Appeal allowed.

(1) 14 Ind. Cas. 741; 11 M. L. T. 424.

ASHFAQ HUSSAIN *v.* BUNYAD HUSSAIN.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 45 OF 1923.

April 5, 1923.

Present:—Mr. Dalal, A. J. C.

Saiyad ASHFAQ HUSSAIN—

PLAINTIFF—APPELLANT

versus

Saiyad BUNYAD HUSSAIN AND OTHERS—

DEFENDANTS—RESPONDENTS.

Court Fees Act (VII of 1870), s. 7 (x) (a)—Suits Valuation Act (VII of 1887), ss. 8, 11—Specific performance of contract, suit for—Valuation for Court-fee and jurisdiction—Appeal—Objection to valuation, when can be urged—Civil Procedure Code (Act V of 1908), O. XXIII, rr. 1, 3—Withdrawal of suit in appeal—Compromise between some parties to circumvent provisions of law, legality of.

Under section 7 (x) (*a*) of the Court Fees Act a suit for the specific performance of a contract of sale must be valued for the purposes of Court-fee at the amount of the consideration and the valuation for the purposes of jurisdiction will be the same under section 8 of the Suits Valuation Act.

A plea as to the want of jurisdiction of the Trial Court based on the ground of undervaluation of the suit cannot, under section 11 of the Suits Valuation Act, be urged during arguments in an Appellate Court unless it has been raised in the grounds of appeal. [p. 874, col. 2.]

A plaintiff-appellant is not entitled to withdraw his suit in the Appellate Court under O. XXIII, r. 1 of the Civil Procedure Code as a matter of course. [p. 875, col. 1.]

A compromise between some of the parties to a suit, the object of which is to circumvent the law and to harass the other parties to the suit, is unlawful, and the Court will not record such a compromise under O. XXIII, r. 3 of the Civil Procedure Cede. [p. 875, col. 1.]

Appeal against a decree of the Sub-Judge, Lucknow, dated the 22nd December 1922.

Mr. *Wasi Hasan*, for the Appellant.

Mr. *M. Wasim*, for the Respondent.

JUDGMENT.—This is a second appeal by a plaintiff, who has failed to establish his claim in the two lower Courts to obtain specific performance of an alleged contract of sale. The plaintiff's aim is to have the questions at issue between himself and the defendants, other than the alleged vendor Saiyed Bunyad Husain, litigated over again. The learned Subordinate Judge of the First Appellate Court has observed in his judgment "After the arguments in this appeal, when the plaintiff saw that his appeal was failing, he applied saying that in the lower Court the valuation of the suit was not properly fixed and that it should have been more than Rs. 2,000." No plea of want of jurisdiction of the Trial Court was raised in his grounds of appeal by the plaintiff and it was the plaintiff himself who had fixed the valuation of the suit for the purposes of jurisdiction. The suit was correctly valued at Rs. 950. It was for the specific performance of a contract of sale of which the consideration was Rs. 950. For the purposes of Court-fee such a suit is valued at the amount of the consideration under section 7 (*x*) (*a*) of the Court Fees Act. In such a suit the valuation for the purposes of jurisdiction will be the same under section 8 of the Suits Valuation Act (VII of 1887). The defendant in the Trial Court had raised the plea of under-valuation but he did not press it and no issue was framed on the subject. Moreover as pointed out by the learned Judge of the lower Appellate Court the plaintiff is not entitled to raise the plea of want of jurisdiction of the Trial Court when no such plea was raised in the grounds of appeal filed in the lower Appellate Court. Section 11 (1) of the Suits Valuation Act is a clear bar to the raising of such a plea during arguments in an appeal.

I may quote again from the lower Appellate Court's judgment the further attempt made by the plaintiff in that Court to render the proceedings of the Trial Court inoperative. The learned Judge says: "After the rejection of this application (that is of the application objecting to the jurisdiction of the Trial Court) he made another application saying that he and the defendant No. 1 (Saiyed Bunyad Husain vendor) had compromised the suit and that he was withdrawing his suit (no appeal) as against the defendants Nos. 2 and 3." The learned Judge refused to permit the appellant to withdraw the suit as against the purchasers, Mahomed Raza and Qazim Raza, and to compromise the suit with Saiyed Bunyad Husain. In this Court it was argued that the Judge was wrong in refusing permission in both cases.

In my opinion the lower Court acted, as it should, to prevent judicial pro-

ceedings being brought into contempt. It has been definitely held by this Court that an appellant is not entitled to withdraw his suit in the Appeal Court under O. XXIII, r. 1 (1) as a matter of course. In first Appeal No. 46 of 1911 decided on 17th January 1913 two Judges of this Court, now Justices Piggott and Lindsay, have dealt with this matter in an elaborate judgment. They held that a plaintiff-appellant had no absolute right to withdraw his suit in appeal. In the present case the finding of the two Courts below are that the vendor Bunyad Husain had colluded with the plaintiff and forged a contract for sale prior to the sale in favour of the other defendants in order to deprive the other defendants of their purchase. The object of the plaintiff is to rid himself of the findings by withdrawing the suit against the purchasers and obtaining a sale-deed from the vendor under a compromise. He can then in a fresh suit for possession litigate over again the issues which have been decided against him by two Courts. If the plaintiff is permitted to succeed in his object it would be an abuse of the process of the Civil Court and under section 151 of the Code of Civil Procedure this Court has inherent power to prevent any such trickery.

It remains finally to decide whether the lower Court was bound to accept the compromise entered into between the plaintiff and Bunyad Husain. The lower Appellate Court was correct in holding that such a compromise would be unlawful as depriving the defendant-purchasers of the fruit of their success in the present litigation. It is not the desire of the plaintiff to hang a sale deed executed by Saiyed Bunyad Husain in a guilt frame to warn himself in future against undertaking such a litigation as the present. As admitted by his learned Counsel, the plaintiff's aim is to file a suit for possession against the defendant-purchasers after obtaining a sale-deed from Saiyed Bunyad Husain of a date prior to that of the transfer in favour of the defendant-purchasers. The compromise which will enable the plaintiff thus to circumvent the law must be held to be unlawful.

The appeal fails and I dismiss it with costs.

Appeal dismissed.

Z. K.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 82 OF 1922

April 12, 1923.

Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Gokul Prasad.

MANGRU RAI—DEFENDANT—APPELLANT

versus

SHIVANAND LAL AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Admission, erroneous, whether binding.

A manifestly erroneous admission does not bind the party making it. [p. 879, col. 2.]

Appeal from a decree of the District Judge, Ghazipur, dated the 29th September 1921.

Messrs. *M. L. Agarwala* and *Abu Ali*, for the Appellant.

Messrs. *S. N. Sen* and *U. S. Bajpai*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for redemption of a mortgage made by one *Musammat* Anarkali in 1898. *Musammat* Anarkali and Jugal Kishore, the father of Raj Lachhan, the original plaintiff in this case, jointly held six occupancy holdings. *Musammat* Anarkali purported to mortgage a half share in three of these holdings and the whole of three more holdings which were mentioned in the mortgage-deed, that is to say, she mortgaged a half share in three holdings and the whole of three other holdings, altogether six holdings. *Musammat* Anarkali died in 1907 and the plaintiff brought this suit for redemption of the mortgage made by her. The defendant who is the mortgagee disputed the plaintiff's right to maintain the suit. He also contended that there was further burden on the property under two other mortgages, one of which was made in 1903 by *Musammat* Anarkali and the other in 1907 by *Musammat* Rekha the daughter of Anarkali. One Ghurhu Lal was a party to the third mortgage mentioned above but it is admitted that Ghurhu was neither the son

of *Musammat* Anarkali's daughter nor her heir in any other way. The learned Judge of the lower Appellate Court held that inasmuch as *Musammat* Anarkali purported to mortgage not only her own share in three of the holdings (*khatas*) but also Jugal Kishore's share in those holdings and the plaintiff, the son of Jugal Kishore acquiesced in that mortgage, the plaintiff must be deemed to be the mortgagor of a portion of the mortgaged property and as such he was entitled to maintain the suit. In our judgment this view of the learned Judge is right. *Musammat* Anarkali as stated above purported to mortgage the whole of three of the holdings and this mortgage was accepted by the plaintiff as a valid mortgage not only of *Musammat* Anarkali's own share in the holdings but also of his share. Therefore, the plaintiff as the owner of a part of the mortgaged property was entitled to redeem the whole mortgage; such mortgage could not be redeemed piecemeal.

The next contention put forward on behalf of the appellant-mortgagee is that Raj Lachhan, the plaintiff had relinquished his rights to the holdings in question inasmuch as in certain proceedings relating to the entry of the name of Ghurhu who was the step-son of *Musammat* Anarkali's daughter, an application was filed on behalf of Raj Lachhan in which he accepted Ghurhu to be the successor to *Musammat* Anarkali and did not assert any right in himself. The learned Judge says in his judgment that this application was neither admitted nor proved. It cannot de denied that no proof was given in the case to show that Raj Lachhan had filed the application. His Pleader made certain statements in the Court of first instance. From those statements it seems that he was not certain in his own mind. What he finally said was that the application bore the signature of Raj Lachhan but it had no effect inasmuch as Raj Lachhan was at the date of the application a minor. The learned Judge has held that Raj Lachhan was not a minor. The document which was before the Court was not the original application but a copy and, therefore, what the Pleader must be deemed to have admitted was that the copy purported to bear the name of Raj Lachhan as the abplicant who had signed it. But even if we assume shat Raj Lachhan did present the application it contains nothing more than an admission to the effect that Ghurhu was the heir to *Musammat* Anarkali. This admission was clearly erroneous inasmuch as admittedly Ghurhu was not the heir to *Musammat* Anarkali, not being a son of her daughter. The admission, therefore, if any, could not bind Raj Lachhan and preclude him from maintaining the present suit.

The third contention before us is that the Court below in not allowing to the appellant the amount of the third mortgage made by *Musammat* Rekha and Ghurhu had committed an error. We do not think that this is so. *Musammat* Rekha made the mortgage in 1907 when the present Tenancy Act was in force. Under that Act she could not make a mortgage of an occupancy holding. Therefore the mortgage is not one which can bind Raj Lachhan and which Raj Lachhan was bound to redeem. The Court below was therefore, right in refusing to allow the amount of that mortgage to be added to the amount of the original mortgage of 1898. The appeal, therefore, fails and must be dismissed.

There are cross-objections on behalf of the plaintiff upon the question of the amount of the second mortgage made by *Musammat* Anarkali in 1903 which the Court below has declared to be an amount which the plaintiff must pay for the purpose of redeeming the mortgage. Upon the terms of the mortgage of 1903 the burden created on the property was increased by the amount of the latter mortgage which provided that the earlier mortgage would not be capable of redemption unless the amount of the second mortgage was also paid. It cannot be disputed that if *Musammat* Anarkali had sought to repudiate the second mortgage and to take back the property from the mortgagee she would not have been allowed to do so unless she paid the amount of the second mortage made by her. The plaintiff who accepts the mortgage made by *Musammat* Anarkali is in no better position. The plaintiff has conceded that *Musammat* Anarkali had made the mortgage of his share and that

he is liable under that mortgage. The effect of the second mortgage was to add a further burden on the property mortgaged under the mortgage of 1898 by an addition to it of the amount of the second mortgage. This burden exists on the property of the plaintiff. He is, therefore, liable to pay the amount of the second mortgage for the purpose of redeeming the property. The learned Judge was, in our opinion, right in ordering the plaintiff to pay the amount due upon this second mortgage. The result is that both the appeals and the cross-objections must fail. We dismiss both of them with costs including in this Court fees on the higher scale.

Appeal and cross objections dismissed.

Z. K.

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL NO. 89 OF 1923.

September 6, 1923.

Present:—Mr. Justice Duckworth.

MA PYONE AND OTHERS—DEFENDANTS—APPELLANTS

versus

MA U AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage—Redemption, suit for—Argeement by mortgagor to sell property to mortgagee, whether can be set up by mortgagee.

There is nothing to prevent a mortgagor from selling the mortgaged property to the mortgagee provided the sale is separate from the actual mortgage itself, that is, is not part and parcel of the mortgage contract. [p. 878, col. 1.]

Kanhayalal Bhikaram v. *Narhir Laxmanshet Vani*, 27 B. 297; 5 Bom. L. R. 140, *Ram Singh* v. *Baij Nath*, 49 Ind. Cas. 353; 17 A. L. J. 117, relied on.

A mortgagee may in answer to a suit for redemption by the mortgagor set up an agreement to sell the mortgaged property, although the agreement has not been carried into effect by the execution of a registered conveyance, and in spite of the fact that limitation for a suit to enforce specific performance of the agreement has expired. [p. 878, col. 1.]

Venkatesh Damodar Mokashi v. *Mallappa Bhimappa Chikkaiki*, 66 Ind. Cas. 868; 24 Bom. L. R. 242; (1922) A. I. R. (B.) 9; 46 B 722, *Sithayi Ammal* v. *M. K. Mahomed*, 65 Ind. Cas. 405; 11 L. B. R. 94, referred to.

Appeal against a decree of the District Court, Pegu, in Civil Appeal No. 1211 of 1923.

Mr. *Keith*, for the Appellants.

Mr. *Janab Ali*, for the Respondents.

JUDGMENT.—In this case the respondents sued the appellants for the redemption of certain paddy land for the sum of Rs. 1,600. Their case was that in June 1916 the said land was mortgaged with the appellants by way of simple mortgage in consideration of a loan of Rs. 1,000, the mortgage being effected by registered deed. Later on in August 1918, as the money could not be re-paid the said mortgage was turned into an usufructuary mortgage, it being agreed that the land could be redeemed for Rs. 1,600.

The case of the appellants-defendants was in many ways the same, but with this essential difference, that they pleaded that in August 1918 what was done was that the mortgagors sold the said land outright to them as the mortgagees, for a sum of Rs. 1,400, then due upon the mortgage, and an additional sum of Rs. 200, making up a total of Rs. 1,600, and that it was in this manner that they got possession of the property. They pleaded that the mortgagors promised to give them a registered conveyance later on, but failed to do so. In these circumstances, they urged that the plaintiffs-respondents were not entitled to recover the land.

The Trial Court decided in favour of the defendants-appellants and dismissed the suit. The lower Appellate Court, on the other hand, held that there was nothing to show that the mortgage had ceased to exist, inasmuch as the present appellants could not legally prove the alleged sale to them, and decreed the claim of the respondents. The learned Judge of the Trial Court held that the evidence of the defendants proved that they were in possession under a contract of sale, and that, therefore, under the rulings of the late Chief Court of Lower Burma, the said defendants could not be evicted from the land. The learned Judge of the District Court did not expressly find whether the evidence showed that there was a valid contract of sale

as such, but only held that the alleged sale, since it was not registered, could not be proved.

I have studied the evidence in the case, and there is little doubt, especially after perusing the evidence of the headman, that there was an invalid sale, and that this evidence may be looked to, in order to decide whether there is still a subsisting contract of sale involved in that invalid sale in August 1918. The evidence that what was done was merely to turn the simple mortgage into a usufructuary mortgage is, even if admissible, of the weakest sort, and the opinion of the learned Judge, who saw and examined the witnesses, is worth a great deal. I think that he was right in his finding. Further, I consider that it is clear that there is a subsisting contract of sale involved. It is in evidence that the appellants took steps to get a registered conveyance, but were put off. There is no reliable evidence that a claim for specific performance of this contract is time-barred, or was so at the time of suit, since there is no clear evidence of a demand and refusal three years prior to the institution of proceedings. Moreover, even if time had elapsed, there is authority in the case of *Venkatesh Damodar Mokashi* v. *Mallappa Bhimappa Chikkalki* (1) for the position that this, as between a vendor and vendee, in the circumstances stated, would make no difference.

There is no reason why a mortgagor should not sell the mortgaged premises to the mortgagee, provided the sale is separate from the actual mortgage itself, *i. e.* is not part and parcel of the mortgage contract. See the cases of *Ram Singh* v. *Brij Nath* (2) and *Kinhayalal Bhikaram* v. *Narhar Laxmanshet Vani* (3).

Finally the case of *Santhayi Ammal* v. *M. K. Mahomed* (4) is authority for the fact that such an invalid sale as is proved here can be used as a contract of sale, which does not require registration and so can be proved apart from whether there is registration or even a document referring to it.

Moreover, in this instance, it is not disputed that, a "*Pyatbaing*" was drawn up, and this *pyatbaing* indicates that an outright sale was intended.

This is evidence in regard to the agreement to sell the land.

It is true that the mortgage still subsists, at any rate until the appellants obtain a registered conveyance of the property, but on the equities, it is manifest that, according to the decisions of the last Chief Court of Lower Burma, the plaintiffs-respondents are not entitled to recover the land from the defendants-appellants.

The appeal is allowed, the decree of the District Court is set aside, and that of the Trial Court, dismissing the plaintiffs-respondents' suit, is restored with costs in all three Courts.

Appeal allowed.

Z. K.

(1) 66 Ind. Cas. 868; 24 Bom. L. R. 242; (1922) A. I. R. (B.) 9; 46 B. 722.
(2) 49 Ind. Cas. 353; 17 A. L. J. 117.
(3) 27 B. 297; 5 Bom. L. R. 140.
(4) 65 Ind. Cas. 405; 11 L. B. R. 94.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 765 OF 1921 (WITH SECOND CIVIL APPEALS NOS. 678 AND 687 OF 1921).

January 30, 1923.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

SITARAM SADASHIV SHASTRI SAPRE —PLAINTIFF—APPELLANT

versus

PARSHURAM BHAU PATIL—DEFENDANT—RESPONDENT.

Bombay Land Revenue Code (V of 1879), s. 53—Occupancy right—Assessment paid by tenants—Presumption—Fixity of tenure—Miras *land.*

In the Satara District the fact that the tenants pay the amount of assessment may not be conclusive, but affords a strong presumption that the tenants have attained to occupancy rights by virtue of their long holding. [p. 879, col. 1.]

The word *miras* should not be used in connection with persons who by virtue of their long holding are presumed by reason of the provisions of section 53 of the Bombay Land Revenue Code to have acquired fixity of tenure. [p. 879, col. 1.]

WISH NATH *v.* RAHMAT ULLAH.

Second appeal from a decree of the Assistant Judge, Satara, in Appeal No. 11 of 1916.

Messrs. *S. S. Patker* and *D. R. Maneriker*, for the Appellant.

Mr. *K. V. Joshi*, for the Respondent.

JUDGMENT.

Macleod, C. J.—I rather doubt whether any second appeal lies. The lower Appellate Court agreeing with the Subordinate Judge has found that the defendants pay assessment. The Record of Right shows that the defendants pay assessment and though this is not conclusive, it is probable that the plaintiff has been getting a trifle beyond the proportionate share from the tenants owing to the splitting up of the Survey Number. The fact that the tenants pay the amount of assessment may not be conclusive evidence in the Satara District in a case of this nature, but it would afford a strong presumption that the tenants have attained to occupancy rights by virtue of their long holding. The Trial Judge at the original hearing of the case said "It is a well-established custom in the part of the country that the rent leviable on *miras* lands, may be enhanced up to the limit of half the gross produce of the land." We have on more than one occasion pointed out the danger of using the word *miras* in case of persons who by virtue of their long holding are presumed by reason of the provision of section 53 of the Land Revenue Code to have acquired fixity of tenure. On the remand the Subordinate Judge found that the plaintiff was not entitled to enhance. His judgment is not printed but it may be presumed that he came to this conclusion owing to the pronouncements of this Court in the judgments remanding the case and the fact that no further evidence was called by the plaintiff that he had a rightly custom or otherwise to enhance the rent in cases where the rent was equivalent to assessment. It is impossible for us in these circumstances to come to a different conclusion.

The appeal must be dismissed with costs

Crump, J.—The previous judgment of this Court in second appeal reversed the judgment of the District Court which proceeded on the ground that section 216 of the Land Revenue Code applied to this land. The case was remanded for a decision, whether on the facts of this particular case plaintiff was entitled to enhance the rent. The judgment of this Court will be found as *Sitaram Sadashiv* v. *Tukaram Daji* (1). Certain remarks were made in these judgments as to the bearing of the alleged correspondence between the assessment on the lands and the payments made by defendants to plaintiffs in past years, but that question was left for the consideration of the lower Courts along with the other evidence in the case. The Courts have found upon the evidence that in this particular case plaintiff's right to enhance must be negatived. I cannot see that there is any error of law involved in that finding. To me it appears a reasonable conclusion on the facts. I agree, therefore, that these appeals must be dismissed with costs.

Appeals dismissed.

Z. K.

(1) 61 Ind. Cas. 577; 45 B. 994; 23 Bom. L. R. 395.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST APPEAL NO. 2708 OF 1922.

May 2, 1923.

Present:—Mr. Justice Campbell.

WISH NATH—JUDGMENT-DEBTOR—APPELLANT

versus

RAHMAT ULLAH—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 908), O. XXI, rr. 54, 67, 90—Execution of decree—Sale proclamation, copy of, not affixed to property—Material irregularity.

Under O. XXI, rr. 54 and 67 of the Civil Procedure Code a copy of the sale proclamation must be affixed to a conspicuous part of the property to be sold. Failure to do this amounts to a material irregularity in publishing the sale, within the meaning of O. XXI, r. 90 of the Civil Procedure Code. [p. 880, col. 2.]

Appeal from an order of the Senior Sub-Judge, Amritsar, dated the 11th August 1922.

WISA NATH *v.* RAHMAT ULLAH.

Mr. *Tirath Ram*, for the Appellant.

Mr. *Zafar Ullah Khan*, for the Respondent.

JUDGMENT.—This is an appeal against an order under O. XXI, r. 92, Civil Procedure Code, in respect of the execution sale of certain immoveable property in Amritsar City.

On the 4th March, an order was made for issue of the proclamation of sale and the proclamation stated the property to be situate in Katra Mahan Singh.

On the 16th March 1922 the serving officer reported that the proclamation had been affixed at Deorhi Chauk Karmon.

On the 18th March 1922 the property was sold by auction and was purchased by the decree-holders for Rs. 10,800. It is not denied that previously the same property had been purchased by the judgment-debtor from the decree-holders for Rs. 13,000, Rs. 2,000 of which was paid in cash and the remaining Rs. 11,000 was secured upon a mortgage of the property. The suit which resulted in the decree now in execution was concerned with that mortgage.

On the 8th May 1922 the judgment-debtor filed objections under O. XXI, r. 90. These were directed to be put up on the 25th May 1922. On that date the Judge was absent and the objections were laid before him on the 8th July. On 8th July the parties were present in Court and the case was adjourned for orders to the 15th July. On the 15th July the parties were present. The order was not ready and an adjournment was made to the 19th July. On the 19th July the decree-holder only was present and the Court directed that the original record should be sent for since one of the objections concerned the measurements of the property. On the next date the 9th August the judgment-debtor was not present, the decree-holder was present and the case was put down for orders on the 11th August. On the 11th August the order under appeal was passed. It stated that the Judge had been through the record, that there was no such apparent irregularity as would render the auction-sale void or justify its being set aside, that the measurements had been correctly stated and that, therefore, the auction-sale was confirmed,

In appeal it is contended that the first objection regarding irregularity of advertisement of the sale was one which was apparent on the record and this certainly seems to be so. Under O. XXI, rr. 54 and 67 a copy of the proclamation order had to be affixed on a conspicuous part of the property. *Prima facie* from the serving officer's report this was not done and it is perfectly legitimate to argue that there may be a great difference between the price obtainable in auction for a property conspicuously labelled for some time previously as to be sold on a certain date and that obtainable for a property not so labelled. Whether the terms Katra Mahan Singh and Deorhi Chauk-Karmon are synonymous or not is not to be discovered from the contents of the record. *Prima facie* they are not.

For the respondents it is pointed out that on the two last hearings the judgment-debtor was not present in Court, that he did not ask the Court for an opportunity of proving substantial injury within the meaning of the proviso to O. XXI, r. 90, and that for these reasons he should not be allowed now to complain of the Court's order. The proceedings of the lower Court nevertheless show that the absence of the judgment-debtor did not affect the decision which was pronounced upon the merits and which undoubtedly overlooked the important point mentioned above.

I accept the aopeal, set aside the order of the lower Court and send the case back for re-decision of the objections contained in paragraphs Nos. 1 and 3 of the judgment-debtor's petition of the 8th May 1922, paragraphs Nos. 2, 4 and 6 admittedly have no force and No. 5 contains no assertion of irregularity but merely explains the substantial injury alleged. The parties should be given an opportunity of producing any evidence which they might wish to lead on the matters in controversy.

In this Court the parties will pay their own costs.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 632 OF 1923.

December 12, 1923.

Present:—Mr. Justice Sulaiman.

DALGANJAN AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 97—Right of private defence of property belonging to another—Attempt to commit offence.

Under section 97 of the Penal Code, the right of private defence of property extends not only to one's own property but also to the property of any other person, and it is not necessary that one of the offences enumerated in the section should have been actually committed, it is enough if there is an attempt to commit any of those offences. [p. 882, col. 1.]

Application for revision against an order of the Additional Sessions Judge, Allahabad, dated the 18th September 1923.

Mr. *Kumuda Prasad*, for the Applicants.

The Assistant Government Advocate, for the Opposite Party.

JUDGMENT.—The present applicants have been convicted under section 323 read with section 147 of the Indian Penal Code. One Jalpa tenant was in possession of a certain mango grove in village Osa which belonged to the Raja Saheb of Bara. On his death he left two step sons and a step daughter, who was married to a cousin of Thakurdin. It is found that Thakurdin was in possession of this grove about May 1923. He applied to the Raja Saheb for the grant of a lease of the crops to him; while that application was pending the Raja Saheb's *sazawal* auctioned the crops to one Rameshwar Kurmi and made a report with a recommendation that the lease to Rameshwar should be sanctioned. On the 12th of May the Raja Saheb accepted the lease in favour of Thakurdin and not Rameshwar. The *sazawal* after having been informed of this order put Thakurdin in actual possession of the crops. He did not, however, inform Rameshwar of this. What next happened may well be described in the words of the learned Additional Sessions Judge himself:—

"On the morning of the 15th of May Rameshwar with two other men went and plucked some mangoes from those trees. They were obstructed by Ujagar appellant who took away from them the fruits plucked by them. Rameshwar then went and complained to Deo Saran, the head of the Kurmi party, and the latter took him again along with him to pluck the mangoes. This time Deo Saran, Rameshwar and Bachchu went to pluck the mangoes armed with *lathis* and Deo Saran challenged that he would take the fruits and any one who could might oppose him. It was wholly wrong on the part of Rameshwar and Deo Saran to have gone there with *lathis* to enforce their supposed right by show of force and challenge Ujagar and others of the other party. The appellants Ujagar and others in response to the challenge went there armed with *lathis* to resist the taking of fruits by Deo Saran's party. There was an exchange of hot words between Deo Saran and Dalganjan, a servant of Behari Lal, and they then came to blows, many other Kurmis also arrived and a fight commenced in which Deo Saran on one side and Dalganjan and his brother Sheo Partap on the other were hurt and felled down. The others then went away."

The learned Additional Sessions Judge has found that Thakurdin was in rightful possession of the mango crops and that as Rameshwar's lease had not been sanctioned he and his party had no right to the crops and had no right whatsoever to take the fruits by force. He has also found that it was quite wrong of Rameshwar to go there and pluck such fruits. He has also found that when they went a second time to pluck the mango fruits they went there armed with *lathis* and challenged that they would take the fruits and anyone who wanted to resist them should come forward. This conduct has been found by the learned Additional Sessions Judge to have been wholly wrong. It has been also found that in response to the challenge the members of Ujagar's party went there to resist the taking of fruits by Deo Saran's party. It is clear that the accused went there to resist the other party, that hot words were exchanged and they ultimately came to blows. In the fight which took place one man Deo Saran was hurt on the other side and received some simple hurts, whereas two

men were hurt on the accused's side and were actually felled down.

The actual facts cannot now be much disputed and they were fully proved by the evidence of a number of neighbours who happened to be present near the scene. The accused at the trial raised the plea of private defence of property. The learned Additional Sessions Judge has overruled that plea on a ground which is not quite apparent. In the course of his judgment he has remarked: "It would have been a different thing if Thakurdin had tried to protect his possession against Rameshwar." What the learned Judge probably thought was that as the crop was in the possession of Thakurdin he alone could have put forward a plea of self-defence and that the other accused persons who are not directly related to Thakurdin could not claim that protection. This view was clearly wrong. He has also remarked that "the fight commenced before any fruits were plucked by the opposite party." Under section 97 of the Indian Penal Code it is provided that every person has a right to defend the property whether moveable or immoveable of himself *or of any other person* against any act which is an offence falling under the definition of theft, robbery or criminal trespass or which is an *attempt* to commit theft, robbery or criminal trespass. On the findings arrived at by the learned Additional Sessions Judge himself there can be no doubt whatsoever that there was certainly an attempt on the part of the opposite party to commit both theft, if not robbery, and mischief as well as criminal trespass in defiance of Thakurdin's right and it was quite immaterial whether the present accused persons did or did not themselves own the mango crops. I may also add that the learned Additional Sessions Judge has not found that the case came under section 99 of the Indian Penal Code. It is not suggested that there was time to have recourse to the protection of the public authorities or that there was more hurt caused than was absolutely necessary for the purpose of the defence. The opposite party having been the aggressors were altogether in the wrong and I am of opinion that the accused persons under the circumstances were justified in defending the rights of Thakurdin and resisting the attack of the opposite party.

I accordingly allow this revision, set aside the convictions and the sentences passed on the applicants and acquit them of the offences with which they have been charged. I also direct that the order calling upon them to furnish security be cancelled,

Z. K. *Revision allowed.*

RANGOON HIGH COURT.

CRIMINAL REVISION NO. 406B OF 1923.

September 18, 1923.

Present:—Mr Justice May Oung.

B. R. BAHADAR—PETITIONER

versus

JADAWJEE MEHTA—RESPONDENT.

Rangoon Rent Act (II of 1920, as amended by Act I of 1922), ss. 14, 14A, 15—Landlord and tenant—Right, to recover excess rent from tenant—Standard rent, certification of, whether necessary.

Under sections 14 and 14A of the Rangoon Rent Act, the Legislature in providing remedies as between the tenant and the landlord, where either of them has enjoyed benefits to which he was not entitled under the Act, intended that these remedies should be granted only in cases in which the Controller has, having regard to all the circumstances, fixed a standard rent under section 15 of the Act.

Therefore, the landlord's remedy under the proviso to sub-section (2) of section 14A of the Rangoon Rent Act, to recover from his tenant rent recovered by the latter from his sub-tenant in excess of the standard rent, cannot be exercised unless and until the Controller has granted a certificate certifying the standard rent of the premises leased by the landlord.

Criminal revision of an order of the Eastern Sub-Divisional Magistrate, Rangoon, in Criminal Miscellaneous Trial No. 103 of 1923.

Messrs. *Cowasji* and *Das*, for the Petitioner.

Mr. *G. C. Banerjee*, for the Respondent.

ORDER.—The petitioner, a landlord, applied to the Magistrate under the proviso to sub-section 2 of section 14 A of the Rangoon Rent Act, 1920, for the recovery

of a sum of Rs. 180 alleged to have been received by his tenant, the respondent, in excess of the standard rent. His case was that he had let three rooms in a house to the respondent on the rental of Rs. 50 a month, that the latter had sub-let two of the rooms at Rs. 25 each per mensem and was thus occupying the third room free of rent, that the monthly rent of the three rooms on the 1st April 1918 was Rs. 42 and that Rs. 30 per mensem was a reasoable charge for the room occupied by the respondent; he, therefore, prayed for the recovery of Rs. 180, being the excess rent "received" by the respondent for six months.

The learned Magistrate holding that the section did not apply because the standard rent had not been fixed by the Controller, dismissed the application summarily.

In effect the petitioner fixed the new standard rent of his own at Rs. 80 a month for the three rooms, as, although he stated that the rent on the 1st April 1918 was Rs. 42, he did not take that figure as the basis of his calculations, as he might possibly have done under sub-clause II (A) of clause (*e*) of section 2. His method was to accept Rs. 50, the rent paid by the tenant, as the "standard rent" under section 14A (2) and then to lay down an arbitrary value for the third room. The law does not allow this.

Reading sections 14 and 14 A together, it is obvious that the Legislature, in providing remedies as between the tenant and the landlord where either has enjoyed benefits to which he, according to the Act was not entitled, intended that these remedies should be granted only in cases in which the Controller has, having regard to all the circumstances, fixed a standard rent under section 15.

I, therefore, hold that the landlord's remedy under the proviso to sub-section (2) of section 14 (A) cannot be exercised unless and until the Controller has granted a certificate certifying the standard rent of the premises leased by the landlord.

The application is dismissed.

Application dismissed.

Z. K.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL NO. 252 OF 1923.

March 28, 1923.

Present:—Mr. Justice Walsh.

BASHA NAND—ACCUSED

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 478, proceeding under—Magistrate, duty of—Charge, absence of—Inquiry, summary, effect of—Commitment, legality of—Trial, whether liable to be set aside.

An Assistant Collector while purporting to act under section 478 of the Criminal Procedure Code framed no charge at all, made an inquiry of a perfunctory nature and committed the accused to the Court of Session on a charge of forgery. There was practically no record on which the commitment was based. The accused was tried and convicted by the Sessions Judge:

Held, that there having been no proper proceeding before the Committing Magistrate the trial was irregular and must be set aside.

Emperor v. *Babu Prasad*, 42 Ind. Cas. 1000; 40 A. 32; 15 A. L. J. 805; 19 Cr. L. J. 40, followed.

Messrs. *Alston* and *Ramavarma Prasad*, for the Accused.

The Government Pleader, for the Crown.

JUDGMENT.—This proceeding must be quashed on the ground of fundamental error while declining to withhold my admiration for the method adopted by the Assistant Collector in speedily disposing of a highly suspicious and complicated case. What the Assistant Collector Mr. J. P. Nicholson did was this:—He had a civil dispute before him in which a highly complicated question had arisen between a Forest Official who seems to have been engaged in some transaction between himself and Beswan and Kadar Nath and some other people, and on a very shabby piece of paper with pen and ink these people put their heads together and proceeded to partition among themselves either their own or other people's money to their mutual satisfaction. The point in dispute in the civil suit was whether an entry or memorandum which is to be found at the top of this shabby piece of paper is true or untrue. It represents a liability or an admission of liability in favour of the accused of a sum of Rs. 800. It does not purport to be signed by anybody nor

does any other part of this document aid it can only be regarded not as an admission but as a contemporaneous record of a no doubt heated discussion which took place at the time each trying to arrive at the actual liability between them. The Assistant Collector came to the conclusion that the Rs. 800 testified to by this entry was not really due and that the entry had been made afterwards. He does not appear to have troubled himself as to who made it and whether the accused was to be charged with forgery or with having altered some document which he must have known had been fraudulently altered by somebody. An alteration made subsequently on a rough document of this kind would not be in itself a forgery unless it was done with attempt to defraud, which might raise the question whether the Rs. 800 was really due or not, that is to say, if several people and myself together met and made various memoranda, I might discover something which I knew ought to have been entered but had been omitted in the general confusion and I might honestly, although perhaps misguidedly, make an additional note as a memorandum to put it beyond dispute if any question should arise hereafter. It would all depend whether I did it honestly or with an attempt to defraud. The Assistant Collector came to the conclusion that it was done dishonestly with intent to create a claim for this specific sum, and I express no opinion whether he was right or wrong about that, although it would obviously be a very clumsy performance if in fact, as the Sessions Judge afterwards finds by his judgment, the document was completed without some additional memorandum and was rendered unintelligible by the addition. That being the state of mind of the Assistant Collector on hearing the civil suit he no doubt had jurisdiction under either section 476 or 478 to give effect to his view that criminal proceedings ought to be brought against the persons who had got this false entry made. Unfortunately the proceedings which he had adopted were very summary. Deciding to act under section 478, he neglected to follow the directions contained in the second sub-section, of that section, which requires that if he concludes the enquiry himself his proceedings 'shall be conducted as nearly as may be in accordance with the provisions of Chapter XVIII of the Criminal Procedure Code. He framed no charge and although he made some sort of enquiry it was of a perfunctory character and when he came to write his committal order which he did on the 2nd January, he incorporated as the main grounds for committing for trial the reasons which he had given in his judgment in the civil suit on the 30th December. The 31st December, being a Sunday and the 1st January, being New Year's day which was presumably a holiday Mr. Nicholson must be complimented upon the despatch which he displayed in disposing of the enquiry but *the result* is that there is nothing in any way resembling a proper record in the Committing Magistrate's Court which, it is obvious that the elaborate provisions of the Criminal Procedure Code provide, shall always exist and which section 478 carefully protects. Unfortunately the point, although raised in the written statements filed before the Sessions Judge, either at or before the hearing, and there seems some mystery as to its exact date, was not raised in such a way as to cause the experienced Sessions Judge who dealt with the case to notice it at all. I am, therefore, unaware of what he should have thought of it if attention had been drawn to it but even if the matter had been *res integra* I think I should have been driven to hold that the trial was irregular, there having been no proper proceedings before the Committing Magistrate; but whether that is so or not I have no hesitation in following the decision which is clearly in point, *Emperor* v. *Babu Prasad* (1). I must allow the appeal and quash the proceeding.

The learned Sessions Judge made a very careful and elaborate examination of the documents and gave his reasons for thinking that the entry in question must have been added afterwards. He is of opinion that it was written by Kedar Nath but as the document remained in the possession of the accused it must have been done with his complicity and was, therefore, uttered by him

(1) 42 Ind. Cas. 1000; 40 A. 32; 15 A. L. J. 805; 19 Cr. L. J. 40.

in the civil proceedings knowing that the addition had been made. He assumes rather than finds that the addition was made because so far as I understand his judgment he has not decided whether in any view of accounts the Rs. 800 was really due. He does not seem to have a very high opinion of the gentleman on whose oath the truth or falsity of Rs. 800 liability depends. He remarks that the gentleman's explanation of the figures seems to show that he was interested in forest contracts and lending money or investing money upon them contrary to his duties and he directs that his conduct should be brought to the notice of the Chief Conservator of Forests. I am unable to express an opinion whether the real guilt or innocence of the present accused depends entirely upon the sworn testimony of this apparently defaulting member of the forest staff, but it is a matter which is clearly not irrelevant and expressing no opinion of my own I return the record to the Assistant Collector to enable him to re-consider it in the light of everything which has happened since. If he thinks it still desirable he can take the proper proceedings for holding an enquiry and decide whether the accused ought to be again committed for trial.

Meanwhile the appeal is allowed and the accused will be discharged.

In considering the matter in all its bearings which after all is a question of the public interest and that further expenditure of money upon this is fruitless, he will no doubt bear in mind that the accused has already suffered punishment and no doubt a great deal of expense in defending himself.

Appeal allowed.

Z. K.

RANGOON HIGH COURT.

CRIMINAL REVISION NO. 452 B OF 1923.

August 22, 1923.

Present:—Mr. Justice May Oung.

ASHU—PETITIONER

versus

MAUNG PO KHAN AND OTHERS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 439, 526, 528—Letters Patent (Ran.) cls. 28, 36—Transfer of case—Order of District Magistrate dismissing application—Revision, whether lies.

The High Court has no power either under section 439 of the Criminal Procedure Code or under the Letters Patent to revise an order of the District Magistrate dismissing an application for the transfer of a case made under section 528 of the Code.

Chin Pin v. *Emperor*, 61 Ind. Cas. 835; 13 Bur. L. T. 154; 22 Cr. L. J. 451, not followed.

Criminal revision of an order of the District Magistrate, Insein, passed in Criminal Miscellaneous Case No. 58 of 1923.

Mr. *Bomanji*, for the Petitioner.

JUDGMENT.—This is an application to revise the order of the District Magistrate dismissing an application for the transfer of a case under section 528, Code of Criminal Procedure. The applicant prays that the record may be called for under section 435 and that action may be taken under section 439. Counsel also refers vaguely to the unlimited powers granted to the High Court by the Letters Patent.

What I am actually asked to do is to order that the case be transferred from the Court which now has seisin of it to some other Court. This being so I fail to see any difference between the present application and one professedly under section 526. In effect, the applicant seeks an order under this last section without complying with its provisions.

Mr. Bomanji has referred me to Criminal Revision No. 105B of 1920 of the Chief Court of Lower Burma—the case of *Chin Pin* v. *Emperor* (1) in which a transfer was ordered on a similar revision petition. I have seen the original record of the case and find that the legal point taken above was not raised and that the

(1) 61 Ind. Cas. 835; 13 Bur. L. T. 154; 22 Cr. L. J. 451.

Crown, was not represented at the hearing.

The High Court's powers of revision are in express terms limited to those conferred by certain sections mentioned in section 439; section 526 is not one of these. I cannot find moreover that the Letters Patent confer any power of transfer over and above that conferred by section 526, since clause 28 is qualified by clause 36.

I hold, therefore, that the application cannot be entertained and is rejected. Learned Counsel asked that he might be allowed to convert his petition into one under section 526 but there is no bar to a fresh petition supported by affirmation.

Application dismissed.

Z. K.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 130 OF 1923.

April 13, 1923.

Present:—Mr. Justice Daniels.

GUDRI KHATIK—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 110—Security to be of good behaviour—Habitual thieves—Evidence of suspicion, admissibility of—General repute.

In a proceeding under section 110 of the Criminal Procedure Code, evidence that the accused have been suspected of theft in a large number of cases is not evidence on the basis of which they can be bound over, yet when evidence of general repute has been given, the fact that the accused have been suspected in a large number of cases may be admissible as corroboration. [p. 886, col. 2.]

When thefts are committed and the perpetrators are not known, the persons on whom suspicion naturally falls are those persons who have the reputation of being habitual thieves. Conversely the fact that the accused have never been suspected in any case might tend to weaken the evidence of general repute. [p. 886, col. 2.]

Criminal revision from an order of the District Magistrate, Benares, dated the 23rd January 1923.

Mr. *Mushtaq Ahmad*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The applicants in revision, Gudri, Markhande and Sahdeo Pandey, have been bound over under section 110, Criminal Procedure Code, by a Magistrate of the First Class together with a fourth man Raja Bhar and their appeals have been dismissed by the District Magistrate. Twenty-nine witnesses in all were called for the prosecution including the headmen of six different villages in the neighbourhood. The general effect of the evidence of these witnesses is that the accused are well known notorious thieves and belong to one gang. The only legal ground urged is that the Magistrate wrongly admitted statements as to the accused having been suspected in particular cases. This point is immaterial because even if this evidence is excluded the evidence of repute is sufficient to support the order. It is a curious circumstance that in a similar application in revision which preceded this, one of the complaints of Counsel was that no evidence had been given of the accused having been suspected in particular cases. In this case the complaint is the other way. My own view regarding such evidence is that while it is clearly not evidence on the basis of which any person could be bound over, yet when evidence of general repute has been given the fact that the accused have been suspected in a large number of cases may be admissible as corroboration. When thefts are committed and the perpetrators are not known the persons on whom suspicion naturally falls are those persons who have the reputation of being habitual thieves. Conversely the fact that the accused had never been suspected in any case might tend to weaken the evidence of general repute.

On the facts there is no ground for interference. As I have already said the evidence is amply sufficient to justify the order passed and it has been carefully considered both by the Trial Court and by the District Magistrate. Stress is laid on the fact that the accused called a large number of witnesses in their defence. This evidence has been considered by the Courts and they give reasons for not

accepting it. Indeed the complaint of one of the Counsel who appeared in the case is that the District Magistrate has devoted too large a portion of his judgment to discussing the defense evidence. The statements as to good character made by the witnesses who appeared for Gudri and Sahdeo are certainly a good deal weakened by the fact that both these men had been bound over previously, Gudri under section 109 and Sahdeo twice under section 110, a fact which the witnesses for the most part suppress. Stress is also laid on behalf of Gudri and Markhande on the fact that only three witnesses in the case of the former and one in the case of the latter come from the actual village in which the accused reside. The Magistrate has given a reason for this. He is of opinion that witnesses were for the most part afraid to come forward on account of the fear inspired by the accused. However that may be, the three witnesses from Dandopur who have deposed against Gudri are very substantial witnesses consisting, as they do, of the headman of the village, the Chaudhri of the Bazar and a substantial money-lender. I find no reason to interfere in the case of any of the applicants and I accordingly dismiss the applications of all three.

Z. K. *Applications dismissed.*

RANGOON HIGH COURT.

CRIMINAL REVISION NO. 519B OF 1923.

September 24, 1923.

Present:—Mr. Justice May Oung.

MAUNG HMAN AND ANOTHER—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 342—Examination of accused, object and mode of—Duty of Court—General question, whether sufficient.

The object of the procedure laid down in section 342 of the Criminal Procedure Code, is to enable the accused to explain each and every circumstance appearing in evidence against him. A Judge or Magistrate should note every point which he thinks he will have to put into the scale against the accused and then question him on each point, otherwise it will be impossible for the accused to know what is in the Court's mind and he cannot reasonably be expected to be able to explain it.

It is not a sufficient compliance with the provisions of section 342 of the Criminal Procedure Code to put a general question to the accused, such as: "What have you to say regarding the statement of the complainant's witnesses?"

Criminal revision against an order of the Township Magistrate, Wakema.

JUDGMENT.—After recording the evidence of six witnesses for the prosecution, the learned Magistrate proceeded to examine the two accused under section 342, Code of Criminal Procedure. But so far as the principal circumstances appearing in the evidence against them were concerned, his only question was:—"What have you to say regarding the statement of the complainant's witnesses?" This was not a sufficient compliance with the requirements of the law. The object of the section is to enable the accused to explain each and every circumstance appearing in evidence against him. A Judge or Magistrate should note every point which he thinks he will have to put into the scale against the accused, and then question him on each point. Otherwise it is impossible for the accused to know what is in the Court's mind. Several points may be made by the prosecution, some of these the Court considers good, others are regarded as practically worthless, but the accused is not afforded any reasonable opportunity of clearing up the case by such a question as "What have you to say?" The specific point or points which weigh against him must be mentioned; for if this is not done, he cannot reasonably be expected to be able to explain it or them.

In the case before me, the complainant alleged that she had obtained possession of the land and had let it out to tenants for four years. If this was so (and I note that the learned Magistrate accepted it) it was a point of supreme importance, and the accused should have been asked about it. They were not, and it follows that they were convicted improperly. In the circumstances, I am unable to accep

the recommendation of the learned District Magistrate in so far as an acquittal is concerned, but for the reasons given above, I set aside the convictions and sentences and direct that the two accused be re-tried by such Magistrate as the District Magistrate may select.

Re-trial ordered.

Z. K.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE NO. 452 OF 1923.

September 17, 1923.

Present—Mr. Justice Sulaiman.

IMAM ALI AND ANOTHER—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 476, proceeding under—Notice, whether necessary.

In a proceeding under section 476 of the Criminal Procedure Code, notice to the accused is not absolutely necessary, but the High Court looks with disfavour upon an order passed under that section without such notice, and it is highly desirable, though not essential, that such notice should be given. [p. 889, col. 1.]

Ram Piari v. *Emperor*, 16 Ind. Cas. 515; 10 A. L. J. 247; 13 Cr. L. J. 707, *Inayat Ali* v. *Mohar Singh*, A. W. N. (1905) 231; 28 A. 142; 2 Cr. L. J. 598, followed.

Criminal reference made by the Sessions Judge, Banda.

Mr. *K Verma*, for the Applicants.

JUDGMENT.—This is a Reference by the Sessions Judge of Banda recommending that the order of the Magistrate for the prosecution of the applicants under section 193, Indian Penal Code, be quashed.

The applicants are two Civil Court process servers and witnesses, who had been sent out with a warrant of arrest against Mahant Ram Kishen Das, who was a judgment-debtor in certain execution proceedings. On the 5th of March, the applicants stated that, they went to the Railway Station Babitpurwa and found the judgment-debtor there; the warrant was shown to him; and he was arrested. A Police Constable was also in attendance, and the judgment-debtor was asked to give in writing to the Constable a written note to the effect that he had been served. He did sign a paper. Later on the judgment-debtor taking a spear from his servant asked the Constable to give back the paper to him which was returned. On this he tore the paper into pieces and threw them away, and then road away from the station. The process servers picked up this paper which was all torn to pieces and the servant of the decree-holder sent a telegram to the decree-holder at Karwi stating that the judgment-debtor had been arrested but had gone away. On the 6th of March the process servers made a report in which they set forth their version of the occurrence and also alleged that at that time the Station Master, the Assistant Station Master, the Constable and the other accused were present. The judgment debtor was accordingly prosecuted, but was ultimately acquitted by Mr. Desai.

The judgment under which the judgment-debtor was acquitted shows that altogether eight witnesses were examined on behalf of the prosecution, six of whom substantially supported the prosecution story. The Station Master and the Assistant Station Master, who were examined on behalf of the prosecution and also were cross-examined as hostile witnesses, stated that they knew nothing of the occurrence and that within their knowledge no such occurrence took place. Taking all the points into consideration, and particularly the extremely unreliable character of the evidence, the material contradictions in the statement of some of the prosecution witnesses, and a total denial of any knowledge by the two witnesses above named, as well as the non-production of the Constable the learned Magistrate was convinced that the case was a false one. He accordingly acquitted the accused. He did at once order proceedings under section 476 against the process servers, but submitted a copy of the judgment to the District Magistrate. Later on he started proceedings under section 476.

The learned Magistrate however was not satisfied with the evidence which was already on the record and in order to further satisfy himself he decided to

hold a preliminary enquiry. No notice to show cause was issued to the present applicants, and they were not given any opportunity to be present at the time when this enquiry was held and when further evidence was recorded. It is true that in proceedings under section 476 notice is not absolutely necessary but it has been held by this Court in a number of cases that it looks with disfavour upon an order passed without such notice, and it has also often been remarked that it is highly desirable, though not essential, that such notice should be given *vide Rim Piari* v. *Emperor* (1) and *Inayat Ali* v. *Mohar Singh* (2).

This case is however stronger still. It was not only a case where no preliminary enquiry was held and notice issued but where a preliminary enquiry was actually held and additional evidence recorded by the Magistrate; and a report from the Circle Inspector, who made another independent private enquiry taken into consideration. In his order passed under section 476 the learned Magistrate has remarked that he had acquitted the accused in the previous case merely because of the unreliability of the prosecution witnesses, although no defence evidence had been taken. That later on he deputed the Circle Inspector to make a thorough local enquiry and to send a report, that he himself went to the village and made an enquiry at the station and examined some of the persons mentioned by the Circle Inspector in his report. He also added that the Circle Inspector had thoroughly enquired into the case, and every one who could throw any light in the case had been examined by him, except the Constable Jamaluddin, who was alleged to have been present at the time of the occurrence, and was on leave and out of station. All this evidence was recorded behind the back of the applicants, and the report of the Circle Inspector, who made an enquiry in the absence of the Magistrate has been taken into account and stress laid upon it.

(1) 16 Ind. Cas. 515; 10 A. L. J 247; 13 Cr. L. J. 707.

(2) A. W. N. (1905) 231; 28 A. 142; 2 Cr. L. J. 598.

The learned Sessions Judge who has considered the case on the merits, has pointed out that the present applicants, from the very start, had been mentioning the names of the Station Master and the Assistant Station Master, as well as the Constable, who has not been examined, as being among those persons who were present at the time. It is not very probable that if the whole story was altogether false, they would have mentioned the names of the Station Master, and of the Assistant Station Master, as well as of the Constable, without any expectation that they would support them. There were six witnesses produced in support of the prosecution story, and as against them the only evidence consists of the denial of the judgment-debtor and also the ignorance of the Station Master and the Assistant Station Master.

In view of all the circumstances pointed out above I am of opinion that this Reference must be accepted, and the order directing the prosecution of the applicants be quashed.

Reference accepted.

Z. K.

RANGOON HIGH COURT.

CRIMINAL APPEAL NO. 874 OF 1923.

September 25, 1923.

Present:—Mr. Justice May Oung and Mr. Justice Beasley.

NGA PO CHET—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 304 II—Injuries on non-vital parts—Death caused by septic poisoning—Offence.

Accused attacked the deceased and inflicted four injuries on him, none of which was on a vital part, and death resulted because of septic poisoning:

Held, that the act of the accused fell within the definition contained in the second part of section 304 of the Penal Code.

Criminal appeal from an order of the Sessions Judge, Myaungmya, passed in Sessions Trial No. 25 of 1922.

SUBEDAR *v.* EMPEROR.

Mr. *Robertson*, for the Appellants.
Mr. *A. G. A.*, for the Crown.

JUDGMENT.

May Oung, J.—There does not appear to be any room for doubt that it was the appellant who attacked Ah Kan and caused his death. He was promptly denounced by Ah Kan, who had seen him before and there was sufficient light. Ah Kan's statement is supported by On Shwe and Ah Yin who know the appellant and had seen him twice on the evening between 7 and 10 o'clock and when they saw him run pass them at a short distance about 11 P.M., they could have had no difficulty in identifying him. There is also the evidence of Ah San and Ba Chit; the latter's statement is open to suspicion but that of the former was, like those of On Shwe and Ah Yin, given at once, not long after the assault, and there is no adequate reason to disbelieve him.

I would, therefore, confirm the finding that Po Chet was the assailant as to the offence committed by him.

This seems to be a case on the border line. Of the four injuries inflicted, one, on the left foot was not serious, that on the back healed up, the right elbow and the right knee suffered most. None of these were vital spots and the assailant's intention was apparently to maim his victim. Death resulted because of septic poisoning and hence it is difficult to hold that the appellant intended to inflict bodily injury sufficient in the ordinary course of nature to cause death. He must, however, in my view, be held to have intended to cause bodily injury which was likely to cause death, the degree of probability as to death ensuing not being so high as to justify a finding of murder. He is, therefore, guilty of an offence punishable under the second part of section 304.

I would alter the conviction accordingly and sentence the appellant to ten years' rigorous imprisonment.

Beasley, J.—I concur.

Conviction and sentence altered.

Z. K.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL NO. 446 OF 1923.

July 17, 1923.

Present:—Mr. Justice Walsh.

SUBEDAR AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—OPPONENT.

Criminal Procedure Code (Act V of 1898), s. 154—First Information Report, what is—Evidence Act (I of 1872), s. 27—Statement to Police by co-accused admissibility of—Statement, whether evidence of guilt of co-accused.

The First Information Report is the technical description of a report under section 154 of the Criminal Procedure Code, giving first information of a cognizable offence. It is usually made by the complainant or by somebody on his behalf. The description is inapplicable to a statement made by the accused. [p. 891, col. 1.]

A statement made by an approver to the Police at the time of his arrest giving the names of other persons who had joined in the offence can be used as against the latter only under section 27 of the Evidence Act. The use which can legitimately be made of such information is merely this that when direct evidence is given against the accused at the trial, it is open to the defence to check such evidence by asking whether the name of a particular accused was mentioned or not at the time. It becomes evidence which may be used to test the consistency of the approver's story and it is information which leads to the discovery of the accused, but it is no evidence of the guilt of the accused. [p. 891, col. 1.]

Criminal appeal against an order of the Additional Sessions Judge, Aligarh, dated the 18th of April 1923.

Mr. *S. N. Mukerji*, for the Appellants.

The Government Pleader, for the Crown.

JUDGMENT.—In this case six men have been convicted of the offence of making preparation for a dacoity and sentenced to varying terms of imprisonment of some severity. The first two Subedar and Ram Chander have already been convicted of a dacoity and sentenced to eight years' imprisonment, which conviction and sentence has been confirmed by me in the connected case. I have no doubt whatever as to the guilt of all the appellants. The same approver Narain who gave evidence in the connected case has also given evidence in this case.

I should not, therefore, interfere, or say anything about the details of the case, if it were not for one unfortunate circumstance in the way in which the learnad Judge

has dealt with one feature in the evidence. A technical point has been argued on behalf of the appellants, and in my opinion it is a good one. With regard to some of the accused it happens to possess little or no importence. I will deal with the way in which it affects the case of the appellants in detail in a moment. But it is a point of general importance affecting other accused, and a point upon which the learned Judge ought never to have made a mistake at all. The point is really an elementary one. I have no doubt the learned Judge is quite familiar with sections 25, 26 and 27 of the Evidence Act, but the complaint against his judgment is that he has misapplied the sections. The point arises in this way. The approver and one of the appellants were arrested practically red-handed. They made statements to the officer who arrested them involving admissions of guilt. They went further and gave a list of the other members of the gang. Thereupon the officer made a report in writing to his superior, containing the information which he had received, including the names of those other persons received from the two men arrested. Somehow or another the learned Judge has described this Police report, which is merely the report of a confession, as "the First Information Report". Now the First Information Report is a well-known technical description of a report under section 154, Criminal Procedure Code, giving first information of a cognizable crime. This is usually made by the complainant, or by some one on his behalf. The language is inapplicable to a statement made by the accused. The novelty of a statement by an accused person being called the First Information Report was to me so strange, that when Counsel for the appellants addressed his argument to me attacking the Judge's use of the First Information Report, I took no notice of the argument. The learned Judge realized that he was dealing with a confession, but he momentarily failed to appreciate that the document itself was inadmissible, and that the only way in which the information relied upon could be used was by section 27. That is to say with regard to the other accused, the officer giving evidence might say: "I arrested them in consequence of information received from Narain and Thakuri. When I arrested them they made a statement to me which caused me to arrest these people". The use which can legitimately be made of such information is merely this, that when direct evidence is given against the accused at the trial and there was evidence against the accused, it is open to the defence to check such evidence by asking whether the name of a particular accused was mentioned or not at the time. So that it becomes evidence which may be used to test that the consistency of an approver's story, and at any rate is information which leads to the discovery of the accused in question. It is no evidence of the guilt of the accused, and the mischief into which the learned Judge has fallen and which has been rightly complained of, is that he has used it throughout as evidence of guilt. In discussing the individual cases he constantly says in the forefront of the points against the individual accused, that "his name occurs in the first report," and he acquits some because their names do not appear in the first report, and in his general discussion in the judgment he says that "the First Information Report in question is of the greatest importance". As regards four of the accused I am quite satisfied that there was abundant evidence without this inadmissible document. Khuba was arrested in the village, where several of the dacoits come from, along with Chiranji who was armed with a loaded weapon. He has been identified as being with other members of the gang in two different places by three witnesses. He unfortunately has a squint. I do not understand why a squint should be regarded as a bar to a legitimate identification. It seems to me rather an aid than otherwise. It is quite true that if there is a dishonest investigation an Inspector might tell the witnesses that one of the persons he wanted identified had a squint, and it might be well, if there are many persons awaiting trial with this abnormalty, that some of them might be put amongst the crowd for identification, but a man might just as well object to an identification because he happens to wear a black moustache. People with remarkable features take that risk when

they take up an evil course. Chiranji has been sworn to by the approver, and as the Judge says his arrest with a loaded pistol is an incriminating fact against him, and he has been identified by some of the witnesses. Umrai was with the two appellants whom I have just mentioned and he has also been identified. Thakuri was with Narain when they were both arrested hiding soon after day-break with a loaded gun and ammunition. In the case of these four I have no hesitation in confirming their conviction and sentences. The case of Ram Chander and Subedar is not quite so simple. Omitting the objectionable report, there is only the identification of witnesses who have made a fair proportion of mistakes, and if this was the only thing against them, I should have felt some difficulty in deciding whether I ought not to order a new trial. But I propose to take a short and common sense course which cannot possibly prejudice the accused. They have already received eight years for dacoity. If I had the power I would make the sentence in this case run concurrently. After the eight years their power for mischief will be very much diminished and it seems an adequate sentence. They must have been guily of some preparation, if not this preparation, and I, therefore, uphold this conviction and having no jurisdiction to order the sentence to run concurrently, I reduce the sentence to one of one day to date from the judgment in the Sessions trial. I have taken the pains which I have done to deal with this question, because I thought it right that the attention of the Sessions Judge should be drawn to the point, and that he should realise that in a case of this kind, if the other evidence or other circumstances have raised a doubt as to the sufficiency of the evidence in the case, the time and trouble spent in this case, would have been thrown away because I should have had to order a new trial. Subject to the above modifications the appeals are dismissed.

Conviction upheld.
Sentence reduced.

Z. K.

CALCUTTA HIGH COURT.

CRIMINAL REVISION PETITION No. 209 OF 1923.

April 10, 1923.

Present:—Mr. Justice Newbould and Mr. Justice Suhrawardy.

SHERMULL AND OTHERS—PETITIONERS
versus
THE CORPORATION OF CALCUTTA—OPPOSITE PARTY.

Calcutta Municipal Act (III of 1899), s. 631—Complaint within three months—Adjournment—Revival after three months, effect of—Criminal Procedure Code (Act V of 1898), ss. 247, 344—Adjournment—Procedure—Summons Case—Absence of complainant, effect of—Acquittal—Order of Magistrate, whether necessary.

On a complaint charging the accused with selling adulterated *ghee* under the Calcutta Municipal Act the accused were summoned and the case was then adjourned for six weeks, as the Food Inspector who had filed the complaint was on leave. No further order was passed in the case and nearly three years afterwards the proceedings were revived on the application of the Food Inspector and fresh summonses were issued to the accused. It was found that it was the practice in the case of such prosecutions to stay proceedings for lengthy periods:

Held, (1) that the order passed by the Magistrate directing the issue of fresh summonses was passed in a pending case of which the Magistrate had taken cognisance on the original complaint and the provisions of section 631 of the Calcutta Municipal Act had not, therefore, been contravened; [p. 894, col. 1.]

Nando Lal Guha v. *Corporation of Calcutta*, 56 Ind. Cas. 862; 24 C. W. N. 467; 31 C. L. J. 442; 21 Cr. L. J. 558, distinguished.

(2) that the procedure adopted by the Magistrate could not be approved and that he should have observed the provisions of section 344 of the Criminal Procedure Code as to adjournments more strictly. [p. 894, col. 1.]

Section 247 of the Criminal Procedure Code gives the Magistrate a discretion to acquit the accused in the absence of the complainant, but the absence of the complainant in a summons case cannot result in the acquittal of the accused without the Magistrate passing any order in the exercise of that discretion. [p. 894, col. 1.]

Babus *Dasarathi Sanyal* and *B. C. Mukherjee*, for the Petitioners.

Babus *M. N. Mukherjee* and *S. N. Mukherjee*, for the Opposite Party.

JUDGMENT.—On the 23rd March 1920 Dr. S. N. Ghose, Food Inspector of the Corporation of Calcutta, filed a complaint in the Court of the Municipal Magistrate asking for summons against the petitioners under section 574-495 A (1) of Act III

(B. C) of 1899 as amended by the Calcutta Municipal Amendment Act of 1917. The offence complained of was that the petitioners had been selling adulterated *ghee* on the 4th February 1920. The Magistrate ordered summons to issue for the 17th April 1920. On that date the petitioners appeared by Pleader and the Magistrate passed an order directing that proceedings be stayed for six weeks as the Food Inspector was on leave. On the record no further order appears until 29th November 1922. On that date the Food Inspector prayed for the revival of the case and the Magistrate directed the record to be put up. On the 16th December 1922 the Magistrate passed the following order "Case revived. Issue fresh summons for 13th January 1923." The petitioners have obtained this Rule calling on the Municipal Magistrate and on the Chairman of the Corporation to show cause why this order reviving the proceedings should not be set aside on the following ground: "For that having regard to the great delay which had occurred from the date when the proceedings were stayed until the application for revival (namely 17th April 1920 to 29th November 1922) it must be assumed that these proceedings were abandoned and that the application for revival on the 29th November 1922 was at least a fresh complaint and being more than three months after the date of the alleged offence the proceedings could not go on in view of section 631 of the Calcutta Municipal Act."

In support of the Rule reliance is placed on the decision of a Bench of this Court in the case of *Nando Lal Guha* v. *Corporation of Calcutta* (1). We hold that the facts of that case are clearly distinguishable from the facts of the present case. The point of resemblance in the two cases is that an order was passed reviving the case after the proceedings had been in abeyance for a very long time. But the point on which the decision of this Rule depends is whether the original proceedings were abandoned so that the application of the 29th November 1922 must be regarded as a fresh complaint: if this were fresh complaint the issue of sommons thereon was clearly illegal having regard to the provisions of section 61 of the Calcutta Municipal Act which prevents a Magistrate from taking cognizance of an offence under the Act unless the complaint is made within three months of its commission. But having regard to the Magistrate's explanation we cannot hold that original proceedings were abandoned. The Municipal Magistrate is a Presidency Magistrate and under section 441, Criminal Procedure Code, we are bound to consider his explanation before setting aside his order. It appears that since the amendment of the Calcutta Municipal Act by the Act of 1917 the Corporation have instituted a large number of prosecutions for adulteration of *ghee*. These cases are usually strongly contested and as the evidence in the majority of cases is more or less similar it is inconvenient for the Corporation and the accused as also for the Court for these cases to go on at one and the same time. Consequently some of the cases including the present case have been stayed consistently with a procedure prevailing in the Court for the last 20 years. It further appears that several other similar cases were instituted against two of the three petitioners and that they were fully aware of all the circumstances. Having regard to these facts we see no reason to hold that the proceedings were abandoned. Further we are satisfied that the petitioners were not prejudiced by the delay and were not led by it to believe that the prosecution had been dropped.

But the most important difference between this case and the case of *Nando Lal Guha* v. *Corporation of Calcutta* (1), cited above is in the form of the applications on which the orders reviving the case were passed. In the reported case the application, which is set out in full in the report, contained statements of facts which were subsequent to a stay of proceedings. Here the application is on a printed form and is in the following terms. "The prosecution prays that case No. 3011 B of 1920 on which proceedings were stayed in this Court in 17th April 1920 may be revived." This was certainly not

(1) 56 Ind. Cas. 862; 24 C. W. N. 467; 31 C. L. J. 442; 21 Cr. L. J. 558.

a complaint on which the Magistrate could have taken fresh cognizance of the offence. His order directing issue of summons was an order passed in a pending case of which he had taken cognizance within three months of the alleged commission of the offence and the provisions of section 631 of Calcutta Municipal Act were not contravened.

It was urged on behalf of the petitioners that the case ceased to be a pending case when the complainant did not appear after the expiry of six weeks from the 17th April 1920 since the Magistrate ought then to have acquitted the petitioners under section 247, Criminal Procedure Code. But that section gives the Magistrate a discretion and we hold that the absence of a complainant in a summons case cannot result in the acquittal of the accused without the Magistrate passing any order in exercise of that discretion.

But though we find no illegality in this case which requires our interference we feel bound to express our disapproval of the procedure followed by the Magistrate. There is obviously something wrong in a procedure that results in a delay of over three years between the alleged commission of the offence and the commencement of the trial and such a procedure cannot be justified even by twenty years prevalence. We fully appreciate that these cases when contested necessitate a lengthy trial. But that does not justify the Magistrate in disregarding the provisions of section 344 of the Code of Criminal Procedure. When the six weeks' adjournment ordered on the 17th April 1920 came to an end the Magistrate should have made an order in writing stating the reason for a further adjournment and adjourning the case for such time as he considered reasonable. In the present case the convenience of parties would have been a sufficient reason for adjourning the case and the circumstances of the case would have rendered remands for lengthy periods reasonable. Had the procedure prescribed by law been followed it would not have been necessary to issue this Rule.

As already stated we hold that the groundon which this Rule was granted has not been established and the Rule is accordingly discharged.

Rule discharged.

Z. K.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION NO. 368 OF 1923.

May 12, 1923.

Present:—Mr. Justice Moti Sagar.

ATA MUHAMMAD AND OTHERS—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 147—Rioting, ingredients of—Unlawful assembly—Number reduced below five—Conviction, whether can be maintained.

In order to sustain a conviction under section 147 of the Penal Code it is necessary to find that the person accused of that offence was a member of an unlawful assembly and that he used force or violence in prosecution of the common object of such assembly. [p. 895, col. 1.]

Where out of five men alleged to have formed unlawful assembly and committed a riot, two are acquitted as not having been members of the unlawful assembly, the conviction of the remainder under section 147 of the Penal Code cannot be maintained and each of them can be held responsible only for what he himself did. [p. 895, col. 1.]

Criminal revision against an order of the Additional District Magistrate, Shahpur at Sargodha, dated 13th January 1923.

Dr. *Mohammad Alam*, for the Petitioners.

SAUDAGAR SINGH *v.* EMPEROR.

JUDGMENT.—On the facts found by the learned Additional District Magistrate it is impossible to maintain the convictions of the petitioners in this case. The story for the prosecution briefly is that on the 19th of October 1922, there was a fight between five persons, namely, Amir, son of Khanan, Jahna, son of Nawab, Ata Muhammad, son of Khanan, Amir, son of Jahana, and Jahana, son of Chiragh, on the one side, and Khanan complainant and his brother, Ghulam Muhammad on the other. In this fight both parties received some slight injuries. The complainant Khanan has stated that Jahana, son of Nawab, gave him two *lathi* blows while Amir, son of Khanan, gave a blow with a sickle on his month which resulted in one of his teeth being knocked out. Ghulam Muhammad, brother of the complainant, was also examined as a witness in the case and stated that Ata Muhammad and Amir, son of Jahana, each gave a *lathi* blow on his head and that Jahana, son of Chiragh, struck him on his hand. Some witnesses were also produced who stated that they were present and that they saw the complainant and his brother being beaten by the accused. The learned Additional District Magistrate did not place any reliance upon their statement so far as Jahana, son of Chiragh, and Amir, son of Jahana, were concerned. He was of opinion that these two persons did not participate in the fight, and that they were not even present. As a result of this finding he acquitted these two persons but maintained the convictions and the sentences imposed upon the other three accused by the Trial Magistrate under sections 147/323 of the Indian Penal Code.

It is impossible to understand how the present three petitioners could be held guilty of the offence of rioting under section 147, Indian Penal Code, when the other two accused, namely, Jahana and Amir, who were alleged to have been with them in the fight, had been acquitted. In order to sustain a conviction under section 147 it is necessary to find that the person accused of that offence was a member of an unlawful assembly, and that he used force or violence in prosecution of the common object of such assembly. In the present case on the finding of the learned Additional District Magistrate it is clear that there was no unlawful assembly, and a conviction under section 147, Indian Penal Code, is, therefore, illegal.

As to the conviction of the petitioners under section 323 it should be observed that the Additional District Magistrate does not say in his judgment what each of the petitioners did, nor has the statement of the complainant that the injury to his tooth was inflicted by Amir, son of Khanan, been believed by him. The medical evidence shows that the tooth was not knocked out by a sickle blow and that it was probably extracted subsequently in order to make the case look serious against the accused. The other evidence produced on behalf of the prosecution has also been disbelieved at least in so far as the two men, who have been acquitted, are concerned. In the absence of any satisfactory evidence connecting the petitioners with the offence I am unable to maintain the convictions and must hold that they are entitled to an acquittal.

I accordingly accept the revision and acquit the petitioners.

Revision accepted.

Z. K.

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 2 OF 1923.

March 23, 1923.

Present:—Mr. Justice Fforde.

SAUDAGAR SINGH AND ANOTHER—CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Evidence Act (I of 1872), ss. 114 ill. (b), 133—Approver, statement of—Corroboration—Evidence relating to recovery of stolen articles from possession of accused.

Evidence relating to the recovery of alleged stolen articles from the possession of an accused person, which is itself suspicious and unsatisfactory, cannot be treated as corroboration of the evidence of an approver involving that accused person in the commission of an offence of dacoity.

The house of a person accused of dacoity was searched in his absence and certain stolen articles were alleged to have been recovered. The accused

SAUDAGAR SINGH *v.* EMPEROR.

was given no opportunity of checking the result of the search or giving any explanation as to how the articles came into the house. There was no evidence as to where the respective articles were found, nor as to who produced them:

Held, that the evidence as to the search was unsatisfactory and could not be used as corroboration of the approver's statement incriminating the accused.

Appeal from an order of the Special Magistrate, First Class, with section 30 powers, Gurdaspur, dated the 24th November 1922.

Mr. *Kharak Singh*, for the Appellants.

The Assistant Legal Remembrancer, for the Crown.

JUDGMENT.—Saudagar Sirgh, Diyala and Jagat Singh have all three been convicted under section 395 of the Indian Penal Code and sentenced to seven years' rigorous imprisonment including three months' solitary confinement and a fine of Rs. 100 each, or in default further rigorous imprisonment for nine months. Having gone through the whole of the evidence on the record, and having listened to all that Counsel for the appellant have had to say, I am satisfied that the finding of the learned Magistrate is correct so far as it concerns Saudagar Singh.

The only direct evidence is the evidence of the approver, and, therefore, one has to look for corroboration of his story in material particulars. I am satisfied that in the case of Saudagar Singh there is ample corroboration of the story of the approver implicating him in the commission of the crime of which he has been convicted and sentenced.

As regards Jagat Singh, the case is on a different footing. The approver himself at first stated most definitely that he did not recognise this man as being one of the party concerned in the dacoity in question. It is true that he subsequently retracted from this statement and declared that he did recognise him; but that was only after he had been pressed by the prosecution and I must accept the statement which he first made.

Even if I accept the subsequent statement of the approver that he in fact did recognise this man as one of the party concerned in the robbery, it does not supply the corroboration required. That corroboration is sought to be established by the recovery list of certain articles, alleged to be some of the articles stolen and subsequently produced from Jagat Singh's house. I cannot, however, regard this evidence of discovery and identification as being satisafctory. This man's house was searched in his absence and he was given no opportunity of checking the results of the search or giving any explanation as to how the articles came into that house. There is no evidence as to where the respective ornaments were found, nor is anything said as to who produced them. As the discovery of these articles is the only evidence put forward as corroborating the story of the approver I cannot hold that his guilt has been established beyond a reasonable probability of doubt.

In the case of Diyala, the only corroborative evidence tendered is the production of one *bank* which he is alleged to have produced before the Police. In the conduct of the search for this particular article the provisions of section 103 of the Code of Criminal Procedure were not satisfactorily complied with. Two of the witnesses present at the production of the article in question stated that the silver *bank* and *band* were produced from a *tind*, but a third witness, Sundar Singh (P. W. No. 25), states that the *tind* contained a silver *bank* and makes no mention of the other article. No explanation is even suggested as to how this other article came to be there and I am not satisfied that the circumstances under which these things were produced are altogether beyond suspicion. As the evidence of recovery is the only evidence tendered as corroborative of the story of the approver in material particulars, and as I am not satisfied with this evidence, I do not consider that Diyala's complicity in the crime has been established beyond reasonable doubt.

I accordingly dismiss the appeal in the case of Saudagar Singh, and I accept the appeals of Diyala and Jagat Singh, and setting aside the convictions and sentences of the learned Magistrate as respects these two men, I order that they both be set at liberty.

Z. K.

Order accordingly.

BEGRAJ *v.* ALISHER.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 26 OF 1920.

September 8, 1922.

Present:—Mr. Kennedy, J. C., and Mr. Raymond, A. J. C.

BEGRAJ—PLAINTIFF—APPELLANT

versus

ALISHER AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), ss. 23, 51—Specific Relief Act (I of 1877), s. 22—Agreement to supply funds for litigation in return for share in property, whether opposed to public policy—Contract for sale of immoveable property—Purchaser, when bound to tender purchase-money—Specific performance—Delay in suing, effect of—Discretion of Court—Notice—Registration, effect of.

A fair agreement to supply funds to carry on a suit in consideration of having a share of the property in dispute, if recovered, ought not to be regarded as being *per se* opposed to public policy. Agreements of this character must, however, be carefully scrutinised and should not be tolerated if their motive is improper or if the immediate object is merely to promote gambling in litigation. [p. 898, col. 2.]

The strict law as to tender is not applicable to a suit for specific performance. [p. 899, col. 1.]

Tribhuvandas Varjivandas v. *Balmukundas Kishoredas*, 67 Ind. Cas. 865; (1923) A. I. R. (B.) 15; 24 Bom. L. R, 434, relied on.

A purchaser is not bound to tender the purchase-money unless the vendor is ready and willing to perform his part of the promise. [p. 899, col. 1.]

Shriram Rupram v. *Madangopal Gowardhan*, 30 C. 865; 5 Bom. L. R. 483; 8 C. W. N. 25, (P. C.) relied on.

The period of limitation for a suit for specific performance of a contract is three years from the day on which the plaintiff has notice that performance is refused, and in the absence of anything to show an abandonment or a sleeping over rights to the detriment of third parties, delay short of the period of limitation does not debar a plaintiff from claiming specific performance. [p. 899, col. 2.]

To operate as a bar to relief in a case of specific performance, delay must be of such a charactar as either to prejudice the defendant or to lead him to the belief that plaintiff has waived his rights. Delay which does not amount to waiver, abandonment or acquiescence and in no way alters the position of the defendant, does not disentitle the plaintiff to sue for specific performance. [p. 899, col. 2.]

Kedar Nath v. *Mannu Bibi*, 13 Ind. Cas. 879; 16 C. W. N. 247, relied on.

Under section 22 of the Specific Relief Act the jurisdiction to decree specific performance is discretionary, but the discretion of the Court is not arbitrary but sound and reasonable and is to be guided by judicial principles. [p. 900, col. 1.]

Notice cannot in all cases be imputed from the mere fact that a document has been registered. [p. 900, col. 1.]

Tilakdhari Lal v. *Khedan Lal*, 57 Ind. Cas. 465; 47 I. A. 239; 22 Bom. L. R. 1319; 39 M. L. J. 243; (1920) M. W. N. 591; 25 C. W. N. 49; 28 M. L. T. 224; 18 A. L. J. 1074; 32 C. L. J. 479; 2 U. P. L. R. (P. C.) 139; 13 L. W. 161; 2 P. L. T. 101; 48 C. 1 (P. C.), followed.

Appeal from a decree of the District Judge, Sukkur.

Mr. *Dipchand Chandumal*, for the Appellant.

Mr. *Hussomal Mulchand*, for the Respondents.

JUDGMENT.

Raymond, A. J. C.—Plaintiff-appellant a Hindu *banta*, residing in Shikarpur, filed a suit in the Sub-Court of Shikarpur, for specific performance of an agreement in writing in terms of which defendant No. 1, Ali Sher, contracted to sell to him his entire interest in certain immoveable property described in the plaint, and for a declaration that the sale of the said property by defendant No. 1 to defendant No. 2 respondents was void and inoperative. It appears from the pleadings that plaintiff had financed defendant No. 1 for the purposes of litigation in consideration of the sale by the latter to the former of half his share in the immoveable property in suit, and both plaintiff and defendant No. 1 obtained a decree against defendant No. 2 and others, awarding them 204 undivided shares out of 1728 shares in the property in suit. Plaintiff contends that after the decree was passed, defendant No. 1 executed an agreement in his favour which was registered, for the sale to him of his remaining 102 shares in the property in consideration of a sum of Rs. 560 out of which a sum of Rs. 100 had been paid as earnest-money, but defendant No. 1 in contravention of this agreement sold his share in the property to defendant No. 2. Defendant No. 1 did not defend the suit in the Trial Court and there was an *ex parte* decree against him; defendant No. 2 raised various defences to the action but it is unnecessary for the purposes of this appeal to consider all of them. The learned Sub-Judge dismissed the plaintiff's suit as he was of opinion that there was unreasonable delay on

his part in the fulfilment of his part of the contract, that there had been no valid tender by him of the purchase price and that in the circumstances of the case he was not entitled to the equitable relief of specific performance. Plaintiff appealed to the District Court, Sukkur, and the issues raised before it were, whether the deed executed in favour of defendant No. 2 by defendant No. 1 was valid and binding on the plaintiff and whether there was any agreement between plaintiff and defendant No. 1, and if so, whether the plaintiff was entitled to the relief sought. The learned District Judge was of opinion that the deed executed by defendant No. 1 in favour of defendant No. 2 was not binding on the plaintiff and that there was an agreement between the plaintiff and defendant No. 1, but came to the conclusion that plaintiff was not entitled to the relief sought as there was no valid tender of the purchase-price by him and secondly that the transaction between him and defendant No. 1 was champertous and that it would not be equitable to grant the plaintiff a decree both on the account of the delay in filing the suit and as it would give the plaintiff, "a Hindu and a champertous purchaser of litigation an additional share or foothold in Musalman property, where he is clearly an intruder." He, therefore, dismissed the appeal.

Plaintiff now comes on second appeal and as in the First Appellate Court, the appeal is contested only by defendant No. 2. I am of opinion, that the judgment of the learned District Judge is unsustainable and plaintiff is entitled to a decree in terms of his prayers in his plaint.

It appears to me that the District Judge was in error in holding that the transaction between the plaintiff and defendant No. 1 was "avowedly champertous" and that this disqualifies the plaintiff from seeking the relief he does. In the first place it was not one of the defences to the action taken in the Trial Court and there is no reference to it in the pleadings nor even in the First Appellate Court was the question of champerty in issue, the appellant, therefore, can with some justification protest against the finding on this point in the absence of any opportunity being given to him to contest it. But further the law is well-established that a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being *per se* opposed to public policy. No doubt agreements of this character are to be carefully scrutinized and they are not to be tolerated if their motive is improper or if the immediate object is merely to promote gambling in litigation. But in the present case there is nothing on the record which even remotely points to any impropriety on the part of the plaintiff in affording financial assistance to defendant No. 1. The latter had an honest claim against defendant No. 2 to judge from the decree in his favour which was confirmed on appeal. Apparently he had not the means to prosecute his suit without monetary help from the plaintiff and there is nothing to show that this help was rendered on extortionate or unconscionable terms. In fact there is not a tittle of evidence on the record to prove that the transaction between the plaintiff and defendant No. 1 was opposed to public policy and we have no right to assume that because the former is a *bania* and the latter a Muhammadan, the Muhammadan has been a victim to the overpowering influence of the *bania*. I am, therefore, of opinion that the learned District Judge was clearly in error in taking into consideration the champertous nature of the transaction, particularly when it has not been pleaded, as one of the reasons for refusing relief to the plaintiff.

Both the lower Courts have held that there was no valid tender by the plaintiff to defendant No. 1 of the purchase-price, and the District Judge has remarked in his judgment "Did I hold that there was a valid tender, plaintiff would be entitled to a decree." To elucidate this point a brief statement of the facts is necessary. The agreement between the plaintiff and defendant No. 1, is Exhibit 49, the wording of which is "extremely slipshod" as remarked by the District Judge. Now I agree with him in his construction of the agreement that the balance of the purchase-price was payable by the

plaintiff to defendant No. 1, one month after the judgment in the second appeal arising out of the suit filed by plaintiff and defendant No. 1 against defendant No. 2. The appellate judgment was given on the 17th November 1916 and according to plaintiff the purchase-money was tendered to defendant No. 1 on the 26th December 1916. It is not shown that time was of the essence of the contract and a delay of nine days would not render it voidable. Now plaintiff's statement on oath that he went to defendant No. 1 to offer him the purchase-price is challenged not by defendant No. 1, but by the defendant No. 2, whose evidence is valueless on the point. Both the lower Courts have come to the conclusion that the witnesses produced by plaintiff to depose to the tender made by the plaintiff are false and they have, therefore, held that there was no valid tender, but there is no express finding that the plaintiff's own statement that he went to defendant No. 1 is not to be relied upon. It has not been contradicted, and though he may not have made a valid tender yet his visit to defendant cannot be explained on any other hypothesis but that he went for the purpose of fulfilment of the contract which implies a readiness and willingness on his part. It is very unlikely that the plaintiff would pay the balance of the purchase-price unless he had ascertained that defendant No. 1 was ready to perform his part of the bargain by executing the sale-deed, etc., and plaintiff was not bound to tender the purchase-price unless defendant No. 1 was ready and willing to perform his part of the promise. This would appear both from section 51, Indian Contract Act, and the Privy Council case of *Shriram Rupram* v. *Madangopal Gowardhan* (1). In *Tribhovandas Varjivandas* v. *Balmukundas Kisharedas* (2) it has been held that in a suit for specific performance the strict law as to tender is not applicable. Therefore, even holding that there was no valid tender of the purchase-price by the plaintiff to defendant No. 1 that would be no ground to disentitle him to the relief he seeks as his evidence as to his readiness and willingness to perform his part of the contract has not been rebutted.

The learned District Judge is also of opinion that the long delay in the filing of the suit is fatal to the plaintiff's claim. The suit was filed on the 4th October 1917, that is, less than a year after the plaintiff had approached defendant No. 1 on the subject of the performance of the contract. The period of limitation for suits for specific performance is three years from the day on which the plaintiff has notice that the performance is refused, and, as held by the Madras High Court, in the absence of anything to show an abandonment or a sleeping over rights to the deteriment of third parties, delay short of the period of limitation does not matter in suits for specific performance. It appears to me that to operate as a bar to relief, delay must be of such a character as either to prejudice the defendant or lead him to the belief that plaintiff has waived his rights. In the present case it is not even alleged much less proved that the delay in the institution of legal proceedings to enforce specific performance, even if it be termed delay, was such as prejudiced defendant No. 1 or conveyed to him the impression that the plaintiff had abandoned his rights. It appears to me that there was no necessity for the plaintiff to take proceedings earlier than he did for the land was still undivided, and even if the sale-deed was executed in his favour by defendant No. 1 he could not get possession until the land was partitioned by metes and bounds and he filed his suit on the 4th October 1917 as on the day previous defendant No. 1 had executed the sale-deed in favour of defendant No 2. In *Kedar Nath* v. *Manu Bibi* (3) it was held that delay which did not amount to waiver abandonment or acquiescence and in no way altered the position of the defendant did not disentitle the plaintiff to sue for specific performance.

(1) 30 C. 865; 5 Bom. L. R. 483; 8 C. W. N. 25 (P. C.).
(2) 67 Ind. Cas. 865; (1923) A. I. R. (B.) 151; 24 Bom. L. R. 434.
(3) 13 Ind. Cas. 879; 16 C. W. M. 247.

For respondent-defendant No. 2 it was contended that he had no knowledge of the previous agreement between plaintiff and defendant No. 1 and though it was registered yet according to the recent Privy Council case of *Tilakdhari Lal* v. *Khedan Lal* (4). "Notice cannot in all cases be imputed from the mere fact that a document is to be found upon the Indian Register of Deeds." The District Judge was of the opinion that defendant No. 2 must have had knowledge of the agreement between plaintiff and defendant No. 1 and in this opinion I concur. Defendants Nos. 1 and 2 are uncle and nephew, and the circumstance that both plaintiff and defendant No. 1 jointly sued defendant No. 2, must have put the latter on inquiry that plaintiff had obtained some interest in the share of defendant No. 1. It is defendant No. 2 that has taken defences to the plaintiff's action which import knowledge of defendant No. 1's relations with the plaintiff and the important fact that defendant No. 1 has been kept away from the witness-box makes it difficult for me to believe that defendant No. 2 was not aware of the transaction between plaintiff and defendant No. 1. I agree therefore with the learned Judge that defendant No. 2 had notice of the plaintiff's prior contract of sale and that consequently his deed is not valid and binding on the plaintiff.

Under section 22, Specific Relief Act, the jurisdiction to decree specific performance is no doubt discretionary but the discretion of the Court is not arbitrary but sound and reasonable and is to be guided by judicial principles, and in my opinion no good reasons are shown in this case why the plaintiff should not be entitled to the equitable relief that he seeks. It is true that he is poaching on Muhammadan preserves, but he has already secured an entrance by the previous sale to him of one half of the rights of defendant No. 1 and his exclusion has been thus rendered impossible.

I would reverse the decree of the lower Court and decree the plaintiff's suit for specefic performance of the agreement in terms of his plaint.

Costs of both this Court and the lower Courts to be borne by respondent No. 2.

Kennedy, J. C.—I agree.

I think, it quite likely that the Court might have refused specific performance in the case where the plaintiff might have been otherwise compensated and where serious inconvenience would have been caused by decree for such performance. But in the present case no such serious inconvenience is possible as the plaintiff is already in possession of a part of this property. As for the question of notice, in Bombay it was always held that the registration of a transaction in a form permitting of easy discovery of the existence of that transaction amounted to notice because registration of some conveyance being compulsory a prudent man before dealing with immoveable property would look into the registers and would thus discover the prior charge or transfer if it was to be found there, whether such charge or transfer was compulsorily registerable or not. In countries where registration was not compulsory, failure to enter into a search which might probably be useless was not incumbent on a prudent man. The Privy Council has, however, now approved of the view that even in countries where registration is compulsory, registration is not necessarily notice, thus approving of the Bengal rather than of the Bombay opinion. In the circumstances of the present case, however, I am of opinion that there was a clear duty on the part of defendant No. 2 to ascertain whether the defendant No. 1 had not alienated a share or encumbered the estate to raise funds for litigation. Had he looked up the registers he would have found the agreement. As he did not he must be held to have grossly neglected his duty and must, therefore, be held to have had constructive notice.

Appeal allowed.

Z. K.

(4) 57 Ind. Cas. 465; 47 I.A. 239; 22 Bom. L. R. 1319; 39 M. L. J. 243; (1920) M. W. N. 591; 25 C. W. N. 49; 28 M. L. T. 224; 18 A. L. J. 1074; 32 C. L. J. 479; 2 U. P. L. R. (P. C.) 139; 13 L. W. 161; 2 P. L. T. 101; 48 C. 1 (P. C.).

IRAPPA *v.* NINGAPPA.

BOMBAY HIGH COURT.

APPEAL FROM ORDER No. 32 OF 1922.

February 1, 1923.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

IRAPPA *bin* ADVIAPPA KAPPARAD—PLAINTIFF—APPELLANT

versus

NINGAPPA *bin* RUDRAPPA KAPPARAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 9—Dismissal of suit for default—Plaintiff, appearance of, immediately afterwards—Restoration, application for—Procedure.

Where a suit is called and dismissed in default in the plaintiff's absence and the latter appears shortly after and applies for restoration of the suit, the suit ought to be restored and the defendant compensated by an order for costs.

Appeal against an order of the First Class, Sub-Judge, Bijapur, in Miscellaneous Application No. 74 of 1921.

Mr. *A. G. Desai*, for the Appellant.

Mr. *P. S. Bakhale*, for Respondent No. 2.

JUDGMENT.—The appeal must be allowed. In cases of this kind when a party appears a few minutes after the case has been called on and dismissed during his absence, it should only be a question of costs on an application for restoring the case to the Board. The appellant should have been made to pay the costs of the application to restore the suit in the lower Court, and that is the order which we make now. The appellant must get his costs of the appeal as the opponents contended in the lower Court that the story of the applicant was false. We allow the appeal and direct that the suit be restored and be rd on the merits, subject to the appellant paying the costs of the application to restore the suit in the lower Court.

Appeal allowed.

Z. K.

GHULAM FATIMA *v.* KHAIRA.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2987 OF 1922.

April 18, 1923.

Present:—Mr. Justice Broadway.

Musammat GHULAM FATIMA (MINOR) THROUGH NASAR DIN—PLAINTIFF—APPELLANT

versus

KHAIRA—DEFENDANT—RESPONDENT.

Muhammadan Law—Marriage—Option of puberty, when to be exercised—Guardian for marriage—Uncle by marriage—Marriage contracted by unauthorised person, legality of.

The right given to a Muhammadan minor girl to repudiate her marriage on attaining puberty must be exercised as soon as the minor attains the age of puberty. [p. 902, col. 2.]

Bismillah Begam v. *Nur Muhammad*, 63 Ind. Cas. 702; 44 A. 61; 19 A. L. J. 845; 3 U. P. L. R. (A.) 186; (1922) A. I. R. (A) 155, dissented from.

An uncle by marriage does not fall within the category of those persons who according to Muhammadan Law are entitled to give a minor in marriage. [p. 902, col. 2; p. 903, col. 1.]

Under the Muhammadan Law marriage is a civil contract, and such a contract entered into on behalf of a minor by a person who has no authority or right to do so, more especially in the presence of the minor's nearer relatives, must be regarded as void. [p. 903, col. 1.]

Appeal from a decree of the District Judge, Gurdaspur, dated the 27th October 1922.

Mr. *Mehr Chand Mahajan*, for the Appellant.

Mr. *Haq Nawaz*, for the Respondent.

JUDGMENT.—One Muhammad Bakhsh died, leaving him surviving a minor daughter, named Ghulam Fatima, a son or sons and a widow. On the 25th of March 1917 a marriage contract was entered into between *Musammat* Ghulam Fatima and one Khaira. On that date *Musammat* Ghulam Fatima was still a minor and her uncle by marriage acted as "guardian for marriage." The marriage was never consummated and on the 22nd of April 1922, *Musammat* Ghulam Fatima, through her step-brother, Nasar Din, instituted a suit asking for a declaration that her marriage was not binding on her and had been repudiated by her in exercise of her option of puberty. Khaira, the defendant, claimed that the marriage had been performed by the plaintiff's mother and brothers and further that it had been consummated and that;

therefore, no option of puberty remained. The Trial Court found that the marriage had been effected not by the plaintiff's mother and brothers but by her uncle by marriage. The exact relationship between *Musammat* Ghulam Fatima and her "guardian for marriage" is not quite clear from the record, for he is indiscriminately described as *phuppar* (father's sister's husband) and *masar* (mother's sister's husband). It was further held that the marriage had not been consummated and that the option of puberty had been validly exercised. Plaintiff's suit was, therefore, decreed and Khaira appealed to the District Judge against that decree.

The learned District Judge held that the marriage had been effected by the plaintiff's uncle by marriage and that her mother and brothers were not present. He also held that the marriage had not been consummated but dismissed the plaintiff's suit on the ground that she had not exercised her option of puberty within a reasonable time from her reaching maturity.

Musammat Ghulam Fatima has come up to this Court now in second appeal through Mr. Mehr Chand Mahajan and I have heard Mr. Haq Nawaz on behalf of the respondent. Two points have been argued at the bar. Firtsly it has been contended that as, under Muhammadan Law, marriage is a civil contract pure and simple, and as in the present case the plaintiff's uncle by marriage could not under Muhammadan Law act as guardian for marriage, the contract of marriage was void; secondly that the option of puberty was exercisable within a reasonable time not merely from the date on which a minor girl attains puberty but from the date on which she learns that she has that right. In support of his arguments on the question of the exercise of the right of option of puberty Mr. Mehr Chand has referred me to *Bismillah Begam* v. *Nur Muhammad* (1) which authority supports his contention. This appears to be the only case in which this question has been decided in this way and is apparently opposed to the recognised authorities on Muhammadan Law. For instance in Tyabji's Muhammadan Law, Second Edition, section 78, page 155, it is said that the option is determined immediately on attaining puberty notwithstanding that the wife may be ignorant of her right to avoid the marriage. The same view is to be found in Syed Ameer Ali's Muhammadan Law, Fourth Edition, Volume II, pages 290-291. According to Hamiltons Hedaya by Grady the right to repudiate a marriage has to be exercised as soon as the minor attains the age of puberty. I must accordingly hold that in the present case inasmuch as the right to repudiate had not been exercised for fully a year after the plaintiff had reached the age of puberty, she had lost the option given to her.

On the question of the validity of the marriage, however, I think this appeal must succeed. According to Grady's Hedaya at page 37 relations stand in the same order in point of authority to contract minors in marriage as they do in point of inheritance; but this authority in the more distant relatives is superseded by the existence of those of a nearer degree. Again, Ameer Ali's Muhammadan Law, Volume II, page 285, lays down that the guardians for marriage are the *asabah* or agnates according to the same order as in inheritance and exclusion. By *asabah* is meant *asabah* in their own right that is, males related without the intervention of females; then the mother, then the distant kindred in order of proximity; then the successors by contract and then the Judge. This learned author points out that the guardianship in marriage belongs in the first place to the *asabah* in the order of inheritance, the more remote being excluded by the nearer. To the same effect is the opinion of Mr. Tyabji in his Muhammadan Law at page 147 *et seq*; while section 208 of Mulla's Muhammadan Law gives expression to the same view. In the present case the mother and brothers of the plaintiff were alive. The uncle by marriage, whether he was the husband of the father's sister or the

(1) 63 Ind. Cas. 702; 44 A. 61; 19 A. L. J. 845; 3 U. P. L. R. (A.) 186; (1922) A. I. R. (A.) 155.

mother's sister, could not admittedly, have inherited and, therefore, it is clear that he did not fall within the category of those who according to Muhammadan Law, are entitled to give a minor in marriage. As marriage is admittedly a civil contract under Muhammadan Law, and as in the present instance this contract was entered into on behalf of the minor by a person who had no authority or right to do so, more especially when the minor's mother and brothers were alive, the marriage must be regarded as void.

Mr. Haq Nawaz contended that inasmuch as it had been found that the marriage had taken place, public policy demanded that it should be regarded as valid. No authority was cited for this proposition and I am unable to see that public policy demands insistence of a contract which is void. It has to be borne in mind that in the present case it has been found as a fact that consummation had not taken place. Again it was urged that the list of persons who could be regarded as guardians for marriage as given in the authorities cited above was not exhaustive, but I do not think that Mr. Haq Nawaz was serious in this matter and in any case he admitted that the person who acted as guardian for marriage in the present instance could not possibly inherit.

I must, therefore, accept this appeal and, setting aside the order of the learned District Judge dismissing the suit, grant the plaintiff a decree for the declaration prayed for. I am unable to see any real reason for not allowing costs and, therefore, direct that the plaintiff get her costs throughout.

Appeal allowed.

Z. K.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 127 OF 1922.

March 23, 1923.

Present:—Mr. Justice Campbell.

RALLA RAM—DEFENDANT—APPELLANT

versus

FEROZ DIN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Mortgage—Redemption, suit for—Subsisting title—Burden of proof—Evidence Act (I of 1872), s. 110.

Under section 110 of the Evidence Act possession is *prima facie* evidence of a complete title, and a person who comes into Court claiming to redeem property in the possession of the defendant, must prove a subsisting title as mortgagor at the date of the suit. [p. 904, col. 2.]

Periа Aiya Ambalam v. *Shanmugasundaram*, 22 Ind. Cas. 615; 36 M. 503; 15 M. L. T. 112; 26 M. L. J. 140; 2 L. W. 179; (1914) M. W. N. 417, *Secretary of State for India* v. *Chelikani Rama Rao*, 35 Ind. Cas. 902; 39 M. 617; 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 224; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 486; 18 Bom. L. R. 1007; 25 C. L. J. 39; 43 I. A. 192 (P.C.), distinguished.

Ram Chand v. *Bhana Mal*, 71 P. R. 1900, *Ramchandra Apaji* v. *Balaji Bhaurao*, 9 B. 137; 5 Ind. Dec. (N. S.) 92, referred to.

Plaintiff sued to redeem certain property in the possession of the defendant in 1921. The only evidence of the mortgage was contained in a certified copy of the mortgage-deed and an entry in the *khasra abadi* of 1870 that one *L* was then in possession of the property as mortgagee. The original mortgage-deed was not forthcoming and there was nothing to indicate any connection between *L* and the defendant:

Held, that no mortgage having any connection with the defendant having been proved the suit could not be decreed against him. [p. 905, col. 1.]

Appeal from a decree of the District Judge, Sialkot, dated the 31st March 1922.

Mr. *Fakir Chand*, for the Appellant.

Mr. *M. Sleem*, for the Respondents.

JUDGMENT.—The suit from which this second appeal resulted was by Feroz Din and Imam Din, *Kaiyars* of *Mauza* Jassar in the Sialkot District, who claimed to be the heirs of *Musammat* Atro, for the redemption of a certain house from one Ralla Ram. The defendant denied that the house had ever belonged to *Musammat* Atro, and that the plaintiffs were *Musammat* Atro's heirs. He further stated that he knew nothing about any mortgage.

The First Court dismissed the suit, but on appeal the District Judge gave the plaintiffs the decree for which they asked. Ralla Ram has come to this Court on second appeal.

The findings of fact are as follows:— (1) The plaintiffs are the great-grandsons of *Musammat* Atro's sister, (2) the house was mortgaged by *Musammat* Atro to one Lal Chand in 1869, (3) in 1870 Lal Chand was in possession as mortgagee from *Musammat* Atro, (4) (by implication) *Musammat* Atro was owner of the house in 1869, (5) no connection between Lal Chand and Ralla Ram is shown, and (6) there is no indication of how Ralla Ram came into possession.

The learned District Judge has not recorded any specific finding about the length of Ralla Ram's possession, but the plaintiffs' witnesses admitted that this had lasted at least for thirty years.

The finding of the learned District Judge was that Ralla Ram could not resist the suit for redemption brought by *Musammat* Atro's heirs without proving how he came into possession. In support of this view the learned Advocate for the plaintiffs-respondents has cited *Perla Aiya Ambalam* v. *Shunmugasundaram* (1) and *Secretary of State for India* v. *Chellkani Rama Rao* (2). Neither of these rulings is directly applicable. In the first named it was held that where a trespasser dispossesses a mortgagee in possession and continues in possession asserting a title adverse to the mortgagor also, he must prove not only that he asserted a right adverse to the mortgagor, but also that the latter knew it. There is nothing to indicate in the present case that any mortgagee was dispossessed by Ralla Ram. Similarly, *Secretary of State for India* v. *Chelikani Rama Rao* (2) cannot be divorced from its context. Reliance is placed upon the remarks of their Lordships regarding the onus of establishing title to property by reason of possession for a certain requisite period, but this is not the case here. Ralla Ram has not admitted the original title of the plaintiff and claimed to have destroyed it by length of his own possession.

The appellant Ralla Ram relies upon *Ram Chand* v. *Bhana Mal* (3) and on *Ramchandra Apaji* v. *Balaji Bhaurao* (4) which was quoted therein. The broad proposition laid down in these cases is that when a plaintiff comes into Court alleging a subsisting title as owner or mortgagee at the date of suit, he must prove it, and that according to section 110 of the Evidence Act possession is *prima facie* evidence of a complete title. Both these decisions were on suits for redemption, and they are distinguishable from the present case in that the plaintiff failed to prove any mortgage of any kind. At the same time the principle holds good here too, in my opinion, that the plaintiffs, where they sued to redeem, were bound to prove a subsisting mortgage. There is nothing proved in the present case to bridge the gap between 1870 and the date of the suit in 1921. Meanwhile several things may have occurred, *Musammat* Atro may have redeemed the mortgage from Lal Chand and sold to the plaintiffs' predecessor, or the ownership rights in the house may have changed hands half a dozen times. The only evidence about the mortgage is contained in a certified copy of the deed, and in an entry in the *khasra abadi* of 1870 that Lal Chand was then in possession as mortgagee. The original deed is not forthcoming and no one apparently knows where it is. There is nothing to indicate any connection of Ralla Ram with Lal Chand.

In the circumstances I consider that the plaintiffs had to show that the mortgage was still in existence. It is true that Ralla Ram has offered no proof of how he came into possession, but in *Ramchandra Apaji* v. *Balaji Bhaurao* (4) the defend

(1) 22 Ind. Cas. 615; 38 M. 903; 15 M. L. T. 112; 26 M. L. J. 140; 1 L. W. 119; (1914) M. W. N. 417.

(2) 35 Ind. Cas. 902; 39 M. 617; 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 224; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 486; 18 Bom. L. R. 1007; 25 C. L. J. 69; 43 I. A. 192 (P. C.).

(3) 71 P. R. 1900.

(4) 9 B. 137; 5 Ind. Dec. (N. S.) 92.

ant resisted the suit for redemption by the plea that he had purchased the property in suit from the plaintiffs' father. He failed to substantiate this allegation, but nevertheless the suit was dismissed. The present case is so far analogous with *Ramchandra Apaji* v. *Balaji Bhaurao* (4) and *Ram Chand* v. *Bhana Mal* (3) that no mortgage having any connection with the defendant has been proved, and, this being so, the lower Appellate Court's order decreeing the suit, in my opinion, was wrong.

I accept the appeal, set aside the order of the Court below and order that the plaintiffs' suit be dismissed with costs throughout.

Appeal allowed.

Z. K.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND APPEAL NO. 150 OF 1922.

May 25, 1922.

Present:—Mr. Justice Pratt.

P. KALI MUTU ASRI—APPELLANT

versus

MEERA HUSSEIN AND ANOTHER—RESPONDENTS.

Possession and dispossession—Possession vacated by trespasser, effect of.

If a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the Statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. There is no one against whom he can bring an action. He cannot make an entry upon himself. There is no positive enactment, nor is there any principle of law, which requires him to do any act, to issue any notice, or to perform any ceremony in order to rehabilitate himself. No new departure is necessary. The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose. [p. 906, col. 1.]

The Trustees, Executors and Agency Company v. *Short*, (1888) 13 App. Cas. 793 at p. 798; 58 L. J. P. C. 41; 59 L. T. 677; 37 W. R. 433; 53 J. P. 132, followed.

Special second appeal against the judgment of the District Judge, Hanthawaddy, setting aside that of Township Judge, Kungyangon North.

Mr. *Thein Maung*, for the Appellant.

Mr. *N. N. Sen*, for Respondent No. 1.

JUDGMENT.—Plaintiff sued for possession of three fields, part of a holding purchased by him from V.R.S.R.M. Chellappa Chetty on the 6th August 1919.

First defendant was sued alleging that he was in possession. Second defendant was made a party because first defendant pleaded that he was in actual possession as his (first defendant's) tenant.

First defendant Meera Hussein pleaded that he was in possession under a lease from the Revenue Authorities.

Meera Hussein failed to prove that he was in possession under a lease and it was clearly established that he was not.

The Trial Court held that as plaintiff failed to prove that he or his predecessors-in-title had ever been in possession, the burden of proving his title was upon him before defendant could be called upon to prove adverse possession.

On the evidence the Court found that plaintiff had clearly proved his title and that defendant had failed to prove twelve years' adverse possession. Plaintiff was accordingly granted a decree.

* * * * *

Defendant has failed to prove any title and there is no doubt he was a trespasser.

As suggested by the Trial Court what seems to have happened is that the Chetty owner was in possession of a large holding. He did not carefully watch the boundaries and defendant was able to enter and work a small portion on the border without the real owner discovering the fact.

I would further point out that, even if Alla Peche had been in possession in 1907-08-09 which is not proved, on his vacating the land possession would vest again in the real owner.

The law is clearly stated by their Lordships of the Privy Council in *The Trustees, Executors and Agency Company* v. *Short* (1):—"They (their Lordships)

(1) (1888) 13 App. Cas. 793 at p. 798; 58 L. J. P. C. 41; 59 L. T. 677; 37 W. R. 433; 53 J. P. 132;

are of opinion that if a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the Statute, abandons possession, the *rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place.* There is no one against whom he can bring an action. He cannot make an entry upon himself. There is no positive enactment, nor is there any principle of law, which requires him to do any act, to issue any notice, or to perform any ceremony in order to rehabilitate himself. No new departure is necessary. The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose."

In view of the Land Records Map of 1908-09 and entries thereon there is no question of twelve years' adverse possession by defendant.

The finding and decree of the First Court were fully justified by the evidence.

* * * * *

The appeal will be allowed.

I set aside the finding and decree of the District Court and restore the decree of the Township Court with costs.

Appeal allowed.

Z. K.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2375 OF 1922.

March 29, 1923.

Present:—Mr. Justice Scott-Smith.

BODH RAJ AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAJA SINGH AND OTHERS—PLAINTIFFS—*Musammat* GANGA DEVI AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation by widow—Just debt, what is—Sale to pay off mortgage—Necessity.

A just debt is one which is really due, and has been contracted for a purpose other than immoral or forbidden by law or opposed to public policy, and can be recovered from the person or property of the debtor generally. [p. 907, col. 1.]

Sardari Mal v. *Khan Bahadur Khan*, 11 P. R. 1899, *Devi Ditta* v. *Saudagar Singh*, 65 P. R. 1900; P. L. R. 1900 p. 322, followed.

A sale of the equity of redemption of a property by a Hindu widow to pay off the principal and interest due under the mortgage cannot be regarded as an alienation for necessity or for the payment of a just debt where it is found that the mortgage money was not recoverable from the other property of the mortgagor. [p. 907, col. 1.]

Second appeal from a decree of the District Judge, Jhelum, dated the 5th June 1922.

Mr. *Nanak Chand*, for the Appellants.

Mr. *Fakir Chand*, for the Respondents.

JUDGMENT.—In the suit out of which the present second appeal arises the plaintiffs sued for a declaration that an alienation by way of sale of ancestral property made by *Musammat* Ganga Devi, widow of Jowala Sahai, would not affect their reversionary rights. Jowala Sahai originally mortgaged the land for Rs. 1,500 on the 20th of November 1903, to the predecessor of defendants-appellants. The interest of Rs. 500 was considered to be equal to the produce of the land. The remaining Rs. 1,000 was to carry interest at the rate of one per cent. per mensem. The interest was to be paid annually and if it was not so paid, compound interest was to be charged at the same rate. The mortgage was converted into a sale by the widow, *Musammat* Ganga Devi, in 1910, the consideration being Rs. 1,500 due on the mortgage, Rs. 1,221-13 due as interest and Rs. 24 spent on repairing a well and due from the mortgagor under the terms of the deed of mortgage. It has been held by both the Courts below that the mortgage cannot be challenged owing to the law of limitation. The First Court dismissed the plaintiffs' suit holding that the sale being for payment of antecedent just debts was binding on the reversioners. The lower Appellate Court, however, held that *Musammat* Ganga Devi had no necessity to sell the equity of redemption of the land, the debt being a charge only on the mortgaged land and not being recoverable from the person or other property of the mortgagor. A second

appeal has been brought by the defendants upon a certificate granted by the District Judge.

The Courts below held that the parties followed agricultural custom, but as it is admitted before me that it makes no difference whether they follow Hindu Law or custom, it is unnecessary to decide by which they are bound. Now, it is quite clear that the widow had no actual necessity to sell the equity of redemption. She got no advantage by doing so and there was no danger to the estate which she averted by the sale, because, as already stated, the debt could not be recovered from any other property of her deceased husband. In *Sardari Mal* v. *Khan Bahadur Khan* (1) the definition of a just debt was given as one which (1) is really due, (2) has been contracted for a purpose other than immoral or forbidden by law or opposed to public policy, and (3) can be recovered from his person or property generally. This definition was recited with approval in *Devi Ditta* v. *Saudagar Singh* (2). Now the interest due under the mortgage was not a just debt within this definition because it could not be recovered from the person or property generally of the mortgagor. I have not been referred to any case which is exactly on all fours with the present one, but after full consideration I am of the opinion that the District Judge's view is right. As pointed out by him the widow gained nothing whatever by the sale and would have lost nothing, if she had left the mortgage as it was for her husband's reversioners to deal with as they pleased. I agree that there was no necessity for the sale of the equity of redemption or for the conversion of the mortgage into a sale thereby putting it out of the power of the reversioners ever to effect redemption.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

Z. K.

(1) 11 P. R. 1899.
(2) 65 P. R. 1900; Pl. L. R. 1900, p. 322.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 300 OF 1922.

December 20, 1922.

Present :—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Panton.

HABIBAR RAHMAN—APPELLANT

versus

SAIDANNESSA BIBI AND OTHERS—RESPONDENTS.

Muhammadan Law—Wakf—Mutwalli—*Permission to lease*—Kazi, *place of, whether taken by District Judge*—*Appeal, whether lies.*

Mutwallis may be authorised to execute leases of *wakf* property, by the District Judge, who, for this purpose, is competent to discharge the functions of a *kazi* under the Muhammadan Law. [p. 908, col. 1.]

Such a proceeding is not a suit but merely a proceeding under section 141 to the Civil Procedure Code. The mere fact, however, that the provisions of the Civil Procedure Code regulate the proceedings does not make the order which may be passed therein appealable. [p. 908, col. 1.]

Case-law discussed.

Appeal against an order of the District Judge, Hughli, dated the 24th July 1922.

Dr. *Jadu Nath Kanjilal*, Babus *Promatha Nath Bandopadhaya* and *Benode Lal Mukerjee*, for the Appellant.

Babus *Mohendra Nath Ray*, *Apurba Charan Mukherjee*, Mr. *Asraf Ali*, Babus *Durga Charan Roy Chowdhury* and *Probodh Kumar Das*, for the Respondents.

JUDGMENT.—This appeal is directed against an order made by the District Judge in favour of two *mutwallis* of a Muhammadan *wakf* authorising them to grant a lease of the *waqf* property. The appellant, another *mutwalli*, preferred an objection to the application but did not appear to support it, with the result that the order in favour of the respondents was made *ex parte* on the 6th June 1922.

A preliminary objection has been taken by the respondents to the competency of the appeal. It has been argued that the order is not a decree and consequently not appealable as such under the Civil Procedure Code. It has further been urged that the order is not one of those expressly made appealable under the Civil Procedure Code nor is it made appealable under any other law. We are of opinion that this contention is well-founded. It is

well settled in this Court: *Shama Churn Roy* v. *Abdut Kabeer* (1), *In re Halima Khatun* (2), *Atimannessa Bibi* v *Abdul Sabhau* (3) that *matwallis* may be authorised to execute leases of this description, by the District Judge, who, for this purpose, is competent to discharge the functions of a *kazi* under the Muhammadan Law. The nature of the proceedings was considered in *Fakhrannessa Begam* v. *District Judge of the 24-Parganas* (4), where it was pointed out that the proceeding is not a suit but merely a proceeding governed by section 141 of the Civil Procedure Code. The fact that the provisions of the Civil Procedure Code regulate the proceedings does not make the order which may be passed therein appealable: *Damodara Menon* v. *Kittappa Menon* (5) and *Parasurama Ayyar* v. *Seshier* (6). If, then, the proceeding is not a suit, the decision therein does not fall within the scope of a decree. It is an order—an order which is not expressly made appealable by any provision in the Code of Civil Procedure or by any other statutory provision. We accordingly hold that the order is not appealable and the preliminary objection must prevail.

The appeal is dismissed with costs, the hearing fee being assessed at one gold *mohur* which must be given to each set of respondents except the opposite party No. 4 for whom Babu Probode Kumar Das appears. His client is not entitled to any costs in this appeal. The costs will not be paid out of the estate.

Appeal dismissed.

Z. K.

(1) 3 C. W. N. 158.
(2) 7 Ind. Cas. 33; 37 C. 870.
(3) 32 Ind. Cas. 21 20 C. W. N. 1131; 43 C. 467; 22 C. L. J. 577.
(4) 56 Ind. Cas. 475; 24 C. W. N. 339; 47 C. 592.
(5) 10 Ind. Cas. 879; 36 M. 16; 21 M. L. J. 613; (1911) 2 M. W. N. 13.
(6) 27 M 504.

LAHORE HIGH COURT.

CIVIL MISCELLANEOUS NO. 14 OF 1923.

April 27, 1923.

Present:—Mr. Justice Abdul Raoof.

Pirji ASHRAF ALI AND ANOTHER—DEFENDANTS—PETITIONERS

versus

RAMESHWAR NATH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIII, rr. 2, 5, O. XLIV, r. 1—Limitation Act (IX of 1908), s. 12—Pauper appeal—Limitation—Time spent in obtaining copies, whether can be excluded—Verification of petition—Verification by separate affidavit, validity of.

The provisions of section 12 of the Limitation Act are applicable to pauper appeals. [p. 909, col. 1.]

Moti Begam v. *Satara Begam*, 33 P. R. 1895, followed.

A petitioner for leave to appeal as a pauper did not verify the contents of the petition at the foot of the petition, but did so by a separate affidavit in which the statements contained in the several paragraphs of the petition were verified on solemn affirmation:

Held, that the affidavit must be treated as part of the petition and the petition must, therefore, be regarded as having been duly verified. [p. 909, col. 1.]

Narsiah v. *Vithalingam Thingandas*, 16 Ind. Cas. 83; 5 Bur. L. T. 123; 6 L. B. R. 117, dissented from.

Appeal from a decree of the Senior Sub-Judge, Delhi, dated the 18th November 1922.

Messrs. *Muharram Ali Chishti* and *Muhammad Amin*, for the Petitioners.

Messrs. *Jai Lal* and *Sardha Ram*, for the Respondent.

ORDER.—Two preliminary objections have been raised by Lala Sardha Ram to the hearing of this petition: (1) that the petition to appeal as pauper was filed beyond time as it was presented after 30 days provided under Art. 130 of the Limitation Act. It, however, appears that the petitioner is entitled to nine days spent in obtaining copies of the judgment and decree of the lower Court. If these nine days be allowed to the petitioner the period for filing the petition of appeal must be held to have expired on the 24th of December 1922, that is, during the Christmas vacation. The petition was presented on the 2nd January 1923, on the re-opening of the Court. There appears to be some conflict of opinion on

the point whether the provisions of section 12 of the Limitation Act are applicable to pauper appeals. The Punjab Chief Court has held that they are so applicable [see for example *Moti Begam* v. *Satara Begam* (1).] The Allahabad High Court has taken a similar view. I must, therefore, overrule this objection and Mr. Sardha Ram has in fact not seriously pressed it after being confronted by the ruling of this Court.

The second objection raised by him is that the petition for permission to appeal as a pauper is not verified by the petitioner as required by O. XXXIII, r. 2 read with O. XXXIII, r. 5 and O. XLIV, r. 1, Civil Procedure Code. I, however, find in this case that although the petitioner did not verify the contents of the petition at the foot of the petition he did so by a separate affidavit in which the statements contained in the several paragraphs of the petition are said to be true and no part of them is false and nothing has been concealed. This affidavit was annexed to the petition and must be treated as a part of it. I, therefore, overrule this objection. I must mention that in support of his contention on the last point he relied upon the decision of the Burma Chief Court reported in an unauthorised report, namely, 16 Ind. Cas. 83. [*Narsiah* v. *Vithalingam Thingandas* (2).] The view taken in that case appears to be too narrow. Mr. Sardha Ram has frankly admitted that he has not been able to discover any rulings of any of the High Courts in India. Before, however, passing my final order as to the admissibility or inadmissibility of this appeal there are two other matters which I must consider and decide, namely, (1) whether the petitioner is, as a matter of fact, a pauper, and (2) whether the decree appealed from is contrary to law or some usage having the force of law or is otherwise erroneous and unjust.

In order to determine the first question I think it necessary to call upon the Court below to enquire into the pauperism of the applicants and submit a report as expeditiously as possible. On receipt of this report the matter will come up again before me for hearing.

Case remanded.

Z. K.

(1) 33 P. R. 1895.
(2) 16 Ind. Cas. 83; 5 Bur. L. T. 123; 6 L. B. R. 117.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 634 OF 1921.
November 27, 1922.
Present:—Mr. Justice Gokul Prasad.

RAM KISHORE AND OTHERS
PLAINTIFFS—APPELLANTS
versus
ABDUL KARIM AND OTHERS—
DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Debts incurred by father—Pious obligation of sons, whether can be enforced during lifetime of father.

The interest of a Hindu son in joint family property cannot, by virtue of the pious obligation of a Hindu son to pay his father's debts, be sold in the father's lifetime in execution of a simple money-decree obtained against the father.

Sheodhan Singh v. *Bhagwan Singh*, 64 Ind Cas. 75; 43 A. 496; 19 A. L. J. 431; 3 U. P. L. R. (A.) 80; (1922) A. I. R. (A.) 323, followed.

Dalip Narain Singh v. *Parmaoti Bibi*, 67 Ind. Cas. 931; 42 A. 58; 17 A. L. J. 982, distinguished.

Sripat Singh Dugar v. *Prodyot Kumar Tagore*, 39 Ind. Cas. 252; 44 C. 524; 44 I. A. 1; 32 M. L. J. 133; 15 A. L. J. 147; (1917) M. W. N. 193; 21 C. W. N. 442; 25 C. L. J. 220; 21 M. L. T. 222; 19 Bom. L. R. 290 (P. C.) and *Sahu Ram Chandra* v. *Bhup Singh*, 39 Ind. Cas. 280; 39 A. 437; 44 I. A. 126; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213 (P. C.), referred to.

There is a difference in this respect between cases in which the property has passed out of the family and cases in which the property has not so passed out.

Chandradeo Singh v. *Mata Prasad*, 1 Ind. Cas. 479; 31 A. 176; 6 A. L. J. 263, followed.

Appeal against a decree of the District Judge, Benares, dated the 12th January 1921.

Mr. *Kamuda Prasad*, for the Appellants.

Dr. *S. M. Sulaiman*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for a declaration that a three-fourth share in certain property was not liable to attachment and sale in execution of a simple money-decree

obtained by the predecessor-in-title of the defendant-decree-holder against the father of the plaintiffs. The allegation was that the father of the plaintiffs being alive the pious obligation of the son to pay up their father's debt did not arise and their share in the family property was not liable to sale. The First Court decreed the suit but the lower Appellate Court has, basing its judgment on the Privy Council case of *Sripat Singh Dugar* v. *Prodyot Kumar Tagore* (1), refused to follow the *dictum* of the Privy Council in the case of *Sahu Ram Chandra* v. *Bhup Singh* (2) to the effect that the pious obligation of the sons to pay their father's debt does not arise till after the death of their father. So far as this Court is concerned the point is covered by the authority of a Division Bench in *Sheodhan Singh* v. *Bhagwan Singh* (3). The case of *Dalip Narain Singh* v. *Parmaoti Bibi* (4), to which my attention has been drawn by the respondents is distinguishable because it does not appear from the report whether the father was alive or not and it is clear that in that case the property had been sold and had already passed out of the family. Of course different considerations would arise in cases where the property has passed out of the family and in cases where the property has not so passed out: see *Chandradeo Singh* v. *Mata Prasad* (5). Sitting as a Single Judge I am bound by the ruling in *Sheodhan Singh* v. *Bhagwan Singh* (3), which is exactly in point. I, therfore, allow this appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance with costs in all Courts.

Appeal allowed.

Z. K.

(1) 39 Ind. Cas. 252; 44 C. 524; 44 I. A. 1; 32 M. L. J. 133; 15 A. L. J. 147; (1917) M. W. N. 193; 21 C. W. N. 442; 25 C. L. J. 220; 21 M. L. T. 232; 19 Bom. L. R. 290 (P. C.).

(2) 39 Ind. Cas. 280; 39 A. 437; 44 I. A. 126; 21 C. W N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213 (P. C.).

(3) 64 Ind. Cas. 75; 43 A. 496; 19 A. L. J. 431; 3 U. P. L. R. (A.) 80; (1922) A. I. R. (A.) 383.

(4) 67 Ind. Cas. 931; 42 A. 58; 17 A. L. J. 982.

(5) 1 Ind. Cas. 479; 31 A. 176; 6 A. L. J. 263.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT NO. 1744 OF 1922.

January 10, 1923

Present:—Mr. Justice Page.

RAMKISSENDAS AND ANOTHER—PLAINTIFFS

versus

BINJRAJ CHOWDHURY AND ANOTHER—DEFENDANTS.

Transfer of Property Act (*IV of* 1882), *s.* 115—*Landlord and tenant—Ejectment of tenant—Decree, effect of—Sub-tenant, whether can resist execution.*

A landlord cannot give to a tenant or a sub-tenant something which he does not possess himself. If his rights are gone, those who claim under and through him lose their rights also.

It is convenient that actions for ejectment based on forfeiture should be brought against all the parties interested in the premises, but the omission of the landlord to make every sub-tenant a party to the action would not limit the landlord's right to execute the decree against those persons only who were parties to the decree.

Mr. *M. N. Kanji Lal*, for the Appellants.

Messrs. *H. D. Bose* and *S. M. Bose*, for the Respondents.

JUDGMENT.—The only question in this case is in respect of costs. It arises in this way. The plaintiffs were in possession of the premises in question as sub-tenants of the defendants. The defendants obtained a decree in ejectment against the plaintiffs' landlords, and that decree having been obtained, by section 115 of the Transfer of Property Act, all rights of sub-lessees who held under the defendants were at an end, for the simple reason that a landlord cannot give to a tenant or to a sub-tenant something which he does not possess himself. If his rights are gone, those, who claim under and through him, lose their rights also. The effect of that decree was that the present defendants, who were the head landlords of the plaintiffs, were entitled to possession of these premises as against the plaintiffs and as against the plaintiffs' landlords, and the plaintiffs have not, and have never suggested that they had, a shadow of right to remain in possession after the decree had been passed against their immediate landlords. What they say is this, that, although it is perfectly true that they had no legal ground for resisting the execution of that decree, yet, as they

had not been made parties to the action they were not bound by the decree. Or, in other words, unless a landlord chooses to make all the sub-lessees and every body who may have acquired an interest through those under-tenants, parties to the action, he can only execute his decree against those persons against whom decrees have been obtained, with the result that he may have to bring any number of suits ultimately against other persons who remained in possession. If that were so, it would, I think, tend unduly to multiply the number of suits. I quite agree that it is convenient that actions for possession based on forfeiture should be brought against all the parties interested in the premises. It is a convenient practice, but I apprehend that Mr. Justice Rankin, who in the case cited to me by Counsel for the plaintiffs, was dealing with a different matter, namely, an application in respect of resistance to delivery of possession under O. XXI, did not intend to decide—and, in my opinion, having regard to section 115 of the Transfer of Property Act it would not have been possible for his Lordship to have decided—that the effect of not making every tenant and sub-tenant a party was to limit the right which the landlord would have on obtaining his decree, to obtain possession of the premises by executing the decree.

Therefore, the question arises in this way. Were the plaintiffs in this action justified in bringing a suit for which they had no legal ground whatever, a suit to restrain the present defendants, their head landlords, from obtaining possession of these premises? In my opinion there was no justification at all for taking any such proceedings. I do not pretend, and it is no part of my duty, in this particular case, to consider the effect of O. XXI, rr. 99 and 101, and I do not propose to express any opinion about the meaning of those sections. But for the purpose of deciding the question as to whether the plaintiffs were justified in bringing this action, and in claiming now, when they have given up possession, that they are entitled to say "we do not propose to go on with the action, but we were perfectly justified in bringing it, and are entitled to our costs," in my view it is sufficient for me to hold that they are taking up a wrong position, that they never had any justification for bringing this action, that they never had any justification for resisting the execution of the decree, and in my opinion, the costs of this action should be borne not by the defendants but by the plaintiffs. The suit will be dismissed with costs on scale No. 2. Interests on costs at 6 per cent.

Suit dismissed.

Z. K.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 365 OF 1919.
August 28, 1920.
Present :—Mr. Hallifax, A. J. C.
RAOJI—APPELLANT
versus
WARLU—RESPONDENT.

Second appeal—Finding based on inadmissible evidence—Evidence material—High Court, whether will interfere.

Where a finding of fact is based on inadmissible evidence and it is not possible to say that such evidence formed no more than a negligible part of the basis of the finding resting on it, the High Court will interfere in second appeal.

Second appeal against a decree of the Additional District Judge, Nagpur, dated the 3rd May 1919, reversing that of the Junior Munsif, Nagpur, dated the 10th December 1918.

Dr. *H. S. Gour*, for the Appellants.

Messrs. *M. Gupta* and *A. Zinzarde*, for the Respondents.

JUDGMENT.—The plaintiffs have a house in Umrer, which has a narrow enclosed courtyard on its eastern side. The eastern wall of this courtyard, and presumably also the northern and southern walls, were built in January 1918, a fact which the plaintiffs omitted to mention as far as possible. The defendant is owner

of a house whose western boundary is the newly built eastern wall of the plaintiffs' courtyerd. This has been lying in ruins and in Jaunary 1918 the defendant re-built it. The eaves on the west would, on the completion of the house, project over the eastern wall of the plaintiffs' courtyard so that the droppings would fall on their wall and in their courtyard. The plaintiffs therefore sued for an injunction prohibiting the defendant from building his western wall so that the eaves project over their courtyard. In the First Court they were given the injunction for which they prayed and the defendant was ordered to cut back the eaves of his house on the west so that the droppings from them should not fall on the eastern wall or in the courtyard of the plaintiffs. This decree was set aside in appeal and the suit was dismissed, on the finding that the land now forming the plaintiffs' compound was common land and that the defendant had a right of easement over it, established by forty years user, to allow his eaves droppings to fall on it. Against this decree the plaintiffs have come up in second appeal.

One of the two arguments put forward on behalf of the appellants can hardly be brought within the words of the petition of appeal. That matters the less in that it has no force. It was urged that the use of the easement had been admittedly interrupted for more than two years next before the institution of the suit and that the right had been extinguished under section 15 of the Easements Act. Explanation II attached to that section is a complete answer to this contention. The other contention is that the finding of fact of the lower Appellate Court is based mainly on inadmissible evidence. The learned Additional District Judge sets out the evidence on both sides and prefers to believe that adduced by the defendant. In setting out the evidence of the defendant's six witnessess he say: "Defendant's witness No. 4 is a very respectable person paying Rs. 1,000 as income-tax and he swears: 'I have seen the site in dispute. After inquiry on the spot I learnt that the site in dispute, was a common site of both the parties.' I don't see any valid reason for disbelieving the evidence given by the defendant's witness No. 4. The witness does not speak of the matter on the strength of his personal knowledge and his evidence rests on what he learnt after making an inquiry on the spot."

The whole of the evidence of this witness is obviously inadmissible, and the last words quoted might indicate that the learned Judge had seen this and had left it out of consideration if it were not for the earlier statement that he could not see why this evidence should be disbelieved. And the whole passage shows clearly this inadmissable evidenee is at least material part of the basis of the finding, though it may not be the main part of it as the appellants urge. The admission and consideration of improper evidence would not necessitate a remand if that evidence formed no more than a negligible part of the basis of the finding resting on it, because in that case it would be possible to say that the finding would undoubtedly be the same, even if the improper evidence were excluded. Here, however, it is not possible to say this. The appeal must, therefore, go back to the lower Appellate Court for a fresh finding on the issue of fact, which must be based on a consideration of the properly admissible evidence only. A certificate for the refund of Court-fees paid in this appeal will issue. Costs in this Court will be costs in the suit.

Appeal remanded.

K. S. D.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 308 OF 1921.

November 17, 1922

Present:—Mr. Justice Walsh.

Lala LACHMAN PRASAD AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

MAJJU AND ANOTHER— DEFENDANTS—RESPONDENTS.

Defamation—Privilege, absolute and qualified—Report made to Police—Burden of proof—Pleadings—Duty of Court—Point not pleaded, whether can be raised.

Statements made in the course of judicial proceedings are absolutely privileged, but a report made to the Police does not come within that principle. Such a report, however, though not within the rule of absolute privilege, which covers judicial proceedings, is *prima facie* privileged, that is to say, the person making it has a right to make it if he honestly believes it, and the person receiving it has a duty to receive it. But qualified privilege provides only a qualified protection and a person charged with defamation who sets up a qualified privilege must prove that he used the privilege honestly, believing the truth of what he said, or in other words, having reasonable grounds for making the statements, and the onus of establishing that lies upon him. [p. 914, col. 1.]

Where the statement is made with reference to something in which the person making the statement was himself involved as a party it is impossible for him to have had an honest belief in its truth if it is shown to be untrue. Therefore, in a case of qualified privilege where the defendant sets up in defence that the allegation is true to his knowledge, the defence of qualified privilege becomes illogical and impossible. [p. 914, col. 1.]

Courts should confine themselves to the dispute between the parties and should not go out of their way to raise fancy points which are not raised by the parties themselves. [p. 913, col. 2.]

Appeal against a decree of the District Judge, Budaun, dated the 2nd December 1920.

Mr. *M. L. Agarwala*, for the Appellants.

Mr. *S. A. Haider*, for the Respondents.

JUDGMENT.—This was a suit for damages for defamation. The alleged defamation is contained in a written document in the nature of a report or information lodged with a Police Officer in the course of the Police Officer's duty, in which the defendants charged the plaintiffs with assault and riot, both of which are cognizable offences. The Police took no action on the report. They were not bound to do so. It was for them to decide whether or not the case was one on which they should charge the persons against whom the complaint was made. A complaint was eventually made before a Magistrate and dismissed. The plaintiffs have brought this suit for damages.

The First Court held that the defendants had published the libel complained of; that it was untrue, and that Rs. 40 damages were an adequate compensation. The defendant's in substance pleaded justification. In paragraph 1 of the particular pleas, they said, the report was correct. They raised no plea of privilege. Both Courts have dismissed the suit on the ground that it is privileged. It would be much better if the inferior Courts would confine themselves to the dispute between the parties and not go out of their way to raise fancy points which are not raised by the parties themselves. I gather that both Courts are of opinion that the information was covered by absolute privilege. A racent Full Bench decision of this Court reported as *Chunni Lal* v. *Narsingh Das* (1) held, that in questions of this kind the English Common Law must prevail, and that inasmuch as statements made in the course of judicial proceedings are absolutly privileged in England, they must be held to be absolutely privileged in India. I cannot agree with the two Courts that information or a report made to the Police comes within this principle. The District Judge says that the first report to the Police in a cognizable case is a commencement of a judicial proceeding, and that the report is receivable in evidence. There is a fallacy in this statement. It may lead to a judicial proceeding, or it may not, but it is a preliminary step taken before any judicial proceeding has been commenced. If, as the learned Judge says, the report is receivable in evidence and is in fact taken in evidence in the course of a judicial proceeding, then no doubt by the Full Bench decision that publication, namely, the putting it in as evidence in a judicial proceeding would be absolutly privileged. I am unable to follow the inference which the learned Judge draws

(1) 45 Ind. Cas. 540; 16 A. L. J. 360; 40 A. 341 (F. B.).

from section 125 of the Evidence Act.

There are two kinds of privileges, absolute privilege and qualified privilege. It is perhaps desirable to say a word about the latter, althogh in this particular case it does not help the defendants. In my opinion, without having heard any argument on the point a report made at a Police Station, though not within the rule of absolute privilege which covers judicial proceedings is *prima facie* privileged, that is to say, the person making it has a right to make it if he honestly believes it, and the person receiving it has a duty to receive it. But qualified privilege, as the term indicates, provides only a qualified protection and the person charged with the defamation must prove that he used the privilege honestly, honestly believing in the truth of what he said, or in other words, having reasonable grounds for making the statements and the onus of establishing that lies upon him. It is obvious that where the statement is made with reference to something in which the person making the complaint was himself involved as a party it is impossible for him to have had an honest belief in its truth if it is shown to be untrue. And, therefore, in a case of qualified privilege where the defendant sets up in defence that the allegation is true to his own knowledge, the defence of qualified privilege becomes illogical and impossible. That may be the reason why no effort was made in the written statement to rely upon it. And to my mind it cannot be raised in such a case as this where the defendents plead justification. I hold, as a matter of law, that there was no absolute privilege and that there was no ground for raising any question of qualified privilege, and the Courts would have been better advised if they had tried the issues as framed. The lower Appellate Court has not dealt with the question of justification or with the question of damages and the case must go back to the lower Appellate Court to dispose of the two main issues of fact, that is to say, Issues Nos. 2 and 3, namely, whether the defamatory statement is true or not, and if true, to what amount of damages is the plaintiff entitled. I set aside the decrees of both the Courts below and remit the case under O. XLI, r. 23. Costs of this appeal will abide the result.

Case remanded.

Z. K.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 144 OF 1921.
February 14, 1923.
Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

KASTURIBHAI MANIBHAI AND ANOTHER—APPELLANTS
versus
BAI MAHALAXMI AND OTHERS—RESPONDENTS.

Hindu Law—Joint family—Partition, partial—Severance in food and business—Properties still joint, nature of—Partition suits—Costs, rule as to—Registration Act (XVI of 1908), s. 17 (1) (b)—Document showing properties allotted on partition, whether requires registration.

When members of a joint Hindu family divide portions of the family property, a state of severance would in all probability result though it depends upon the circumstances in each case and the facts proved, whether the family still remains joint, each member holding his share of the properties divided as his own separate property, and all the members holding the undivided property as members of a joint Hindu family. [p. 916, col. 1.]

A very large portion of the property of a joint family was divided amongst the members in 1889 and from that date they began to live separate and have separate business and enjoyment in respect of their respective properties:

Held, that it was a legitimate presumption to draw that the members of the family intended to live divided after 1889 and continued to own the property still remaining undivided as tenants-in-common. [p. 916, col. 1.]

The general rule is that in partition suits the parties should bear their own costs, except with regard to the institution fee, which should be borne equally. [p. 916, col. 2.]

Per *Crump, J.*—Where parties draw up a document showing different properties allotted to them on a partition and the intention is that they should be the owners of their separate shares as from the date of the document, the document falls within the purview of section 17 (1) (*b*) of the Registration Act, and the mere fact that the

parties had in contemplation the execution of a formal document in the future, does not suffice to take it out of the scope of that section. [p. 916, col. 2.]

Appeal against a decree of the Joint First Class Sub-Judge, Amedabad, in Suit No. 251 of 1918.

Messrs. *G. N. Thakor* and *R. J. Thakor*, for the Appellants.

Sir *Thomas Strangman* and Mr. *K. V. Divatia*, for Respondent No. 1.

JUDGMENT.

Macleod, C. J.—The plaintiff sued to have it declared that she had become absolute owner of certain properties mentioned in paragraph 6 of the plaint; to recover possession of the properties allotted to her in partition, except a certain house of which she had already got possession; for mesne profits; and for a registered deed in terms of the *kacha* instrument of partition passed in respect of the family property on the 30th March 1915. The pedigree of the family is set out at paragraph 3 of the print. It is not disputed that Mayabhai, Manibhai and Chimanbhai, a minor son of Lalbhai, deceased, divided a considerable amount of joint family property in 1889. It is also found by the Judge that since 1889 these three persons began to live separate, and to have separate business and enjoyment, and to have their respective properties.

Defendants Nos. 1 and 2, sons of Mayabhai in their written statement said that the suit properties were the joint family properties of the descendants of Sheth Premabhai, and that the plaintiff was not entitled to file the suit in the present form. The third defendant asserted that the plaintiff had no interest in the joint properties specified in the plaint; that the said properties devolved upon defendants by right of survivorship. It is important to note what the third defendant said with regard to the document relating to partition relied upon by the plaintiff in paragraph 5 of the plaint. Paragraph 5 of the written statement is as follows:—"With reference to what is stated in paragraph 5 of the plaint, we say that the said property is not held in common nor was it so held. But the said property is joint and as the parties thought of dividing the same at the time mentioned in paragraph 5 of the plaint, a draft was prepared but a dispute arose with regard to the preparation of a formal document (a partition-deed) and hence a formal document in respect thereof was not made. Not only that but on taking legal advice as regards the partition matter as my brother defendant No. 4 was a minor, I came to know that the plaintiff could not have any right to the joint property and that if the plaintiff's husband has made any will with regard to the joint property, the same would be void to that extent, and the plaintiff does not get any right thereunder. And, therefore, the work of partition has been stopped since then, and it has not been at all given full effect to."

On these pleadings the first issue would be whether the suit properties were joint family property; and that would involve the question whether the family remained joint after 1889. Certainly if the family was joint and the members held the properties as joint family property, then Chimanbhai's Will would be inoperative, and the widow would only have a right to maintenance. It was never suggested in the pleadings that the document, Exhibit 81, of the 30th March 1915 required registration. The third defendant's evidence goes to show that it was a draft, and that no formal document, although one had been thought of, was ever executed.

The learned Judge, however, raised an issue whether the deed relied upon by the plaintiff was a deed of partition and required registration, and whether it was inadmissible in evidence for want of registration. He found that issue in the negative, and accordingly passed a decree in favour of the plaintiff for specific performance of the agreement. The plaintiff's legal advisers would have been wise when that issue was raised if they had asked the Court to allow them to amend their pleadings so as to insert an alternative prayer to the effect that if the document was inadmissible as requiring registration, an equitable partition might be decreed by the Court. That however was not suggested by plaintiff's Counsel, and as the decision on the seventh issue was in their favour, there was no necessity for them to ask for any amendment after judgment was delivered.

Defendants Nos. 3 and 4 appeal from the decision of the Trial Court and ask us to hold that the suit properties remained joint family property after 1889 so that the plaintiff could have no interest in them. It seems to me that when members of a joint family divide portions of the family property, a state of severance would in all probability result though it depends upon the circumstances in each case, and the facts proved, whether the family still remained joint, each member holding his share of the property divided as his own separate property, and all the members holding the undivided property as members of Hindu joint family. Here we have the fact that a very large portion of the family property was divided in 1889 amongst Mayabhai, Manibhai and Chimanbhai and from that date they began to live separate, and have separate business and enjoyment in respect of their respective properties. In those circumstances it would be a legitimate presumption that they intended from that date to live divided and consequently they would own the property still remaining undivided as tenants-in-common. The third defendant thought that Chimanbhai was separate from the other members of the family, and, therefore, his widow was not entitled to the family property. But clearly from the written statement of the third defendant it appears that there were negotiations for partition of the family property. I am, therefore, of opinion that at the date of the suit these properties were held by the family as tenants-in-common, and as there has been no question of exclusion, the plaintiff was entitled to sue for partition. I am also of opinion that as the plaintiff was not put on notice by the defendants' pleading that Exhibit 81 was inadmissible for want of registration we are entitled even in first appeal to allow her to make that amendment in the plaint, which undoubtedly she would have been advised to make if the defendants had raised in their written statement the question of registration with regard to Exhibit 81.

We, therefore, allow the plaintiff to amend the plaint so as to enable her to sue in the alternative for partition of the property which remained undivided after the partition of 1889; and if any additional Court-fees have to be paid on such amendment, the plaintiff will have to pay them, and when that has been done, the directions which we now give that the suit properties should be equitably partitioned between the plaintiff, defendants Nos. 1 and 2, and defendants Nos. 3 and 4, will become effective, and it will be for the Trial Court to give the necessary directions for partitioning the suit properties.

The general rule is that in partition suits parties should have their own costs, except with regard to the institution fee which should be borne equally by all the parties. Therefore the plaintiff will pay one-third of the institution fee and defendants two-third. With regard to the other costs each party should bear his own costs.

Crump, J.—In my opinion it is impossible to construe the document, Exhibit 81, as being anything but an instrument of partition. It is clearly a document which purports to create or to declare an interest in immoveable property of the value of more than Rs. 100. That the value of the shares is more than Rs. 100 is clear on the face of the document itself, and the whole tenor of it shows that the intention was that the parties should be the owners of their separate shares as from the date of the document; and that being so, it is impossible to escape from the bar created by section 17, clause (*b*), of the Registration Act, 1908. The mere fact that parties had in contemplation the execution of a formal document in the future, does not suffice to take it out of the scope of that section.

It was suggested that it might be regarded as an agreement to effect a partition in future, and, therefore, an agreement of which specific performance could be directed. But that is not the plain meaning of the language of the document and, therefore, the result must be that it is a document which is compulsorily registerable, and, therefore, one which cannot be used in evidence for any of the purposes indicated in section 49 of the same Act.

Now it is clear from the plaint, as originally presented, that it was sought to use that document as evidence of a completed partition, and if it cannot be used for that purpose, the transaction, of which it is evidence becomes incapable of proof for no other evidence except the document itself is admissible under section 92 of the Indian Evidence Act.

Therefore the case must be approached on the footing that at the date of that document there had been no partition. That before that date the parties were tenants-in-common of such property as remained undivided at the partition of 1889 appears to me to be proved beyond doubt upon the evidence. The Judge says that it is not denied that since the date of that partition Mayabhai, Manibhai and Chimanbhai, the husband of the present plaintiff, began to live separate and to have separate business and enjoyment and to have their respective properties. Though the partition-deed of 1889. Exhibit 62, is not itself clear upon the point, still when it is read in the light in which the parties acted upon it, there can be no doubt that there was severance of interest in the family, and that, therefore, they remained tenants-in-common of such portion of the joint estate as remained undivided by that document. It follows clearly, therefore, that the plaintiff, failing to prove the alleged partition, evidenced by Exhibit 81, is entitled to partition by metes and bounds of the property which the parties still held as tenants-in-common. It would be, in my opinion, extremely unjust in view of the pleadings of the defendants to allow that claim to be defeated now because of the question of registration which was raised, not by the parties, but by the Court of its own motion. I, therefore, agree in the order proposed.

Z. K. *Order accordingly.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 585 OF 1920.

November 23, 1021.

Present:—Mr. Justice Kumaraswamy Sastri and Mr. Justice Devadoss.

POTHARI ILLATH MADHAVAN NAIR—PLAINTIFF—APPELLANT

versus

CHALIKADAVATH PAKKISSAN THOTIYIL ABDUR RAHIMAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 4—Res judicata between co-defendants—Contest, absence of, effect of—Partition—Minor not properly represented—Acquiescence after attaining majority—Heirs of minor, whether can object.

A decision in a prior suit cannot operate as *res judicata* between parties who were co-defendants in the suit, where it is found that it was not necessary for the point to be raised in the prior suit as between the co-defendants.

Somasundara Muadali v. *Kulandaivelu Pillai*, 28 M. 457; 14 M. L. J. 404, followed.

Where a minor was not properly represented in a partition but all the adult members treated the partition as valid and enjoyed or disposed of their shares under the partition deed and the minor after attaining majority continued in possession of her share, her heirs cannot dispute the partition or claim any interest in the shares which fell to the other members and were enjoyed by them absolutely and adversely for over twelve years.

Second appeal against a decree of the District Court, South Malabar, in Appeal Suit No. 134 of 1919, presented against a decree of the Court of the District Munsif, Parapanangudy, in Original Suit No. 5 of 1916.

Mr. *C. Madhavan Nair*, for the Appellants.

Mr. *T. C. K. Kurup*, for the Respondents.

JUDGMENT.—We are of opinion that the decision in Original Suit No. 398 of 1903 does not render the question of the validity o the deed of partition *res judicata*. There was no contest between the defendants. *Somasundara Mudali* v. *Kulandaivelu Pillai* (1) supports the contentions of the appellant. The suit being to eject the defendants on the ground of an alleged trespass, it was not necessary for the second defendant to raise the question of the validity of the partition.

As regards the deed of partition in 1896 it is clear from the facts set out by the

(1) 28 M. 457; 14 M. L. J. 404.

District Munsif in paragraph 8 of his judgment that Atta Bi and the other parties acted on the deed. Atta Bi took under the Will of her brother who gave her the share he got on partition. Assuming that the partition was invalid as Atta Bi was not properly represented in the partition, the fact that all the adult male members treated the partition as valid and enjoyed or disposed of their shares under the deed and the fact that Atta Bi after she attained majority was in possession of her share would prevent her heirs from disputing the partition or claiming any interest in the shares which fell to the other members and were enjoyed by them absolutely and adversely for over twelve years.

We set aside the decision of the District Judge and restore that of the District Munsif with costs throughout.

Appeal allowed.

V. N. V.
Z. K.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 278 OF 1921.
November 27, 1922.
Present—Mr. Justice Stuart.
BABA AND OTHERS—PLAINTIFFS—APPELLANTS
versus
SUKKHA AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Religious endowment—Temple—Muhammadan pujari, *whether liable to removal.*

When Shudras become Muhammadans it frequently happens that their social relationship with Hindu Shudras remains much as it was. It is more a question of custom than a question of what is laid down by writers on the Hindu Law. [p. 919, col. 1.]

In a small Hindu temple of great antiquity the right to receive offerings and the right to officiate as *pujaris* had for a long time been shared between Hindu and Muhammadan *malis* without objection by the worshippers;

Held, that the Muhammadans could not be deprived of the right merely on the ground that the temple was a Hindu temple. [p. 919, col. 1.]

Appeal against a decree of the District Judge, Allahabad, dated the 27th November 1920.

Messrs. *U. S. Bajpai* and *Panna Lal*, for the Appellants.

Mr. *Iqbal Ahmad*, for the Respondents.

JUDGMENT.—This appeal raises some interesting points. It relates to rights to officiate as *pujaris* at the temple of Sitla at Farahampur Kalesharman. Farahampur Kalesharman is a small place close to Kara in the Allahabad District. Kara is the head-quarters of a Tehsil and was once a place of importance. The temple in question is of some antiquity. The learned Munsif who heard the original suit stated in his judgment that according to the Allahabad Gazetteer this temple was four thousand years old. I have been unable to trace a quotation that the temple is four thousand years old, but it is referred to at page 87 of the Gazetteer as one of the old temples in the district and it is a place where three fairs are held every year to which a large number of persons go. It is established on the facts that connected with this temple are certain families of *malis* and it is found on facts that for very many years certain families of *malis* who are Hindus and certain families of *malis* who are Muhammadans, have both officiated as *pujaris* in this temple which is undoubtedly a Hindu temple. The lower Courts have gone on to find that they have so officiated without any real objection being taken either by Hindus or Muhammadans. Apparently Hindu worshippers have in many instances willingly accepted the ministrations of the Muhammadan *malis*. It is probable (one can only conjecture in matters of this nature) that whoever were the original *pujaris* of the temple, there were attached to this temple, (as is usually the case) certain families of the *malis* caste who supplied the flowers for use in the temple, and that as years went on these *malis* united the functions of *pujaris* with the functions of *malis* and that some of them became Muhammadans very likely during the period of the Muhammadan domination of Kara. It would appear that in spite of certain of these *malis* becoming Muhammadans, they continued to take their share of the pilgrims offerings and even to officiate in the temple.

The findings of the Courts below must be examined carefully. They are, that Muhammadans have taken charge of piligrims

who come to the temple; that Muhammadans have received offerings of pilgrims who have come to the temple; that Muhammadans have even performed the ceremonies of laying hands on the pilgrims coming to the temples and that this habit has continued for a very large number of years. Accepting these findings of fact I come to the grounds of appeal.

The first ground is that the burden of proof was wrongly laid. There is no force in this. There was no question of burden of proof. Both sides called evidence and the Courts below have arrived at an affirmative finding that the Muhammadans are in the position which I have already stated they are in at present.

The next ground taken is that the temple came into existence before the Muhammadan religion came into existence. On that point it is impossible to arrive at a finding. Tradition would seem to suggest that the temple did come into existence before the Muhammaden religion came into existence but there is no evidence to support such a conclusion.

The next ground is that the very idea of a non-Hindu entering the consecrated part of a temple is obnoxious to Hindu sentiment and inconsistent with Hindu religion. This ground conflicts with the findings of fact because on the findings of fact the Hindus who attend this temple do not object to Muhammadans performing the functions which they claim the right to perform.

The next ground is that any association or mixing up of Muhammadans with Hindus or sharing in the offerings is of no legal consequence and cannot confer any right on the defendants to officiate as priests.

Now it must be remembered that *malis* are Shudras. There is very little difference between Kachis, Muraos and Malis and the status of the mali is that of the Kachi. He is a superior Shudra, not an unclean Shudra, a clean Shudra performing clean work and in no way a person to be despised, but nevertheless a Shudra. It is a well-known fact that when Shudras become Muhammadans it frequently happens that their social relationship with Hindu Shudras remains much as it was, and in such cases it is much more a question of custom than a question of what is laid down by writers on the Hindu Law. As a matter of fact there is nothing as far as I know in the Hindu sacred writings which in any way touches on this subject. It is impossible to decide a question like this on *a priori* principles that it is impossible for a non-Hindu to officiate in a temple such as the temple in question. What has to be looked at is what has been the usage in the past. I admit the position is peculiar but on the facts hardly any one seems to mind. The duties of the *pujari* appear to be confined to reciting some more or less colourless words and mainly to collecting the offerings and being in the temple in such a manner that the worshipper will feel that he has really made a pilgrimage to a shrine and offered up prayers which the sanctity of the shrine (the personality of the *pujari* being a matter of no importance) is likely to cause to be successful.

I should not discuss the 4th ground from any point of view other than the point of view of use.

The 5th ground questions the interpretation by the lower Courts of the documents upon the record. On this I will only say shortly that I agree with the interpretation.

The last ground endeavours to draw a distinction between the right to officiate as a priest and the right to receive offerings. In some cases these two rights can be separated but on the evidence it appears to me that in this particular temple the right to receive the offerings and the right to perform the exceedingly simple duties of *pujaries* are so connected as not to be separate.

For the above reasons I dismiss this appeal with costs including fees on the higher scale.

Appeal dismissed.

Z. K.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL NO. 1 OF 1921.

February 7, 1922.

Present:—Mr. Justice Pratt and Mr. Justice Duckworth.

THE LEIBAOAK SYNDICATE—PLAINTIFFS—APPELLANTS

versus

FINLAY FLEMING & Co.—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), ss. 73, Expl., 190—Principal and agent—Factor for sale of goods abroad—Sub-agent, whether can be appointed—Implementing of contracts, whether permissible—Lien of agent on moneys of principal for expenses incurred.

Plaintiffs made forward contracts to supply a certain quantity of wolfram to defendants which the latter arranged to sell in England through their agents, the latter in their turn contracting to sell in their own name. Plaintiffs failed to supply the full quantity agreed to be supplied by them, and the defendants' agents in England being pressed by their purchasers carried out the contracts by supplying wolfram received from other sources and charged the defendants for the cost thereof. In a suit by the plaintiffs to recover from the defendants the price of wolfram supplied the latter claimed to deduct for the moneys in their hands the expenses properly incurred by them in carrying out the contracts in England through their agents:

Held, (1) that the defendants were the factors as well as the agents of the plaintiffs; [p. 921, col. 1.]

(2) that under section 190 of the Contract Act, the defendants had authority to employ sub-agents in England to sell the ore; [p. 921, col. 1.]

(3) that plaintiffs having failed to supply the full quantity of the ore, the defendants and their sub-agents were entitled to implement the contracts entered into by them in England, provided that they acted reasonably and prudently and in mitigation of damages; [p. 921, col. 2.]

(4) that the defendants were entitled to retain moneys of the plaintiffs which were in their hands for expenses properly incurred in implementing the contracts. [p. 922, col. 1.]

Case-law referred to.

The explanation to section 73 of the Contract Act shows that the implementing of contracts is recognised by the Act and that it is a part of the law in the case of unfulfilled contracts. [p. 921, col. 2.]

First appeal against the judgment of Young, J., on the Original Side.

Mr. *Keith* with him Mr. *Barnabas*, for the Appellants.

Mr. *Lentaigne*, for the Respondents.

JUDGMENT.—The appellant Syndicate sued the respondents, Messrs. Finlay Fleming & Co., before the Original Side of this Court to recover Rs. 6,465-13-9, being the balance of the price of certain wolfram which the respondents had admittedly received and disposed of on their behalf. The amount in suit included interest.

The first contract made between the parties was duly carried out by the appellants. This was 15 tons of the mineral. The contracts with which we have to deal are two forward contracts, Exhibits F and G, for a total of 35 tons of wolfram ore, the first of which is really merged in the last, the price agreed upon being 52 shillings. It is admitted that some 14 tons were supplied leaving a deficiency of 21 tons and 1 hundredweight.

The wolfram received was sold through Messrs. Milne and Co., the London Agents of the respondents, who contracted to sell it in England in their own name. When the appellants failed to supply the full amount to the respondents, Messrs. Milne and Co., carried out the contracts by supplying wolfram received from other sources, and charged the respondents for the cost thereof. The latter contended that the amount sued for, less a sum of Rs. 285-1-9 (which they admitted was due, and paid into Court), represented the charges and expenses entailed by the fulfilment of the contracts, and claimed that they were entitled to retain the same out of the money in their possession belonging to the appellants. In fact, they claimed a right of lien or retainer.

The appellants have waived a great deal of the grounds set out in the memorandum of appeal *i. e.*, all that part of the appeal which relates to their allegations in the original Court that the carrying out of the contracts had become impossible owing to the action of the Local Government, and that that action was largely due to the machinations of the respondents themselves.

The grounds upon which the appeal is based, for the learned Judge on the Original Side found in favour of respondents on every point, may be summarized as follows:—

1. That the respondents were not entitled in law to appoint sub-agents for sale of the ore.

2. That the respondents had no authorization from the appellants to implement the contracts.

3. That without such direct authority Messrs. Milne and Co., were not justified in implementing the contract.

4. That in any case the respondents were not justified in re-paying themselves from moneys in hand belonging to the syndicate.

5. That the claim of the respondents ought to have been stamped as a set-off or counterclaim.

6. That the claim of the respondents was time-barred, *i. e.*, their claim for loss in implementing the contract, and for commission, etc.

7. That in any case inasmuch as the respondents' claim "sounds in damages," it was incapable of being made the subject of a set-off under the Civil Procedure Code.

It must here be stated that the appellants do not dispute the actual figures of the respondents, but only their right to retain the money in question.

I will deal with the first ground at once. In this is involved the question whether we are to consider the respondents merely as agents of the appellants, or also as their factors. The learned Judge on the Original Side held that they were factors, and, inasmuch as the respondents were entrusted by their principals with goods for sale, we are of opinion that there is little doubt that respondents were factors as well as agents. (Bowstead on Agency, page 4, Edition V). We would then refer to section 190 of the Contract Act. The respondents have no London Business House, and from the nature of the agency it is manifest that, in order that they might sell wolfram in time of war, they would have to appoint a sub-agent in England. Apart from this purchasers at that time would have been chary of entering into contracts with a Foreign Principal, because of the difficulty of suit and other matters. We hold that there was authority to appoint a sub-agent to sell the ore, and that it cannot be held that the respondents contracted to sell the ore personally.

Next as to ground No. 2, apart from what is stated in the explanation to section 73 of the Contract Act, which clearly shows that the implementing of contracts is recognised by that Act, and that it is part of the law in the case of an unfulfilled contract, it is manifest that, after the receipt of the letter Exhibit K, the appellants remained quiet for a long time, and that when they wrote to the respondents in the letter, Exhibit R, on the 17th of April they spoke of including the amount of respondents' claim in their suit against Turnbull and Co. We consider that this could have only referred to the present claim of the respondents, and that it is shown that the appellants did not construe the letter, Exhibit DD, dated in March as meaning that the respondents had dropped the matter. The appellants' letter, Exhibit S, dated in June refusing leave to implement and charge them came too late. The wolfram had then been sold. The evidence of Mr. Oakley shows that the appellants could not have procured the wolfram more cheaply themselves than did Messrs. Milne and Co. In fact it appears at once that the actions of that Firm were reasonable and to the advantage of the defaulting appellants.

In regard to ground No. 3, we consider that Messrs. Milne and Co. were quite justified in what they did. Wolfram ore in the early part of 1916 was of great national importance to Great Britain. Messrs. Milne and Co. were in duty bound to disclose and procure sanction for, the contracts in question, and to carry them out with the utmost urgency. Moreover we think that the evidence shows that Messrs. Watson of Liverpool, who purchased this ore, must be taken to have been pressing Messrs. Milne and Co. for completion of the contract. In these circumstances, it is manifest that the only course for them to pursue was to implement the contract, which they were in law entitled to do, provided that they acted reasonably and prudently, and in mitigation of damages. By their actions they saved the appellants 5 shillings, the price at Home being 60 shillings, whilst they bought at 55, or only three shillings more than the contract price, and at the cheapest price available at the time.

From this we pass to ground No. 4. Respondents actually held moneys belonging to

the appellants in their hands. We consider that, whether as agents or factors, they were entitled to retain money due to them therefrom by a right of lien or retainer whether their lien be particular or general.

As to grounds Nos. 5 and 7, there was in our opinion no question of a set-off. It is probable that as a set-off the claim of respondents could not have been made in this suit, see the case of *Mahomed Nassoruddin* v. *Oppenheimer* (1) which was decided by a Full Bench of this Court in 1903 under section 111 of the then Civil Procedure Code. Under the present law a claim of set-oft must be stamped.

In regard to ground No. 6, the case being one of exercise of lien or retainer, no question of time limit arises at all.

As to the absence of time limit against the claims of respondents we would quote the case of *Chidambara Mudaliar* v. *Krishnaswami Pillai* (2) and the case of *Curwen* v. *Milburn* (3).

We would further point out authority for the findings which we have come to in regard to implementing contracts. The first case is *Eris County Natural Gas and Fuel Co.* v. *Carroll* (4). and we would refer specially to pages 116, 117 and 118 of that decision of their Lordship of the Privy Council. The next is the case of *British Westinghouse Electric and Manufacturing Company* v. *Underground Electric Railways* (5).

As to the lien the case quoted by the learned Judge on the Original Side is to the point, *viz.*, *Hammonds* v. *Barclay* (6). Further the passages quoted by Mr. Lentaigne for the respondents from Halsbury's Laws of England are useful in this connection *viz.*, Volume XIX, page 8, section 9, page 7, section 8, and page 3, section 2. He also relied upon Volume I, pages 196 to 198, sections 417, 419 and 420. Then there are sections 217, 221 and 222 of the Contract Act.

We consider that implementing of contracts is a part of the general law, and that in such a case as this the agent is entitled to a lien or retainer upon moneys of the principal which are in his hands for all expenses properly incurred. It is clear that in this instance the expenses in question were properly incurred.

We think that the suit was rightly decided on the Original Side and accordingly dismiss the appeal with costs, confirming the decree of the learned Judge on the Original Side.

Appeal dismissed.

Z. K.

(1) 2 L. B. R. 186 (F. B.).
(2) 28 Ind. Cas. 221; 39 M. 365 at pp. 375, 376; 28 M. L. J. 285; 2 L. W. 241.
(3) (1889) 42 Ch. D. 424 at p. 434; 62 L. T. 278; 38 W. R. 49.
(4) (1911) A. C. 105; 80 L. J. P. C. 59; 103 L. T. 678.
(5) (1912) A. C. 673 at pp. 683, 684, 686, 690; 81 L. J. K. B. 1132; 107 L. T. 395; 56 S. J. 734.
(6) (1802) 2 East 227; 102 E. R. 356.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 243 OF 1921.

February 28, 1922.

Present:—Justice Sir Francis Oldfield, KT., and Mr. Justice Venkatasubba Rao.

RAYABHARAM SARAMMA *alias* SARRAJU AND ANOTHER—DEFENDANTS—APPELLANTS

versus

DEVAPURAJALA GANGAYYA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Res judicata—*Mortgage, decree on—Sale—Purchaser, whether affected by result of suit subsequent to mortgage.*

A sale in execution of a mortgage-decree and the proceedings in which such a decree was obtained are a part of the working out of the rights of the mortgagee under the mortgage, and the purchaser is not, therefore, affected by a decision in a suit subsequent to the mortgage, though prior to the Court sale.

Soshi Bhusun Guha v. *Gogan Chunder Shaha*, 22 C. 364; 11 Ind. Dec. (N. S.) 244, *Anakaran Puthiyavallapil Mussan Haji* v. *Thiyan Thavara Koran*, 65 Ind. Cas. 979; 41 M. L. J. 392; 14 L. W. 387; (1921) M. W. N. 679 and *Ramchandra Dhondo Kulkarni* v. *Malkapa Narsapa*, 36 Ind. Cas. 443; 40 B. 679; 18 Bom. L. R. 757, relied on.

MAUNG TUN GYAW v. MAUNG PO THWE.

Appeal against an order of the Court of the Additional Subordinate Judge at Ellore, in Appeal Suit No. 159 of 1920 (Appeal Suit No. 193 of 1919 on the file of the Court of the Subordinate Judge, Ellore), preferred against a decree of the Court of the Additional District Munsif, Narasapur, in Original Suit No. 54 of 1917 (Original Suit No. 974 of 1914 on the file of the principal District Munsif, Narsapur).

Mr. *B. Somayya*, for the Appellants.

Mr. *P. Somasundaram*, for the Respondents.

JUDGMENT.—In this case we need refer to one only of the two grounds given by the lower Appellate Court for its remand, that the judgment in Oiginal Suit No. 695 of 1891 relied on as *res judicata* by the fourth and fifth defendants, here appellants, has not that character, because the present plaintiff's interest in the propeity arises from a mortgage of it to him prior to Original Suit No. 695 of 1898. Clearly the decision in that suit cannot bind him. It is urged that it does so, because the purchase of the property at a sale held in execution of the decree on his mortgage was subsequent to the judgment in Original Suit No. 695. But the purchase and the proceedings, in which a decree was obtained, are a part of the working out of his right under the mortgage, which the decision in Original Suit No. 695 could not affect. In these circumstances, we cannot see how the fact that the purchase was subsequent to the decision in Original Suit No. 695 is material. Our conclusion is supported by *Soshi Bhusun Guha* v. *Gogan Chunder Shaha* (1), *Anakaran Puthiyavallapil Mussan Haji* v. *Thyan Thavara Koran* (2) and *Ramchandra Dhondo Kulkarni* v. *Malkapa Narsapa* (3), the facts in the last mentioned case very closely resembling those in the present. The learned Subordinate Judge's order of remand is correct. The appeal is dismissed with costs.

V. N. V. *Appeal dismissed.*

Z. K.

(1) 22 C. 364; 11 Ind. Dec. (N. S.) 244.

(2) 65 Ind. Cas. 979; 41 M. L. J. 392; 14 L. W. 387; (1921) M. W. N. 679.

(3) 36 Ind. Cas. 443; 40 B. 679; 18 Bom. L. R. 757.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL NO. 118 OF 1921.

March 29, 1922.

Present:—Mr. Justice Pratt and Mr. Justice Duckworth.

MAUNG TUN GYAW—APPELLANT

versus

MAUNG PO THWE—RESPONDENT.

Evidence Act (I of 1872), s. 92, applicability of, to parties on same side—Oral evidence to vary terms of document, admissibility of.

Section 92 of the Evidence Act applies to all parties to a document whether on the one side or the other. It is not open to parties to a document on the same side to prove, as against each other, that a document to which they are parties, though purporting to be a sale is in reality a mortgage. [p. 925, col. 2.]

Maung Kyin v. *Ma Shwe La*, 42 Ind. Cas. 642; 45 C. 320; 9 L. B. R. 113; 15 A. L. J. 825; 33 M. L. J. 648; 3 P. L. W. 185; 6 L. W. 777; 22 C. W. N. 257; 23 M. L. T. 361; 27 C. L. J. 175; 20 Bom. L. R. 278; (1918) M. W. N. 300; 11 Bur. L. T. 21; 44 I. A. 236 (P. C.), followed.

Mulchand v. *Madho Ram*, 10 A. 421; A. W. N. (1888) 127; 6 Ind. Dec. (N. S.) 283, *Shamsh-ul-Jahan Begam* v. *Ahmad Wali Khan*, 25 A. 337; A. W. N. (1903) 64, referred to.

First appeal against the judgment of the District Judge, Hanthawaddy.

Mr. *Giles*, for the Appellant.

Mr. *Chari*, for the Respondent.

JUDGMENT.—The appellant, Maung Tun Gyaw, as a widower, married Ma Kha, a widow, some 20 to 25 years ago. The plaintiff-respondent, Maung Po Thwe, claims to be the *kittima* adopted son of Ma Kha and her previous husband. It may be as well to say at once that the question as to whether he was adopted or not has not to be considered in this case.

The appellant and Ma Kha appeared to have lived happily together for a long time, but recently they fell out and quarrelled. As the result of this quarrel, Ma Kha executed a deed transferring 100·96 acres of paddy land to Po Thwe. The date of this deed is the 10th of June 1920. The deed was duly registered and attested and, for the purposes of this appeal, it is common ground that it may be treated as though it were a deed of gift.

There were then disputes between Tun Gyaw and Po Thwe as regards possession and working of this paddy land, which

culminated in cases before the Criminal Courts.

Relying on this deed of gift, Po Thwe sued Maung Tun Gyaw in the present suit to recover possession of 65·85 acres of the paddy land on the ground that Maung Tun Gyaw's possession was wrongful. He also sued for the paddy estimated to amount to 2,310 baskets or its value Rs. 3,465 and for 16 heads of cattle or their value Rs. 1,400. Tun Gyaw resisted this claim on the ground that the land was the *lettetpwa* property of Ma Kha and himself. It was not disputed that the land originally was the *payin* property of Ma Kha at the time of her marriage to Tun Gyaw; but it was claimed that during their coverture the land changed its character, and at the time of the so-called deed of gift, had become the *lettetpwa* property of Tun Gyaw and Ma Kha.

The plaintiff-respondent's case, on the other hand, was that the land had not ceased to be the *payin* property of Ma Kha, that she was entitled to dispose of it as she wished, and that the appellant, Maung Tun Gyaw, had no right whatever to the property, or the paddy, or the cattle.

The learned Judge of the District Court decided that the plaintiff-respondent, Maung Po Thwe, was entitled to the possession of the suit land and the paddy or its value Rs. 3,465, but he dismissed the rest of the claim. The learned Judge seems to have been of opinion that the paddy land continued throughout to be the *payin* property of Ma Kha.

The principal ground of appeal argued by Mr. Giles for the appellant, Maung Tun Gyaw, is that the District Court erred in not holding that the property had changed its character and had become the *lettetpwa* property of Ma Kha and appellant. He also argued that Ma Kha was unable to make a gift to Maung Po Thwe of anything more than an undivided share in such joint property, or, in other words, the right to claim partition of a moiety thereof.

The history of the land is shown by the documentary evidence in the case. It was first of all mortgaged by Tun Gyaw and Ma Kha to U Po Khine and Ma Myit on the 22nd of March 1907. The paddy land in question was stated to measure 196·70 acres and three acres of Dhani garden were also included in the mortgage. Then on the 29th of June 1908, as they were unable to pay up the mortgage, Maung Tun Gyaw and Ma Kha transferred this land outright to U Po Khine and Ma Myit for Rs. 5,500. In addition to the amount due on the mortgage, they appear to have received some consideration in cash. (With reference to this transaction, it is part of the plaintiff's case that there was a collateral verbal agreement that the land should be reconveyed at the same price.) Almost four years later, or on the 18th of May 1912, U Po Khine and Ma Myit re-conveyed the same land to Ma Kha alone for Rs. 5,500. On the 5th of August 1919, Tun Gyaw and Ma Kha executed what is called a second mortgage of 163·64 acres of this same land to Ko Po Wa and Ma Thein Me for Rs. 3,500, the first mortgage being referred to in the registered bond.

On the 10th June of 1920, Ma Kha executed the deed under which Po Thwe claims in this suit. There are two other transactions which must be referred to. On the 11th of May 1912 or one week prior to the re-conveyance to Ma Kha by U Po Khine and Ma Myit, there was a sale of certain land which Tun Gyaw claims as his *payin* property and which has been found to have been his *payin* land. The vendors were Po Hlaing and Ma Hte (who were said to be the mortgagees). Tun Gyaw, Ma Kha, Ma The U and a minor, Maung Ba Sein and the purchasers were Ko Tha Zan and Ma Si. The price was Rs. 3,290 and the area sold was 35·57 acres. It is not contended that Maung Tun Gyaw did not receive this money. Then on the 18th of May 1912 or on the same day as the conveyance to Ma Kha by U Po Khine and Ma Myit, Ma Kha purports to have sold to Maung Po Sa and Ma Mya for a sum of Rs. 3,376, 36·55 acres out of the land which is the subject of this suit. We may add that at a later date it appears that she sold

another 66 acres. The importance of these last mentioned transactions of the 11th of May and of the 18th of May by Tun Gyaw and Ma Kha is that it is probable that they provided the funds for the re-purchase of the 196·70 acres from U Po Khine and Ma Myit.

Now there is no doubt that the transaction of the 29th of June 1908, whereby the land was transferred outright to U PoKhine and Ma Myit for Rs. 5,500 must be taken as an absolute sale. If so, the property ceased to be Ma Kha's *payin* property. Four years later it was re-conveyed by the vendees to one of the vendors. The fact that it was re-conveyed to only one of the vendors is not of great importance, because at that time it is an admitted fact that Maung Tun Gyaw was heavily involved in debt and was actually an inmate of the Civil Jail. It would be, therefore, not at all likely that the property would have been re-conveyed in the names of the two vendors.

It is important here to consider with what funds this re-purchase could have been made. It is clear that Ma Kha by selling 36 and odd acres of the land did not realize more than Rs. 3,376. So far as we are able to see, it is not explained whence she obtained the balance to make up the sum of Rs. 5,500 unless, as on full considration we think to be the case, that balance was made up from the sale-proceeds of Tun Gyaw's *payin* land dated the 11th of May. We cannot see our way to avoid holding that ths money was included in the money necessary for this re-purchase. Taking this view, it is manifest that the property could no longer be treated as the *payin* property of Ma Kha, but must be considered to have become the *letletpwa* property of Tun Gyaw and Ma Kha.

We think that the learned Judge of the District Court was in error in thinking that Tun Gyaw's money was not included. On this decision alone, it would be possible to decide this appeal but there is another question which has been argued before us which, we consider, it is necessary to go into. Mr. Giles has argued that inasmuch as Maung Po Thwe claims on behalf of Ma Kha and as her representative-in interest, he must be treated as though he were a party to the sale of the 29th of June 1908, and that, therefore, he cannot raise the question that that transaction was in effect a mortgage, and that the re-conveyance of the 18th of May 1912 was merely a redemption thereof. Mr. Chari on behalf of Maung Po Thwe has advanced the argument that, although Mr. Giles' contention might hold good if it was between the parties on the one side and the other in the sale of the 29th of June 1908, yet it cannot be held to be of any avail in the present instance, because here we are dealing with a question between the parties on one side *alone*, namely, Tun Gyaw, and Ma Kha as represented by Maung Po Thwe. He urges that section 92 of the Evidence Act has, therefore, no application, and he relies upon the case of *Mulchand* v. *Madho Ram* (1), which was followed in the case of *Shamsh-ul-Jahan Begam* v. *Ahamd Wali Khan* (2). It was there held that the words in section 92 of the Evidence Act "between the parties to any such instrument" refer to the persons who on the one side and on the other came together to make the contract or dispose of property and would not apply to questions raised between the parties on the one side only of the deed regarding their relations to each other under the contract.

We do not quarrel with this statement of the law, but, in our opinion the Allahabad Court went too far if it intended to lay down that the parties on one side of a deed, as between themselves; were able to contradict, vary, add to or subtract from, its terms by means of parol evidence. We consider that the meaning of section 92 is clear, and that it has application to all parties to a document. Quite apart from section 92 of the Evidence Act, it would, of course, be possible for the parties on one side of a deed to show by parol evidence their mutual relations the one with the other. That they should be able to show with reference to any transaction to which they are the parties on one side, that such

(1) 10 A. 421; A. W. N. (1888) 127; 6 Ind. Dec. (N. S.) 283.

(2) 25 A. 337; A. W. N. (1903) 64.

transaction, though purporting to be a sale is a mortgage, we are unable to hold.

The decision of their Lordships of the Privy Council in the case of *Maung Kyin* v. *Ma Shwe La* (3) is binding, and following that ruling we are of opinion that Maung Po Thwe was precluded from showing that there was any collateral verbal agreement which would have rendered the transaction of the 29th of June 1908, in effect, a mortgage. As a matter of fact, the only direct evidence on the point is that of Ma Kha who calls that transaction a "temporary sale." The rest of the evidence, that it was in effect a mortgage, is merely circumstantial, and we do not think that, where direct evidence is prohibited, circumstantial evidence could be permitted to prevail.

We would add that with reference to the sale of the 29th of June 1908, the document shows that the debt was extinguished, and it is obvious that there can be no mortgage unless there is a debt. Moreover, there could have been no mortgage unless the rules laid down by section 59 of the Transfer of Property Act were complied with.

In view of these findings, we think it was quite obvious that in order to succeed in this case, the plaintiff-respondent Maung Po Thwe had to establish his title and show that the property remained Ma Kha's *payin* property right up to the end. We think that he has failed to discharge this onus.

As regards the gift by Ma Kha to Po Thwe it is obviously invalid as regards Tun Gyaw's share in the land, and it can only be valid so far as to give Po Thwe a right to claim partition of his adoptive mother's share. This he has not done.

In our opinion this appeal must, therefore, be allowed and the decree of the lower Court set aside and the suit dismissed with costs in both Courts.

Z. K. *Appeal allowed.*

(3) 42 Ind. Cas. 642; 45 C. 320; 9 L. B. R. 114; 15 A. L. J. 825; 33 M. L. J. 648; 3 P. L. W. 185; 6 L. W. 777; 22 C. W. N. 257; 23 M. L. T. 36; 27 C. L. J. 175, 20 Bom. L. R. 278; (1918) M. W. N. 300; 11 Bur. L. T. 21; 44 I. A. 236 (P. C.).

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 74 OF 1923.

May 2, 1923.

Present:—Mr. Justice Campbell.

BALLA—APPELLANT

versus

BARU MAL AND OTHERS—RESPONDENTS.

Hindu Law—Joint family—Debt incurred by one member—Liability of other members—Necessity, proof of.

A member of a joint Hindu family can be made jointly liable for a debt incurred by another member of the family only on proof that the money was borrowed for necessary family purposes.

Har Kishen Singh v. *Lahore Bank, Limited*, 51 Ind. Cas. 712; 64 P. R. 1919, *Bhura* v. *Banarsi Das*, 30 Ind. Cas. 481; 174 P. L. R. 1915; 113 P. W. R. 1915, *Paras Ram Jawala Das* v. *Gian Chand*, 50 Ind. Cas. 36; 48 P. W. R. 1919, *Ram Dhan Das* v. *Ramji Das*, 50 Ind. Cas. 215; 59 P. L. R. 1919, referred to.

Appeal from a decree of the District Judge, Karnal, dated the 14th December 1922, modifying that of the Munsif, First Class, Sonepat, District Karnal, dated the 26th April 1922.

Mr. *Shamair Chand*, for the Appellant.

Mr. *Rustomji*, for the Respondents.

JUDGMENT.—This suit was instituted against Balla and his son Raman for Rs. 846 principal and interest due on book account which ran from *Sambat* 1964 to *Sambat* 1976. From *Sambat* 1964 to *Sambat* 1967 the dealings were in the name of Balla and from *Sambat* 1967 to *Sambat* 1976 they were in the name of Raman and terminated with a balance struck by Raman.

The plaint alleged that Raman struck the balance as manager of the joint Hindu family constituted by Balla and Raman. The defendants pleaded separation. The Trial Court held that they had separated and decreed against Raman only. An appeal was made to the District Judge who decided that there had been no separation and that, therefore, Balla was also liable and he was included in the decree.

On second appeal by Balla it is urged that even on these facts Balla could not be made liable without affirmative proof that the money borrowed by Raman had been borrowed for necessary joint Hindu family purposes, and in support of this contention

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Har Kishen Singh v. *Lahore Bank, Limited* (1), *Bhura* v. *Binarsi Das* (2), *Paras Ram Jawala Das* v. *Gian Chand* (3), *Ram Dhan Das* v. *Rimji Das* (4) are cited. The reply of the learned Counsel for the respondents is that the account is one and indivisible.

Admittedly there is no evidence about the purpose for which the money was borrowed by Raman and the objection of the appellant must prevail. Had Raman been sued on Balla's account before 1967 he would not have been liable without proof that the money had been taken for the benefit of the family. A suit on the account of Balla would be time-barred now and he can only be bound if the loans to Raman were taken for the benefit of the family.

I accept the appeal with costs and restore the decree of the Trial Court.

Z. K.

Appeal allowed.

(1) 51 Ind. Cas. 712; 64 P. R. 1919.
(2) 30 Ind. Cas. 481; 174 P. L. R. 1915; 113 P. W. R. 1915.
(3) 50 Ind. Cas. 36; 48 P. W. R. 1919.
(4) 50 Ind. Cas. 215; 59 P. L. R. 1919.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 86 OF 1921.

June 22, 1922.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Piggott.

Mahant KUBER DAS—PLAINTIFF—APPELLANT

versus

RAM DIN KALWAR—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 57—Landlord and tenant—Ejectment—Non-payment of rent whether ground for ejectment.

Under a compromise defendant was allowed to retain possession of certain plots of land so long as he paid the rent fixed by the compromise but if he failed to pay the rent he was liable to be ejected:

Held, that although the compromise was binding on the parties the defendant could not under section 57 of the Agra Tenancy Act be ejected for mere non-payment of rent in the absence of a decree for arrears of rent as required by clause (*a*) of the section.

Tara Singh v. *Khushal Kunwar*, 28 A. 610; 3 A. L. J. 349; A. W. N. (1906) 110, followed.

Letters Patent Appeal from a judgment of Mr. Justice Stuart, dated the 9th May 1921.

Mr. *Harnandan Prasad*, for the Appellant.

Mr. *S. P. Sinha*, for the Respondent.

FACTS appear from the following judgment of Mr. Justice Stuart:

"The land in dispute is a portion of property held by a Nanakshahi endowment in the Basti Distsict. Karandass was formerly *Mahant*. Upon the death of Karandass, Anant Dass took possession of the property claiming to be the successor of Karandass. While in possession of the property, he executed usufructuary mortgages of the land in dispute in favour of Ramdin Kalwar. Uday Bhan instituted proceedings against Anant Dass, claiming to be successor of Karan Dass. He succeeded. He thus became the recognized *Mahant*. He then sued in a Civil Court to eject Ramdin. The suit was compromised on the 30th of March 1914 on these terms:—Ramdin was to retain possession over the plots in dispute at a rental of Rs. 2 a *bigha* so long as he paid the rent. Uday Bhan agreed not to eject him so long as he paid his rent, but in default of payment of the rent, Uday Bhan could eject him. According to the decision in *Bhola Nath Tewari* v.

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Suraj Bali Rai (1) there was nothing illegal in this arrangement. Uday Bhan was not entitled to eject Ramdin so long as he paid the rent. Uday Bhan alleging that Ramdin had not paid the rent applied to the Rent Court to eject him under the provisions of section 58, Local Act II of 1901. The District Judge held, on appeal on those proceedings, that Ramdin could not be ejected under the provisions of section 58, Local Act II of 1901. He was of opinion that he could be ejected under the provisions of section 57 (*c*), Local Act II of 1901. He remitted the case for decision under the provision, of O. XLI, r, 23, Civil Procedure Code. When the case went back it was found on the facts by the lower Appellate Court that Ramdin had paid no rent. The lower Appellate Court then ordered his ejectment. He comes here in second appeal. The main point taken on his behalf is that he cannot be ejected, otherwise than in accordance with the provisions of the Tenancy Act. He relies on the decision in *Tara Singh* v. *Khushhal Kunwar* (2). Under the provisions of section 57 (*a*), Local Act II of 1901, the mere circumstance that he has not paid the rent is not sufficient to justify his ejectment. It is necessary first that a decree for arrears should have been passed and, until this is done, he cannot be ejected. The respondent takes the position that, inasmuch as Ramdin did not appeal against the order of remand, declaring that there was a cause of action under section 57 (*c*), he cannot take this objection now. The appellant replies to this that in the first place the order of remand did not state definitely that he could be ejected under section 57 (*c*), it only stated that in the opinion of the Judge hearing the appeal an amendment of the plaint claiming relief under section 57 (*c*) might be successful; and that, in the second place, under the provisions of Local Act II of 1901, no appeal lay against such remand proceedings, Chapter XLIII of the Code not applying to Rent Courts. The contention of the appellant on this point must prevail. I agree with the learned Counsel for the appellant that the decision in *Tara Singh* v. *Khushhal Kunwar* (2) governs the matter. This decision is binding upon me as a Judge sitting singly. The compromise undoubtedly binds the parties, but this fact does not render it possible for the appellant to be ejected for non-payment of rent in the absence of a decree against him for arrears. The appeal must, therefore, prevail and the suit will stand dismissed. I have now to decide a point under O. XXII, r. 5, Civil Procedure Code. *Mahant* Uday Bhan having died during the proceedings, the appellant substituted the names of Anant Dass and Kuber Das as his representatives. The appellant did not know which of the two was entitled to succeed as *Mahant*. I have to decide summarily for the purpose of this appeal which of the two represents him. They are rival claimants for the office of *Mahant*. On the affidavit of Gajadhar Pal, which is the only evidence before me, I decide summarily, and for the purpose of this appeal only, that Kuber Das is the successor to the deceased Uday Bhan. The result is that this appeal is decreed, that the suit will stand dismissed and that Kuber Dass will pay his own costs and those of Ramdin in all Courts. Anant Das has incurred no costs."

JUDGMENT.—The point taken on behalf of the plaintiff-appellant is an ingenious one and no doubt entitled to consideration; but we are satisfied on the whole that the ruling referred to by the learned Judge of this Court does govern the present case and that the decision under appeal was correct.

We dismiss this appeal with costs.

Appeal dismissed.

Z. K.

(1) 49 Ind. Cas. 357; 41 A. 223; 17 A. L. J. 120.
(2) 28 A. 610; 3 A. L. J. 349; A. W. N. (1906) 110.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 70 OF 1919.

June 28, 1922.

Present:—Justice Sir Jwala Prasad, KT., and Justice Sir John Bucknill, KT.

JOGENDRA SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

Maharaja KESHO PRASAD SINGH—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 120—Zerait land—Lease for term of years—Sub-lessee, position of.

Tenancy is created by a contract, either express or implied, between the landlord and the tenant, or by Statute. A lessee of *zerait* land for a term of years has no right to settle the land with sub-tenants for a term exceeding the term of his own lease. On the expiry of the term of such lease the rights of the lessee in the land together with those of his sub-lessees come to an end.

Binad Lal Pakrashi v. *Kalu Pramanik*, 20 C. 708 (F. B.); 10 Ind. Dec (N. S.) 477, distinguished.

Kuman Das v. *Gulam Ali Nadaf*, 57 Ind. Cas. 323; 1 P. L. T. 184, referred to.

Appeal from a decision of the Subordinate Judge, Shahabad, dated the 28th November 1918.

Messrs. *Lakshmi Narain Singh* and *Gour Chandra Pal*, for the Appellants.

Messrs. *Shiva Saran Lal*, *Kulwant Sahay* and *Nirsu Narain Sinha*, for the Respondents.

JUDGMENT.

Jwala Prasad, J.—This appeal arises out of a suit in ejectment.

The plaintiff is the Maharaja of Dumraon. Briefly speaking his case is that the land in suit measuring about 125 *bighas*, situated in two *mauzas* called Katar and Batra, is his *zerait* land known as Deori *zerait* land, and was let out from time to time for a fixed term of years; the last lease was in favour of Nakchhedi Lal and Ram Bahadur Singh, from 1307 to 1316; that on the expiry of this lease it was again given to Ram Bahadur Singh under the orders of the Court of Wards, which was then in charge of the estate, for three years from 1317; that defendants Nos. 1 to 46 are residents of the same village and are related to each other and they in collusion and with the consent of one another took various proceedings with a view to establish their *raiyati* claim to the land in suit and to the prejudice of the plaintiff, and refused to give up possession after the expiry of the lease in spite of the notice served upon them. The plaintiff, therefore, brought the present action in the Court of the Subordinate Judge of Shahabad, for recovery of possession of the land in dispute and for mesne profits.

The Court below has decreed the plaintiff's suit for possession directing the amount of mesne profits to be determined later on, evidence on which was reserved.

There were 46 defendants in this case, some of them did not enter appearance and some did not contest the plaintiff's claim, and some of them claimed portions of the disputed lands as their *gujashta* holding.

The defendants, 25 in number, have appealed to this Court and repeat the contentions which were made on their behalf in the Court below and disposed of by the learned Subordinate Judge. They dispute the finding of the Court below that the land in dispute is the *zerait* land.

The land has been described as *zerait* in all the *kabuliyats* whereby the land was in possession of the lessees from time to time. The first *kabuliyat* is dated the 20th July 1872, for 1280 to 1286, executed by Hari Singh. The second *kabuliyat* is dated the 27th May 1879, executed by Gopi Raut, for 1287 to 1296. The third *kabuliyat* is dated the 18th April 1888 executed by Nakchhedi Lal and Rajpat Singh for 1296 to 1306. The fourth *kabuliyat* is dated the 23rd June 1899, executed by Nakchhedi Lal and Ram Bahadur Singh, defendant No. 1, for 1307 to 1317. All these *kabuliyats* describe the land as *zerait* of the proprietor, the lessee having covenanted not to

"Sub-let the leasehold property on *kathana* settlement unless the proprietor permits him to do so and that on the expiry of the term of lease the proprietor shall be at liberty to settle the land with whomsoever he may like."

The lessees were further prohibited from planting any trees themselves or through anybody else. This was obviously with the object of preserving the cultivable

nature of the land, for the plantation of such permanent trees would impair the character of the land for cultivation purposes. In the body of these *kabuliyats* the land is described, in places more than one, as the *zerait* of the proprietor and the object of the covenants in the lease was to preserve that character. Ram Bahadur Singh, defendant No. 1, who is one of the executants of the last *kabuliyat* cannot in face of these covenants in the document contend that the land in suit was not the *zerait* of the proprietor, or that he or any of the lessees had any right to settle the land for terms exceeding those of their own.

The Dumraon Raj Treasury *chalan* dated the 26th May 1909, shows payment of rent of the land in dispute in the treasury of the Raj. It describes the land as *zerait* Katar and Barah Batra. This *chalan* bears the signature of lessee Ram Bahadur Singh, defendant No. 1. Even the rent-receipts filed on behalf of the defendants describe the land as *zerait*; in some of the receipts the tenants have been described as *shikmidars*, in some as *shikadars* and in others as *jotedars*. The oral evidence adduced in this case also shows that the land was commonly known as the Deori *zerait*. Even the defendant, witness No. 2, a son of the former lessee, and the lessee himself for a pretty long time admitted in cross-examination that the land in suit is called the *zerait* land. Mr. Lakshmi Narain Singh contended that the description in the *kabliyats* and in the rent-receipts only showed that the Badhar in which the land lies is called *zerait*, but that the land itself is not *zerait* in the true sense of the term as referred to in Chapter XI of the Bengal Tenancy Act. The learned Subordinate Judge has pointed out that it is true that in this case the landlord has not been able to prove that the land in question was cultivated as *zerait* by the proprietor himself with his own stock and by his own servants for twelve continuous years immediately before the passing of the Act as is required by clause *(a)* of section 120; but that the land was recognized by village usage as proprietor's *zerait* land, as is required by clause (*b*) of the section.

Now, two of the leases are of a period before the 2nd of March 1883, and these *kabuliyats* show that the land in question was let out as proprietor's private or *zerait* land. The description of the land, therefore, in these exhibits assuming for the sake of argument that it referred to the Badhar, shows the notoriety of the land in the locality and is evidence which, under the section, may be considered as proof of the character of the land being *zerait*. We, therefore, agree with the view of the Court below that the land in dispute has been proved to be the *zerait* land of the plaintiff.

Mr. Lakshmi Narain Singh then contends that even if the land were *zerait* land, the appellants acquired tenancy rights by being in possession thereof as tenants for a long period, more than twelve years prior to the institution of the suit. His contention is based upon the rent-receipts filed in this case. All these receipts are of the time of the lessees. There is no receipt of a prior date. These defendants claim that they were let into the occupation of the land by the lessees of the Dumraon Raj from time to time and, although they did not take any settlement directly from the Raj, they are entitled to claim the tenancy right against the Raj. The proposition put forward by Mr. Lakshmi Narain Singh appears to me to be fundamentally unsound. Tenancy is created by contract, either express or implied, between the landlord and the tenant, or by Statute. In the present case there was no privity between the Raj and the defendants. There was, therefore, no tenancy created by contract. The lessees had no authority to settle the lands and to create *raiyati* interest therein. Therefore, the Dumraon Raj proprietor of the land, is not bound by the settlement made by its lessees in excess of the rights conferred upon them by the several leases. Now, their possession over the land for a number of years would not in the least create by Statute any tenancy right in them as against the Dumraon Raj, inasmuch as there must be at the inception a tenancy created by a contract between the landlord and the tenant, and holding possession of the same as a tenant or *raiyat* for a continuous period of twelve years might

under the Statute called the Bengal Tenancy Act create a right of occupancy against the will of the landlord. As observed above, these defendants did not take any settlement of the land directly from the Maharaja, nor was there any acquiescence on the part of the Raja in their holding possession of the land. After the expiry of the lease no receipt has been granted by the Raj and there was, therefore, no recognition and consequently no implied contract of tenancy in favour of the defendants.

Mr. Lakshmi Narain Singh relied upon the wellknown case of *Binad Lal Pakrashi* v. *Kalu Pramanik* (1) in support of his contention that, although the lessees of the *zerait* land had no occupancy right themselves, and were merely trespassers after the expiry of the lease, yet the right created by them in favour of the defendants will be binding upon the real proprietor, the Maharaja of Dumraon. I have tried to quote the essence of that ruling in the way that Mr. Lakshmi Narain Singh put it so as to make it applicable to his contention; but that is not the essence of the ruling, nor is that principle deducible either directly or by implication from anything observed by their Lordships in that case. There the title was unknown. The man in possession of the subject-matter and exercising all the powers and functions of a title holder made settlement with tenants who *bona fide* believed that the lessor had title in him. It ultimately turned out that the lessor was only a trespasser, and that the real proprietor was a third person. Here there was no mistake as to the rights of the lessees who are said to have granted the tenancy right to the defendants. It was well known that the proprietor of the land was the Maharaja o Dumraon. It was equally known that the lessees had only limited interest for a fixed term of years. Therefore the principle of that ruling will not apply and it was pointed out in a later case, which I appropriated in my decision in the case of *Kuman Das* v. *Gulam Ali Nadaf* (2) that the case of *Bind Lal Pakrashi* v. *Kalu Pramanik* (1) "is an encroachment upon the ordinary rule of law, *viz.*, a grantor is not competent to confer upon the grantee a better title than what he himself possesses and it must be cautiously applied and is not to be extended." The result will be disastrous if the decision in that case were extended to apply to the facts of the present case. A lessee then holding for a term of years, say for five years, who after the expiry of that term ceases to hold the land, will upon the contention of Mr. Lakshmi Narain Singh be able to grant a permanent right of tenancy to a third person without the permission and knowledge of the landlord. Nothing will be more profitable than to take a lease of short term and to settle it on large premiums with third persons giving them permanent right of occupancy against the landlord. The proposition is preposterous. Here, the lease of defendant No. 1 expired in 1917 and was extended by permission of the Court of Wards, which then had charge of the property, till 1317 *Fasli*. After the expiry of the lease defendant No. 1 became a trespasser. All sub tenants described as *shikmidars*, *thikadars* and *jotedars* (call them by whatever term you like) must also go with the lessee, defendant No. 1. They did not ever acquire the right to remain on the land even for a moment beyond what defendant No. 1 had. The title was derived from defendant No. 1, and the previous lessee, and their title extinguished also with the title of the former. Therefore, the rent-receipts in the present case do not help the defendants.

The survey entry in the Record of Rights was then relied upon; but this entry also does not help the defendants, for in respect of the Katar land the rights of the defendants have been described as *quami zarait*, and in respect of the land in *Mauza* Barah Batra the defendants Nos. 1 to 6, the lessees, are shown as holding the land as their *bakasht*; some in their own possession and most of it in possession of the remaining defendants. Therefore, the survey entry described the land as *zerait* and the *bakasht* of defendants Nos. 1 to 6, the lessees. It cannot in any way support the claim of

(1) 20 C. 708 (F. B.) 10 Ind. Dec. (N. S.) 477.
(2) 57 Ind. Cas. 323; 1 P. L. T. 184.

the defendants. The effect of this survey entry would seem to have been nullified by the decision of this Court, dated the 27th March 1916, in a proceeding by the defendants against the plaintiff. The defendants-appellants in the present case disputed the right of the Maharaja to distrain the crops for arrears of rent describing the land as having been settled with defendant No. 1, the lessee. The contention of the defendants was, in that case as in the present one, that they were the tenants of the land and that the defendant No. 1 was tenure-holder and consequently the distraint proceedings, which applied only to the case of cultivating tenants, were llegally instituted by the Maharaja. It was held there that the cultivating tenant was Ram Bahadur Singh, lessee, who was defendant No. 2 in that case, and that the defendants-appellants in the present case, the appellants before us, could not claim to be tenants of the land as holding directly under the Maharaja. The leases in the present case were all construed as conferring only the right of cultivation in the land in suit upon the lessees including defendant No. 1. In this view the lessee was a *raiyat* for a term of years, and a *raiyat* cannot create a tenancy right in favour of another extending his own term. For all considerations we think that after the expiry of the lease not only the lessee defendant No. 1 but all the defendants, who may have been holding the land under a settlement made by him, must be treated as trespassers [*Mahanth Jagarnath Das* v. *Janki Singh* (3)]. As the landlord is, therefore, entitled to recover *khas* possession of the land, the defendants are also liable for mesne profits.

The appeal must, therefore, be dismissed with costs to the plaintiff-respondent only who has contested the appeal.

Now, defendants Nos. 10, 15, 29 to 31; who are respondents in this case, say that they had in their written statement disclaimed all connections with the land in dispute and, therefore, they are not lable to any *wasilat*. Their contention is that the concluding words in the penultimate paragraph of the judgment of the learned Subordinate Judge apply to defendants Nos. 1 to 6, who had by means of a *sulehnama* entered into an agreement with the plaintiff for reduction of the *wasilat*, and do not apply to the defendants who did not contest the plaintiff's elaim. No doubt, these defendants stated in their written statement filed on the 27th of November 1915 (corresponding to *Aghan* 1323) that they were no longer in possession of the land. Therefore, it would seem that they are not liable for mesne profits after the institution of the suit; but it is not clear whether they were or were not in possession of the land after the expiry of the term up to the institution of the suit, that is, 1320, 1321 and 1322. The evidence on this point on behalf of the plaintiff was reserved. The defendant No. 10 (witness No. 9) examined himself and said that these defendants had given up the land from 1320. It will, therefore be open to these defendants when the plaintiff gives evidence as to the amount of *wasilat*, to show that they had abandoned the lands from 1320 and that they themselves were not responsible directly or indirectly for the lands not being in possession of the plaintiff during the years in suit. In any case, the other defendants who disputed the right of the plaintiff and according to the finding of the Court below kept him out of possession, are liable to the plaintiff for mesne profits of the years in suit.

Bucknill, J.—I agree.

Z. K. *Appeal dismissed.*

(3) 66 Ind. Cas. 337; 1 Pat. 340; 49 I. A. 81 3 P. L. T. 197; 35 C. L. J. 506; 43 M. L. J. 55; 26 C. W. N. 833; (1922) M. W. N. 410; (1922) A. I. R. (P. C.) 142; 31 M. L. T. 231 (P. C.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 509 OF 1920.

November 16, 1922.

Present :—Mr. Justice Rafique and Mr. Justice Lindsay.

UDIT NARAIN LAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RAM LACHHMAN RAO AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Pre-emption—Co-sharer—Hindu widow, position of—Association of stranger in suit, effect of.

The widow of a co-parcener in a joint Hindu family is only entitled to maintenance and has no interest in the joint family property which would confer upon her status of a co-sharer.

A plaintiff who has in himself a right to claim pre-emption may lose that right by joining in a suit along with a person who is a stranger to the property and has no such right.

Karan Singh v. *Muhammad Ismail Khan*, 7 A 860; A. W. N. (1885) 247; 4 Ind. Dec. (N. S.) 945, followed.

Appeal against a decree of the Sub-Judge, Basti, dated the 30th January 1920.

Messrs. *Iswar Saran* and *P. L. Banerji*, for the Appellants.

Messrs. *K. N. Katju* and *S. P. Sinha*, for the Respondents.

JUDGMENT.—We have heard the learned Counsel in these appeals and are of opinion that they must fail. The point for decision seems to us to be covered by authority.

The facts of the case as found by the Court below may be briefly stated as follows.

One Mahadeo Prasad had three sons, Kando Prasad, Brijnandan, and Newal Rai.

According to the pedigree the line of Brijnandan had become extinct. The first plaintiff in the case, Udit Narain Lal, is the son of Kando Prasad, and the second plaintiff is *Musammat* Ram Kali who is the widow of Suraj Prasad son of Newal Rai: Suraj Prasad is said to have died in 1904. It is to be noted that Suraj Prasad left surviving him a brother named Harbans.

These two plaintiffs joined in a suit for pre-emption claiming a preferential right on the ground that they were co-sharers in the village.

Their suit has failed on the grounds:—

(1) That *Musammat* Ram Kali is not a co-sharer in the village but, for the purposes of pre-emption, a stranger;

(2) That Udit Narain Lal although he is a co-sharer in the village has lost his right for pre-emption by joining with him a stranger in the present suit.

These findings are based upon the following considerations. It was pleaded in the Courts below that Suraj Prasad and his brother Harbans were members of a joint Hindu family and that consequently when Suraj Prasad died in 1904 the whole of his interest in the property passed by survivorship to Harbans. It was pointed out that this being so *Musammat* Ram Kali could not claim to have any interest in the property as a co-sharer. She might under the Hindu Law be entitled, as the widow of Suraj Prasad, to maintenance, but it was held that she had no interest which would confer upon her the status of a co-sharer. This finding as to the position of *Musammat* Ram Kali was supported by reference to a case which was decided in *Karan Singh* v. *Muhammad Ismail Khan* (1). We are satisfied that the lower Appellate Court was right in following this judgment and there is no ground for distinguishing between that case and the present case.

This case is also an authority for the proposition that a plaintiff who has in himself a right to claim pre-emption may lose that right by joining in a suit along with a person who is a stranger to the property and has no such right. It seems to us, therefore, that the view taken by the Court below is fully supported by the authority just referred and from which we see no reason to differ. The result is that both the appeals fail and are dismissed with costs including fees in this Court on the higher scale.

Appeal dismissed.

Z. K.

(1) 7 A. 860; A. W. N. (1885) 247; 4 Ind. Dec. (N. S.) 945.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL NO. 51 OF 1921.

August 5, 1921.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Shah.

GOVINDLAL BANSILAL AND ANOTHER —DEFENDANTS—APPELLANTS

versus

BANSILAL MOTILAL—PLAINTIFF—RESPONDENTS.

Letters Patent (Bom.), cl. 12, interpretation of —Partition suit—Portion of property outside Court's jurisdiction—Grant of leave—Discretion of High Court.

Clause 12, Letters Patent (Bom.), contains no territorial limitation as to the situation of immoveable property outside the local limits of the original jurisdiction of the High Court which has power to grant leave in a partition suit if a part of the property is situate within such limits and under the circumstances of the case it is appropriate to do so. [p. 940, col. 1.]

In a suit brought by a person claiming partition of property situate in British India, application made by the defendant asking for leave under clause 12 Letters Patent, to file a counter-claim for partition of the properties outside British India cannot be granted, where the chances of the parties being willing to partition the property, in case the Court passes a partition decree, appear to be remote and the leave if granted would defer the final decision of the points at issue between the parties. [p. 937, col. 2.]

Per *Macleod, C. J.*—Where part of the property in a partition suit is outside British India the Courts would be slow to grant leave, so that the High Court could exercise jurisdiction over such property as undoubtedly difficulties would arise in execution of any decree that might be passed in the suit unless all the parties were agreed that the Courts should exercise jurisdiction and that they would assist in carrying out the terms of the decree that would be passed in the suit. [p. 937, col. 1.]

Mr. *Desai*, for the Appellant.

Mr. *Bahadurji*, Acting Advocate-General, for Respondent No. 1.

Mr. *Desai*, (with him Mr. *Mulla*, for Respondents Nos. 2, 6 and 7.

Mr. *Munshi*, for Respondents Nos. 3, 4 and 9.

Mr. *Bahadurji*, Acting Advocate-General, with him Mr. *Taraporevala*, for Respondent No. 8.

JUDGMENT.

Macleod, C. J.—This is an appeal from the decision of Mr. Justice Pratt dismissing an application by the first defendant in the suit for leave to file an additional written statement. The suit was filed in 1917 by Bansilal Motilal, the father of the first defendant, asking for a declaration that all the properties in the hands of Motilal Shivlal at his death were ancestral joint family properties, and passed on his death by survivorship to the plaintiff and defendants Nos. 1 to 5 and defendants Nos. 8 and 9, and that all the properties in British India might be partitioned amongst the plaintiff and the other members of the joint family entitled thereto by and under the directions of this Hon'ble Court. Clause 11 of the plaint is as follows:—

"The first defendant resides and part of the properties both moveable and immoveable are situte and the cause of action has arisen in Bombay within the jurisdiction of this Hon'ble Court and the plaintiff submits that, with leave granted under clause 12 of the Letters Patent, this Hon'ble Court will have jurisdiction to try the suit and to order partition of all the joint family properties situate in British India."

Leave was granted under clause 12 of the Letters Patent.

The first defendant in filing his written statement in clause 12 said:

"This defendant submits that as the condition precedent to any portion of the joint ancestral properties situate or lying in British India being given to the plaintiff towards his share, he may be ordered to bring into hotchpot all the properties in his possession at Hyderabad and to account for the same. This defendant submits that if either on account of the professed inability of the plaintiff or otherwise the said Hyderabad properties cannot be brought into hotchpot the partition of the said joint family properties should be so effected as to allot to the plaintiff and the eighth defendant (should she be held entitled to a share) for their respective shares properties of sufficient value out of those situate and lying at Hyderabad."

A considerable amount of the family properties both moveable and immoveable are in Hyderabad outside British India, and all attempts to deal with those properties by means of a Receiver appointed by this Court have not availed the parties, so that at the present moment this

Court can exercise no control whatever over the properties in Hyderabad. The parties agreed that the Receiver appointed by this High Court of Bombay should file a suit in the Hyderabad State asking that he might be entitled to take possession of all the properties of the deceased within the Hyderabad territories and to manage them. That suit was dismissed, and the decision dismissing the suit was affirmed in appeal. The result, therefore, is that at present in regard to the properties in Hyderabad State there is a deadlock. The plaintiff says that is due to the attitude adopted in Hyderabad, not of the plaintiff himself, but of the authorities, and it is also due to the judicial decision of the Highest Court of Appeal in the State subject to the final decision of the Judicial Committee. The decision of the Court of Appeal was given on the 7th March 1921.

This application was made on the 1st of April 1921. The additional written statement sought to be filed was declared on the 21st February 1921. Now the reason given for the application for filing an additional written statement was to the effect that the first defendant wished to include in the additional written statement a counter-claim which, if treated on the same footing as a plaint, could, with leave granted under clause 12 of the Letters Patent, come within the jurisdiction of this Hon'ble Court. In the additional written statement the first defendant counter claimed that all the joint family properties situated in British India and in the territories of His Exalted Highness the Nizam and the income thereof and the properties at Nagaur and in any other Native State might be partitioned by this Hon'ble Court as contended for by the first defendant in his written statement dated the 15th January 1919; that the plaintiff might be ordered to render an account of the income of the immoveable properties situated in the territories of His Exalted Highness the Nizam and the outstandings due in the said territories on the footing of wilful default, and for further and other relief which it is not necessary to set out in detail.

The application was dismissed by the learned Judge on the ground that when in a suit for land leave is asked for because only part of the land is within local limits, the remaining portion of the land must be within the limits of the Presidency of Bombay, and it would necessarily follow from that, that according to the view taken by the learned Judge, this Court has no jurisdiction to entertain a suit for partition of land outside British India, even though part of the estate is within the local limits of the ordinary original civil jurisdiction.

Now the proper construction of clause 12 of the Letters Patent has been a constant subject for discussion. On the one hand it has been argued that in a suit for land or other immoveable property, unless the whole of the land or immoveable property is wholly within the jurisdiction, the Court has no jurisdiction to try the case; the other construction is that, if part of the land or immoveable property is situate within the jurisdiction, then in case the leave of the Court shall have been first obtained the Court will have jurisdiction to try the suit. In *Balaram Bhaskarji* v. *Ramchandra Bhaskarji* (1) the plaintiff sued for partition of certain property, alleging it to be joint family property, consisting of a house in Bombay and, certain fields at Vavla in the Thana District. It was held that as to Vavla property the Court had no jurisdiction because the leave had not been asked for under clause 12 of the Letters Patent. Mr. Justice Candy considered the construction of clause 12 of the Letters Patent. He said (page 925):

"The uniform practice of the three High Courts at Bombay, Calcutta and Madras has apparently been to read that clause as if it ran as follows....(*a*) In the case of suits for land or other immoveable property, such land or property shall be situated either wholly, or, in case the leave of the Court shall have been first obtained, in part within the local limits of the ordinary original jurisdiction of the said High Court.....I confess, were the matter *res integra*, I should be inclined to doubt the correctness of the above construction,

(1) 22 B, 922; 11 Ind. Dec. (N.S.) 1198.

but there are obvious difficulties in whatever way we regard the clause, and I am not prepared after this lapse of time to question the uniform practice of all the Courts."

Therefore, it was at that time considered by the decisions of the Courts of Calcutta, Madras and Bombay that clause 12 of the Letters Patent with regard to suits for land should be given the wider construction.

In *Vaghogi Kuverji* v. *Camaji Bomanji* (2) it was held that the suit was a suit for land, but it was a suit for land entirely outside the local limits of the jurisdiction of the High Court, and, therefore ordinarily speaking, the question would not arise what construction should be applied to clause 12 of the Letters Patent. But Sir Lawrence Jenkins said (pages 253-254):

"It is some times overlooked that under section 12 of the Letters Patent leave is only required where the cause of action shall have arisen in part within the local limits of the ordinary original jurisiction of the High Court: in no other case is there any power or need to give leave under the section."

Balaram Bhaskarji v. *Ramchandra Bhaskarji* (1), was referred to has deciding that in a partition suit the Court has no jurisdiction over land outside the local limits. But, with all due respect, what was held in *Balaram Bhaskarji* v. *Ramchandra Bhaskarji* (1) was that the Court had no jurisdiction with regard to the land outside the local limits unless leave had been obtained to sue under clause 12 of the Letters Patent.

In *Bachoo Harkisondas* v. *Nagindas Bhagwandas* (3) the suit was for partition of property which was partly within the local limits of the jurisdiction and partly outside but not outside British India. Leave was obtained under clause 12 of the Letters Patent. But when the case came on for trial before me on the Original Side, it was faintly argued that the Court had no power to grant leave under clause 12 in the case of a suit for land partly within and partly without the jurisdiction, and following the decision in *Balaram Bhaskarji* v. *Ramchandra Bhaskarji* (1) and other decisions of the Calcutta and Madras High Courts, I held the Court could grant leave under clause 12 in suits for land where the land was partly within and partly without the jurisdiction, and although the case was taken first to the Court of Appeal and then to the Privy Council, no further argument appears to have been raised on the question what is the proper construction of clause 12, and it might safely be presumed that, if, as a matter of fact the Court had no jurisdiction to grant leave in the case of a suit for land partly within and partly without the jurisdiction, even if the parties did not raise the point, the Court must have taken the point, and the suit would have been held to be bad.

But the learned Judge considered that the land outside the local limits must still be within the local limits of the Presidency of Bombay. He refers to section 9 of the Indian High Courts Act of 1861, recited in the preamble of the Letters Patent. But I cannot see that the preamble in any way fetters this Court in construing clause 12 of the Letters Patent which directs that in the case of a suit for land or immoveable property, if part of the land is within the local limits, then the suit can proceed provided leave of the Court has first been obtained. What gives the Court jurisdiction is, first, that part of the land is within the local limits; and, secondly, the fact that leave has been granted. The question of granting leave is purely a question for the discretion of the Court and it will be considered according to the facts of each case whether it is advisable that leave should be granted. In ordinary cases leave is granted practically as a matter of course, unless either the portion of the land or the part of the cause of action inside the local limits is so trifling that it is not desirable that the suit should be tried in the High Court. It is open to the defendant to apply for a revocation of the leave granted, and if the defendant can show that the Court had no power to grant leave, then no doubt that application should be made at the earliest opportunity; as if the Court had no power to grant leave, that is fatal to the suit. But if it is merely a question of discretion, whether or not leave

(2) 29 B. 249; 6 Bom. L. R. 958.
(3) 23 Ind. Cas. 912; 16 Bom. L. R. 263.

should be granted, it is open to the defendant to ask the Court to exercise its discretion against the plaintiff according to the circumstances of the case; and undoubtedly where part of the property in a partition suit is outside British India, the Courts would certainly be very slow to grant leave, so that the Court could exercise jurisdiction over such property, as undoubtedly difficulties would arise in the execution of any decree that might be passed in the suit, unless all the parties were agreed that the Courts should exercise jurisdiction and would assist in carrying out the terms of the decree that would be passed in the suit.

The question really then in this case seems to me to be, whether, on the facts which are now presented to us, it is advisable that leave should be granted to the defendant to file this counterclaim which asks for partition of the properties outside British India, considering the very contentious attitude which is taken by the plaintiff and his wife, the eighth defendant, and the decision of the Hyderabad High Court which has decided that it will not allow the Receiver to continue a suit filed with the consent of all the parties with the object of getting possession of the properties in Hyderabad. I think, speaking for myself, that, in the first instance, the Court would have power to grant leave in a partition suit where part of the property is outside British India. But the question whether its discretion should be exercised in favour of granting leave, no doubt, can be raised before the hearing, and while there may be cases where a Court would leave the matter to be decided at the hearing, there may be other cases where the Court would decide the question against the party asking for leave at once. Of course if the leave is granted, still that does not prevent the Court at the hearing deciding that no direction should be given with regard to property outside the jurisdiction but that the parties should be left with regard to that property to a separate suit. I cannot exclude the possibility of a partition suit being filed in which all the parties are anxious that the joint family property wherever situate should be divided according to law, and are willing to assist the Court in such a division. I am not prepared to say, if the parties were so willing, that the Court would have no jurisdiction whatever to order partition in cases where the properties were in part within the local limits even if the remainder of the properties were outside British India. But in this case, if the Court granted leave, the chances of the parties being willing to partition the property in the case of the Court passing a partition decree appear to me to be rather remote, and as the plaintiff and the eighth defendant have asked us to decide the question with regard to leave on its merits at this stage, I think we have to consider what the chances can be, on the facts presented to us at present of their attitude changing when the suit actually comes on for hearing. Certainly it is a question which should be decided as soon as possible. Otherwise if leave is granted the suit after a considerable time will come on for hearing, and the Court, seeing the obvious difficulties in the way of granting a partition decree which would have no possible chance of being executed, will probably confine itself to the properties within the jurisdiction or certainly to the properties within British India, and leave the parties to partition the properties outside British India as best they might in other proceedings I think, therefore, as this question has come before us for argument at this stage we should be only delaying the final decision with regard to partition of all the properties if we allowed leave to be granted.

I do not think that the decision in *Ramacharya* v. *Anantacharya* (4) can be taken as laying down anythig in opposition to what I have said. That was a suit for partition filed in the First Class Subordinate Judge's Court at Satara. The defendants pleaded that the plaintiff should bring into hotchpot certain family property at Gwalior. Admittedly the suit being filed under the Civil Procedure Code, the Satara Court had no jurisdiction to deal with property at Gwalior. But the Court was asked to exer-

(4) 18 B. 389; 9 Ind. Dec. (N. s.) 768.

cise its authority against the plaintiff *in personam*, and Mr. Justice Telang said:

"Here the property alleged to be family property lies outside the jurisdiction of this Court and indeed outside British India. It is plain that the Court has no jurisdiction and no machinery for partitioning that property. Such jurisdiction and machinery are wanting in exactly the same way whether the suit is one like *Dada Naik's case*, where the plaintiff, in the first instance, claimed partition of property outside the jurisdiction, or whether it is like the present case where the defendant asks that property should be brought into hotchpot for purposes of division although it lies outside the jurisdiction. It must, therefore, be futile to call on the plaintiff to bring that property into hotchpot for purposes of partition.....But it is said that although the Court cannot make partition of property in a foreign jurisdiction it may nevertheless take such property into its calculation and award to the plaintiff in possession so much only of the property in British India as will equalize the shares of the plaintiff and defendant. In the first place this is doing indirectly that which the law says may not be done directly. Secondly, it excludes a plaintiff who has property in a Native State, for no fault of his own, from what ordinarily would be his proper share in properties in British territory. And thirdly, in the event of the property in British territories being less than that in the Native State, it will exclude him from all share or benefit out of the former property. It appears to me that these results are much more inequitable than the results of refusing to entertain jurisdiction in any way, direct or indirect, in relation to the property in Native States."

The circumstances here are different, but I do not wish at this stage of the proceedings to say anything that might affect the decision of the Court which bears this suit on the question with regard to hotchpot, which will no doubt be raised under the written statement of the first defendant which has already been filed. I think, therefore, that the decision of the learned Judge must be confirmed, but not on the ground on which the original application was dismissed. I think that the Court should exercise its discretion in not granting leave in this case, as it will only tend to defer the final decision of the points at issue between the parties whereas if the question with regard to the partition of properties outside British India is at this stage exeluded from the cognizance of the Court, then the parties may be able to come to some decision with regard to those properties, which they could not possibly do as long as the question of partition is pending in this suit. The appeal is dismissed with costs in favour of the plaintiff. The other parties to pay their own costs.

Shah, J.—I concur in the order proposed by my Lord the Chief Justice. Having regard to the importance of the case and to the arguments which we have heard, I desire to state briefly the grounds on which it seems to me that the leave applied for should be refused. I need not recapitulate the facts which have been stated in the judgment just delivered. The point with reference to which various arguments have been urged is, whether, as regards the counter-claim made by defendant No. 1 for the partition of immoveable property situated in the dominions of His Exalted Highness the Nizam, leave under clause 12 should be granted. The first question that arises relates to the construction of clause 12 of the Amended Letters Patent. On the one hand, it is contended that clause 12 limits the jurisdiction of the High Court in the case of land or other immoveable property, to property situated within the limits of the ordinary original jurisdiction of this Court and that no leave can be granted as to the part of the property situated outside Bombay. On the other hand, it is urged that such a limited construction has been consistently rejected by the High Courts in India, and that on the proper reading of the clause there is no justification for that restricted reading. I do not desire to discuss the cases on this point in detail. I may refer to the decision in *Balaram Bhaskarji* v. *Ramchandra*

Bhaskarji (1) in which so far back as 1898 Candy, J. accepted the view that in case the property was partly situate in Bombay and partly outside Bombay, with leave obtained, the Court would have jurisdiction to deal with the property outside Bombay in the suit. Thereafter certain observations of Sir Lawrence Jenkin, C. J., in *Vaghogi Kuverji* v. *Gamji Bomanji* (2), have been relied upon as conflicting with this reading of clause 12. No doubt if those observations are read without reference to the context and without relation to the facts of the case, they are susceptible of being read in that manner. But, on a consideration of the whole judgment in that case, I do not think that the current of decisions on that point was intended to be overruled. It is also clear that the point now under consideration did not arise in that case. The question was raised in the case of *Bachoo Harkisondas* v. *Nagindas Bhagwandas* (3), the decision thereon being at page 269. The property there was partly situated in Bombay and partly in the District of Thana outside Bombay, and leave was granted. It is true that the point was not raised before the Court of Appeal or the Privy Council when the case came to be dealt with on the merits by them. But the case affords an instance in which the wider construction was accepted and the restricted construction definitely rejected by the Trial Court without any objection being taken by the parties in the Court of Appeal here or before the Privy Council. A reference has been made to the case of *Harendra Lal Roy Chowdhuri* v. *Hari Dasi Debi* (5), as practically deciding this point in the same sense. It has been suggested on behalf of the appellant in the course of the argument that by necessary implication their Lordships of the Privy Council have accepted the view of clause 12 which has so far been taken by the Indian High Courts. It is urged by way of reply with reference to this decision that the point was not raised, and a decision on the point could not be spelled out by implication. That may be perfectly true. But apart from that case it seems to me that the case of *Bachoo Harkisondas* v. *Nagindas Bhagwandas* (3) is a direct instance in point; and having regard to the course of the decisions, it seems to me that so far as this Court is concerned the construction of clause 12 so far accepted must be taken to be the true construction. The restricted reading would involve the result that this Court would have no jurisdiction to deal with any immoveable property situated outside Bombay, while a Subordinate Judge in the *mofussil* would be able to entertain a partition suit even though a part of the immoveable property may be situated outside his jurisdiction any where in British India under sections 16 and 17 of the Code of Civil Procedure. I do not think that the jurisdiction of this Court was intended to be so restricted or that it is in fact so restricted.

That being so, it follows that this Court has the power to grant leave, if under the circumstances of the case it is appropriate to do so. With regard to that the facts, broadly speaking, are that the plaintiff has filed a suit in this Court for partition of property in British India, including immoveable properties situated in Bombay, and for a declaration in respect of all property including property situated outside British India with leave obtained under clause 12. Among the various points raised in defence, one is that the whole property situated outside British India should be brought into account before partition of the property in British India could be effected. The counter-claim which is now made is, to a certain extent, a re-assertion of the point which was raised in the written statement of defendant No. 1. During the interval, however, the parties have not been able to see their way to take up a position which would render it possible to partition the whole property at one time. Having regard to the facts, so far as they have transpired, it is difficult to believe that any useful purpose could be served by now allowing leave with re-

(5) 23 Ind. Cas. 637; 41 I. A. 110; 16 Bom. L. R. 400; 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L. T. 6; 18 C. W. N. 817; 19 C. L. J. 484; 12 A. L. J. 774; 1 L. W. 1050; 41 C. 972 (P. C.).

ference to the counter-claim to property situated outside British India.

There is one general consideration with reference to the granting of leave when, as in this case, the property is situate not only outside Bombay but outside British India, *viz.*, whether this Court would have any jurisdiction to deal with property situated in a foreign territory. It has been urged on behalf of respondents Nos. 1 and 8 that this Court has no jurisdiction in any case to deal with property situated in a foreign territory in a partition suit in which immoveable property is concerned; and in support of that contention the decision in *Ram Chandra Dada Naik* v. *Dada Mahadev Naik* (6), the remarks in *Jairam Narayan Raje* v. *Atmaram Narayan Raje* (7) and *Vaghoji Kuverji* v. *Camaji Bomanji* (2) and the decision in *Ramacharya* v. *Anantacharya* (4) have been relied upon. In this appeal, however, I do not propose to decide this question. It is conceivable that in some cases it may be possible for this Court to deal with a partition suit in such a manner as to effect a partition once for all of all the property inclusive of the property situated in a foreign territory. As to the possibility of such a case arising I do not desire to raise any doubt. In such a case the point whether the Court has jurisdiction or not, if raised, would have to be dealt with by the Court, when the decisions and the observations, to which I have referred, would have to be considered. At the same time these cases suggest a fairly general consideration to be borne in mind in determining whether it is proper to grant leave in a particular case. Without expressing any opinion upon the question as to whether it is an invariable rule that in no case can this Court deal with property situated in a foreign territory in a partition suit, I am satisfied on the facts of this case, that the leave has been properly refused. It is true, as contended by the appellant, that clause 12 contains no territorial limitation as to the situation of the immoveable property outside the local limits of the original jurisdiction of this Court. For the purpose of granting leave, it is sufficient, according to law, if a part of it is situated within such limits. But the Court has to exercise its discretion in granting leave under that clause, with reference to the facts of the case. Though the fact that the plaintiff has obtained leave under this clause is a circumstance in favour of the appellant, so far as the present point is concerned, I think that on the whole the leave asked for should not be granted.

N. F. *Appeal dismissed.*

(6) 1 B. H. C. R. App. LXXVI.
(7) 4 B. 482=2 Ind. Dec. (N. S.) 830.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1585 OF 1920.

November 16, 1922.

Present:—Mr. justice Rafique and Mr. Justice Lindsay.

Syed FAZAL HAQ—DEFENDANT—APPELLANT

versus

AZIZ HASAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom — Pre-emption—Wajib-ul-arz, *entry in* —Bhai *and* baradarzadah, *meaning of.*

The words *"bhai"* and *"baradarzadah"* are general terms and apply in the Urdu language to much more distant relations than in any other language, and include all members of the same family. [p. 940, col. 1.]

Second appeal against a decree of the District Judge, Allahabad, dated the 15th June 1920.

Mr. *Mukhtar Ahmad* for Messrs. *Iqbal Ahmad* and *Haider Mehdi*, for the Appellant.

Mr. *M. A. Aziz* for Dr. *S. M. Sulaiman*, for the Respondents.

JUDGMENT.—The dispute between the parties to this appeal relates to the interpretation of the words *"bhai"* and *"baradarzadah."* It is contended on behalf of the defendant-appellant, the vendee, that the words *"bhai"* and *"baradarzadah"* in the *wajib-ul-arz* mean own brother and the son of the own brother, and that they cannot be extended to mean any other relatives.

It appears that one *Musammat* Saidun-nissa executed a deed of sale in favour of *Musammat* Reaz-un-nissa and the latter in her turn conveyed the property to one Sayed Fazal Haq. Thereupon Aziz Hasan, *Musammat* Rahmat-un-nissa Bibi and Waqar-un-nissa Bibi sued to recover possession of the property from Fazal Haq on the allegation that they had a preferential right to get it. They alleged that they were of the same family as *Musammat* Said-un-nissa and, therefore, under the terms of the *wajib-ul-arz* had a preferential right to the property as against a stranger. The Court of first instance dismissed the claim holding that the plaintiffs were too distantly related to *Musammat* Said-un-nissa to fall under the terms "*bhai*" and "*baradarzadah*."

On appeal the learned District Judge disagreed with the First Court and held that the words "*bhai*" and "*baradarzadah*" used in the *wajib-ul-arz* did not mean the own brother and the own brother's son only, but had a larger significance. He was of opinion that the said words meant the members of the family of the vendor including thereby distant relatives also. The decree of the First Court was accordingly reversed and the claim of the plaintiff was decreed.

The vendee in second appeal before us repeats the argument which found favour with the learned Munsif. According to the appellant the words "*bhai*" and "*baradarzadah*" signify and can only signify an own brother and an own brother's son.

We do not think that the contention for the vendee-appellant is correct. "*Bhai*" and "*baradarzadah*" are general terms and apply in the Urdu language to much more distant relations than in any other language. The vendor *Musammat* Said-un-nissa and the plaintiffs are descended from a common ancestor, of the name of Basu Mian. One of the plaintiffs and the vendor are in the same degree of descent from Basu Mian. We think that the plaintiffs have a preferential right to a stranger on the terms of the *wajib-ul-arz*. The appeal, therefore, fails and is dismissed with costs.

Z. K.

Appeal dismissed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL NO. 51 OF 1921.

December 16, 1921.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Shah.

GOVINDLAL BANSILAL—APPELLANT

versus

BANSILAL MOTILAL—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 110 (3)—Appeal to Privy Council—Discretion, exercise of, by High Court—Substantial question of law.

The question of the exercise of its discretion by the High Court does not involve a substantial question of law within the meaning of section 110 (3) of the Civil Procedure Code, so as to justify a certificate that the case is a fit one for appeal to the Privy Council. [p. 942, col. 1.]

Application for leave to appeal to Privy Council against the decision of Mr. Justice Macleod, C. J. and Shah, J. and printed as 77 Ind. Cas. 934.

Sir *Thomas Strangman*, Advocate-General, for the Appellant.

Mr. *Taraporevalla*, for Respondent No. 1.

Mr. *Jinnah*, for Respondent No. 2.

Mr. *Munshi*, for Respondents Nos. 3, 4 and 5.

JUDGMENT.

Macleod, C. J.—This is an application for a certificate for leave to appeal to the Privy Council. The first defendant wished to file a counter-claim at a very late stage of the case, and two questions arose: (1) whether the Court had jurisdiction to accept the counter-claim; and (2) whether, if it had jurisdiction, it should exercise its discretion in granting leave under clause 12 of the Letters Patent. This Court held it had jurisdiction to entertain the counter-claim if it was considered on the facts of the case that leave should be granted, but considering the particular facts of the case it came to the conclusion that leave should not be granted. The question, therefore, arises whether this is a case which should be certified as a fit one to appeal to the Privy Council; and it can only be so if the appeal involves some substantial question of law. It has been argued by the appellant that because he had a question of law decided in his favour, therefore, the appeal involves some substantial question of law.

Reliance for that proposition has been placed on the case of *Moran* v. *Mitu*

Bibee (1). But, with due respect, that is a proposition which should not, considering the facts of this case, be applied. The only ground of appeal which the appellant could have, if the appeal was taken to the Privy Council, would be that the Court had wrongly exercised its discretion in refusing to grant leave, and as soon as his appeal was opened the point would be taken that the question of the exercise of its discretion by the lower Court did not involve any substantial question of law. No doubt, if the appeal is once admitted and opened for argument, then the question of law, in which the appellant has succeeded in the lower Court, can be contested by the respondent. But I do not think that it follows from the words of the last clause of section 110, Civil Procedure Code, that because that course is open to a respondent, therefore, the appeal itself involves some substantial question of law, so that we can issue a certificate. I think myself what this Court has to consider is the appeal itself, and as I have already stated, the only appeal, which the appellant could make, would be to ask the Privy Council to hold that our discretion has been wrongly exercised. Whether the discretion has been rightly or wrongly exercised may in some cases involve a question of law; but it cannot be said that any substantial question of law would arise.

I think, therefore, that this is not a case in which a certificate should be granted, and the Rule will be discharged with costs.

Shah, J.—I agree. Without expressing any dissent from the cases cited in the argument, *viz.*, *Moran* v. *Mittu Bibee* (1), *Ashghar Reza* v. *Hyder Reza* (2) and the observations of Ranade, J., in *In re Vishwambhar Pandit* (3), I think the present application for leave to appeal to the Privy Council should be refused. Section 110, Civil Procedure Code, requires that the appeal should involve some substantial question of law; and it is difficult to say on the judgments of this Court that the point that the discretion was wrongly exercised in refusing to grant leave under clause 12 of the Letters Patent is a substantial question of law. It is true that in refusing leave I referred to the general consideration as to the jurisdiction of the Court to dealt with immoveable properties situated outside British India. But as the discretion was exercised on the facts of the case, I cannot say that that ground can be treated as a substantial question of law within the meaning of section 110. I should have been glad to see my way to let the appellant take his case to the higher Tribunal. But in view of the provisions of section 110 of the Code, I do not see how we can grant the certificate prayed for.

W. C. A. *Rule discharged.*

(1) 2 C. 228; 1 Ind. Dec. (N. S.) 439.
(2) 16 C. 287; 13 Ind. Jur. 336; 8 Ind. Dec. (N. S.) 189.
(3) 20 B. 699; 10 Ind. Dec. (N. S.) 1035.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1950 OF 1920.

November 17, 1921.

Present:—Mr. Justice Odgers and Mr. Justice Devadoss.

ADIRAJU ARASU KANNIKE BALLALA —PLAINTIFF—APPELLANT

versus

PATTU *alias* LAKSHMINARAYANA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXI, r. 2—Suit against temple—Trustees, whether necessary parties.

Under O. XXXI, r. 2 of the Civil Procedure Code all the trustees of a temple are necessary parties to a suit against the temple even where there is a *karar* authorising one of several trustees to represent the temple in suits.

Malaippurath Paramadhathil v. *Gannazhi Krishnan*, 13 Ind. Cas. 234; (1911) 2 M. W. N. 537, followed.

Madhavan v. *Keshavan*, 11 M. 191; 4 Ind. Dec. (N. S.) 133, and *Somasundara Mudali* v. *Kulandaivelu Pillai*, 28 M. 457 at p. 456; 14 M. L. J. 404, referred to.

Appeal against a decree of the District Court, South Kanara, in Appeal Suit No. 82 of 1920, preferred against a decree of the Court of the District Munsif, Karkal, in Original Suit No. 540 of 1918.

Mr. *B. Sitarama Rao*, for the Appellant.

Mr. *K. V. Adiga*, for the Respondents.

JUDGMENT.—We are of opinion that the Acting District Judge is clearly wrong in holding that the suit is barred by section 47, Civil Procedure Code and Mr. Adiga for the respondents has not attempted to support this part of the judgment. He however argues mainly on the ruling in *Madhavan* v. *Keshavan* (1) and *Somasundara Mudali* v. *Kulandaivelu Pillai* (2) that the District Judge was wrong in holding that the former decree (in Original Suit No. 574 of 1910) was invalid as against the temple as all the trustees were not impleaded. The rule (O. XXXI, r. 2) is now quite specific, the word "trustees" having been inserted and it does not appear to us that the rulings quoted by Mr. Adiga which refer in the main to co-owners are now applicable to a case like the present.

On the other hand, we have the ruling in *Malappurath Paramadhathil* v. *Channazhi Krishnan* (3) by a Bench of this Court that all the trustees are necessary parties even when there is a *karar* authorising one of several trustees to represent a temple in suits. With this decision we respectfully agree, and, therefore, reverse the decision of the Acting District Judge. The result is that the decision of the District Munsif will be confirmed and the appeal allowed with costs.

V. N. V. *Appeal allowed.*

Z. K.

(1) 11 M. 191; 4 Ind. Dec. (N. S.) 135.
(2) 28 M. 457 at p. 465; 14 M. L. J. 404.
(3) 13 Ind. Cas. 234; (1911) 2 M. W. N. 537.

BOMBAY HIGH COURT.

S. C. C. SUIT NO. 766-9736 OF 1920.

August 8, 1922.

Present:—Mr. Justice Mulla.

NAJAN AHMED HAJI ALI—PLAINTIEFS

versus

SALEMAHOMED PEERMAHOMED—DEFENDANTS.

Vendor and purchaser—Delivery of goods from time to time—Seller, repudiation by—Cause of action—Civil Procedure Code (Act V of 1908), O. VIII, r. 6—Set-off and counter claim, distinction between—Unliquidated damages, claim for—Omission to plead set-off—Amendment of pleas—Limitation, plea of—Plaintiff, what must prove—Bombay High Court Rules, r. 118, procedure under.

Where a tradesman has a bill against a party for any amount in which the items are so connected together, that it appears that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another and form one continuous demand, the whole together forms but one cause of action and cannot be divided. [p. 946, col. 2.]

Bonsey v. *Wordsworth*, (1856) 18 C. B. 325; 25 L. J. C. P. 205; 2 Jur. (N.S.) 494; 4 W. R. 566; 139 E. R. 1395; 107 R. R. 318, *Kedar Nath Mitter* v. *Denobandhu Shaha*, 31 Ind. Cas. 626; 19 C. W. N. 724; 42 C. 1043, followed.

In the case of a contract for the delivery of goods from time to time, when the seller clearly shows his intention not to be bound by and to repudiate the contract, the buyer, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed and then hold the seller responsible for all consequences of non-performance, but in that case he keeps the contract alive for the benefit of the seller as well as his own; the buyer remains subject to all his obligations and liabilities under it, and enables the seller not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it. On the other hand, the buyer may, if he thinks proper, treat the repudiation of the seller as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it, and in such action he will be entitled to such damages as would have arisen from non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his damage. [p. 949, cols. 1 & 2.]

Frost v. *Knight*, (1872) 7 Ex. 111; 41 L. J. Ex. 78; 26 L. T. 771 20 W. R. 471, *Cort* v. *Ambergate Railway Company*, (1851) 17 Q. B. 127; 20 L. J. Q. B. 460; 15 Jur. 877; 117 E. R. 1229; 85 R. R. 309, *Braithwaite* v. *Foreign Hardwood Co.* (1905) 2 K. B. 543; 74 L. J. K. B. 688; 92 L. T. 637; 10 Com. Cas. 189; 10 Asp. M. C. 521 21 T. L. R. 413, *Melachrino* v. *Nicholl*, (1920) 1 K. B. 693; 122 L. T.

545; 25 Com. Cas. 103; 36 T. L. R. 143; 89 L. J. K. B. 906, relied on.

The omission to plead part of the cross-claim as a set-off amounts merely to a technical defect which can be cured, if necessary, by an amendment of the pleading. [p. 948, col. 2.]

A claim for unliquidated damages for alleged breach of contract cannot be allowed as a set-off under O. VIII, r. 6 of the Civil Procedure Code. But the Code does not exclude what is called an equitable set-off, provided the defendants' cross-demand arises out of the same transaction as the plaintiffs' claim. [p. 949, col. 2.]

Stephen Clark v. *Ruthnavaloo Chetti*, 2 M. H. C. R. 296 at p. 303, followed.

Under r. 118 of the Bombay High Court Rules a defendant may set up by way of set-off or counter-claim, against the claims of the plaintiff, any right or claim whether such set-off or counter-claim sounds in damages or not. [p. 949, col. 1.]

Nothing which was not a good set-off before the passing of the said rule can be a good set-off under the said rule; the set-off must still be for an ascertained sum or it must arise out of the same transaction as the plaintiff's claim. A counter-claim, however, need not arise out of the same transaction. [p. 949, col. 1.]

Set-off is a ground of defence and it should be pleaded in the written statement. Counter-claim does not afford any defence to the plaintiff's claim; it is a weapon of offence which enables a defendant to enforce a claim against the plaintiff as effectually as in an independent action. [p. 949, col. 1.]

Stooke v. *Taylor*, (1880) 5 Q. B. D. 569; 49 L. J. Q. B. 857; 43 L. T. 200; 29 W. R. 49; 44 J. P. 748, followed.

If the Statute of Limitations is pleaded to a defence of set-off, the plaintiff, in order to establish his plea, must prove that the set-off was barred when the plaintiff commenced his action, it is not enough to prove that it was barred at the time when it was pleaded. [p. 949, col. 2.]

Walker v. *Clements*, (1850) 15 Q. B. 1046; 117 E. R. 755; 81 R. R. 882, followed.

In the case of a counter-claim it is enough for the plaintiff to prove that the counter-claim was barred when it was pleaded. [p. 949, col. 2.]

McGowan v. *Middleton*, (1883) 11 Q. B. D. 464; 52 L. J. Q. B. 355; 31 W. R. 835, followed.

Three different contracts were entered into by the parties, one on the 16th April 1916 and two on April 6, 1917, by which the plaintiffs agreed to supply lime to the defendants. No time was mentioned for the payment of the price under the first contract but the other two contracts provided that defendants should pay the price of such quantity as was delivered after retaining 10 per cent. as a deposit and the balance should be paid on the completion of the building work. Deliveries were made under the too later contracts until June 10, 1917, when on account of disputes having arisen between the parties plaintiffs refused to supply lime. After a good deal of correspondence between the parties, the plaintiffs eventually put on end to the contracts on July 3, 1917, on the ground that the defendants had not paid them all that was due to them. Defendants thereupon commenced purchasing lime in the market against the plaintiffs and bought about 400 candies between July 4 and 13, 1917. On July 6 they intimated the fact to the plaintiffs stating that they (the defendants) would hold the plaintiffs liable for the consequence. On August 13 defendants again wrote to the plaintiffs stating that they had bought 400 candies of lime and would give them one more opportunity not to commit further breaches of the contracts, adding that if they failed to deliver a sufficient quantity of lime within 48 hours they could buy the same in the market against the plaintiffs. As on previous occasions the plaintiffs did not reply to this letter. Thereafter defendants purchased several candies of lime between October 3 and 30, 1917. On March 19, 1918, defendants sent a Solicitor's notice to the plaintiffs demanding Rs. 494 as damages alleged to have been sustained by them by reason of the plaintiffs' failure to deliver lime. Plaintiffs again did not reply. On June 8, 1920, they filed the present suit to recover the balance of the price of lime sold and delivered to the defendants under all the three contracts. The defendants filed the written statement on September 14, 1920, in which they counter-claimed a larger sum than that claimed by the plaintiffs as damages for failure on the part of the plaintiffs to deliver the balance of the goods:

Held, (1) that the plaintiffs' claim in respect of the items prior to June 7, 1917, was not barred by limitation as both the parties kept only one account of the transaction from the date of the first contract; [p. 946, col. 2.]

(2) that the breach, if any, of the contracts took place on July 6, 1917, the date of the plaintiffs' repudiation; [p. 948, col. 2.]

(3) that the fact that the defendants had not pleaded a set-off by their written statement did not preclude them from pleading a set-off now; [p. 948, col. 2.]

(4) that the defendants' cross-claim was time-barred. [p. 949, col. 2.]

Mr. *Taraporevala*, for the Plaintiffs.

Mr. *Kania*, for the Defendants.

JUDGMENT.—This is a suit to recover the balance of the price of goods sold and delivered by the plaintiffs to the defendants under several contracts. The defendants counter-claim a larger sum than that claimed by the plaintiffs as damages for failure on the part of the plaintiffs to deliver the balance of the goods.

The plaintiffs deal in lime. The defendants are building contractors. The plaintiffs allege that they sold and delivered to the defendants lime under the following contracts, *viz*:—

(1) contract dated April 16, 1916 (Exhibit A), for the supply of lime for the

Navatia Flour Mills at the rate of Rs. 2-13-3 per candy;

(2) a verbal contract entered into some months after the date of Exhibit A, for the supply of lime for the Planet and Indo-China Mills at Rs. 2-11-6 per candy;

(3) contract dated April 6, 1917 (Exhibit B), for the supply of lime between 500 and 700 candies as ordered by the defendants from time to time for the Indo-China Mills at the rate of Rs. 3-6-3 per candy; and

(4) contract dated April 6, 1917 (Exhibit C), for the supply of lime from time to time amounting to about 1500 candies as ordered by the defendants for the Planet Mills, at the rate of Rs. 3-8-3 per candy.

The contracts, Exhibits B and C, superseded the verbal contract referred to above from the date they were entered into.

The plaintiffs allege that they supplied lime to the defendants prior to April 6, 1917, and that from and after that date they supplied to the defendants about 442½ candies for the Planet Mills and 380 candies for the Indo-China Mills under the said contracts, Exhibits B and C.

There is no time mentioned for the payment of price under the contract Exhibit A. By the contracts, Exhibits B and C, it was provided that the defendants should pay the price of such quantity as was delivered after retaining 10 per cent. as a deposit, and that the balance of the price should be paid after the building works referred to therein were completed.

It is common ground that deliveries were made under the contracts, Exhibits B and C, until June 10, 1917. Disputes had arisen between the parties prior to that date, but they took an acute form after that date, and the plaintiffs ceased to supply lime after June 10, 1917, though the defendants required them to do so.

By their letter of June 23, 1917 (Exhibit F), the defendants complained that the plaintiffs had ceased to deliver further lime, and suggested that the reason why the plaintiffs did so was that the rate of lime had gone up considerably since the date of the said contracts. By the said letter the defendants required the plaintiffs to supply 25 carts per day (one cart containing two candies) for the Navatia Flour Mills and 20 to 25 carts per day for the Planet Mills and they gave final notice to the plaintiffs that in default of the plaintiffs' complying with the said requisition by Wednesday next June 27, they would buy lime against the plaintiffs. To the said letter the plaintiffs replied on June 27, stating that the amount due to them for the lime already supplied to the defendants was Rs. 1,795, that the amount payable to them after deducting 10 per cent. was Rs. 1,332, and that unless the defendants paid that sum they would not supply further lime. On June 29, the defendants replied to the said letter stating that the amount due to the plaintiffs after deducting 10 per cent. was Rs. 269 only and they sent a cheque to the plaintiffs for that amount. With the said letter the defendants sent a statement of account from which it appears that they claimed to retain a deposit of Rs. 10 not only in respect of lime supplied under the contracts Exhibits B and C but under the earlier contracts. To the said letter the plaintiffs replied on July 3, stating that they had accepted the said cheque under protest. By the said letter the plaintiffs purported to put an end to the said contracts on the ground that the defendants had not paid to them all that was due to them and they threatened to file a suit to recover the balance of the price.

Thereafter the defendants commenced purchasing lime in the market against the plaintiffs, and, according to their case, they bought about 400 candies between July 4 and 13, 1917. In the meantime on July 6, the defendants through their attorneys wrote to the plaintiffs stating that as the plaintiffs had refused to perform their part of the contract and had committed a breach thereof, the defendants had purchased lime in the market on account and at the risk of the plaintiffs at Rs. 4-14-0 per candy, and that the defendants would hold the plaintiffs liable for the consequence.

The plaintiffs did not reply to the said letter, and, as stated above, the defendants went on buying until July 13, 1917. On August 13, the defendants through their attorneys wrote to the plaintiffs stating that they had purchased 400 candies of lime at Rs. 4-14-3 per candy for

the Planet Mills, and as the defendants wanted more lime they were advised, without prejudice, to give one more opportunity to the plaintiffs not to further commit breaches of the contracts. By the said letter the defendants called upon the plaintiffs to deliver for the Planet Mills a sufficient quantity of lime, and intimated to the plaintiffs that if they failed to do so within forty-eight hours the defendants would buy the same in the market against the plaintiffs. The plaintiffs did not reply to the said letter. Thereafter the defendants did not issue any orders to the plaintiffs for the supply of lime, and according to their case they purchased several candies of lime between October 3 and 30, 1917.

On March 19, 1918, the defendants sent a Solicitors' notice to the plaintiffs demanding Rs. 494 alleged to be damages sustained by them by reason of failure on the part of the plaintiffs to deliver lime for the Planet Mills. The plaintiffs did not reply to the said letter nor to the two reminders sent on April 13, 1918 and on June 6, 1918.

Nothing was done by either party for about two years, and on June 8, 1920 the plaintiffs filed the present suit in the Court of Small Causes at Bombay to recover Rs. 1,800 being the balance of the price of the lime sold and delivered to the defendants under all the said contracts. The suit was filed just in time to save it from the bar of limitation, the last delivery of lime having been made as stated above on June 10, 1917. The writ of summons was served upon the defendants on August 23, 1920. On August 30, 1920, the defendants obtained an order for transfer of the suit to the High Court. On September 14, 1920, the defendants filed their written statement and counter-claim.

In their written statement the defendants say that the balance due to the plaintiffs for the price of the goods was Rs. 1,385 and not Rs. 1,800; that out of the said sum the plaintiffs' claim for Rs. 1,163 was barred by the law of limitation, and that the balance legally due to the plaintiffs was Rs. 221 only. The defendants further say that as the plaintiffs failed to deliver the balance of lime under the said contracts, they sustained damages to the extent of Rs. 2,716. The defendants gave credit to the plaintiffs for Rs. 221 and they counter-claimed Rs. 2,494.

At the hearing of the suit the following questions were raised, *viz.*—

1. Whether the claim, if any, of the plaintiffs for the price of lime supplied prior to June 7, 1917, was barred by the law of limitation?

2. Whether the plaintiffs were justified in refusing to deliver further lime to the defendants under the said contracts?

3. If not, whether the defendants are entitled to their counter-claim?

4. Whether the defendants' counter-claim is barred by the law of limitation?

5. What amount, if any, is due from either party to the other?

It was agreed between the parties at the hearing of the suit that the questions of limitation should be disposed of first by the Court. It was also agreed that to determine the question whether the counter-claim was time-barred, the Court should proceed on the assumption that the plaintiffs were not justified in refusing to deliver further goods, in other words, that the plaintiffs committed a breach of the said contracts.

As regards the question whether the plaintiffs' claim in respect of the items prior to June 7, 1917, is barred by limitation, I have no doubt that it is not. Both the plaintiffs and the defendants kept only one account of the transactions from the date of Exhibit A. In *Bonsey* v. *Wordsworth* (1), followed by Jenkins C. J., in *Kedar Nath Mitter* v. *Denobandhu Shaha* (2), it was said on the strength of the previous authorities that "where a tradesman has a bill against a party for any amount, in which the items are so connected together that it appears that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another, and form one continuous demand, the whole together forms

(1) (1856) 18 C. B. 325; 25 L. J. C. P. 205; 2 Jur. (N. S.) 494; 4 W. R. 566; 139 E. R. 1395; 107 R. R. 318.

(2) 31 Ind. Cas. 626; 19 C. W. N. 724; 42 • 1043.

but one cause of action and cannot be divided." It is clear from the passage cited above that if all the items form but one cause of action, it is idle to suggest that a part of it can be barred by limitation, and that the rest may not be so barred. In fact Counsel for the defendants, at a later stage of the proceedings, gave up the contention as to limitation, with the result that the amount admittedly due by the defendants to the plaintiffs is now Rs. 1,385 instead of Rs. 221.

In determining the question whether the defendants' counter-claim is barred by limitation, I am asked to assume that the plaintiffs committed a breach of the said contracts in not making further deliveries to the defendants after June 10, 1917. The question is—what is the date of the breach? On behalf of the plaintiffs it is contended that the date of the breach is July 3, 1917, being the date on which the plaintiffs gave notice to the defendants that they would not supply any more lime, or, at the latest, August 15, 1917, being the date within which the defendants required the plaintiffs to supply further lime by their letter of August 13, 1917. On the other hand, it is contended for the defendants that the earliest date of the breach is October 3, 1917, being the date on which the defendants recommenced purchasing in the market against the plaintiffs subsequent to their letter of August 13, 1917.

In dealing with this question it is to be noted that the contracts were for delivery of lime to the defendants from time to time as they required it for their works. In such case when the seller clearly shows his intention not to be bound by and to repudiate the contract, the buyer, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed and then hold the seller responsible for all consequences of non-performance, but in that case he keeps the contract alive for the benefit of the seller as well as his own; the buyer remains subject to all his obligations and liabilities under it, and enables the seller not only to complete the contract, if so advised, notwithstanding his previous repudiation of it but also to take advantage of any supervening circumstances which would justify him in declining to complete it. On the other hand, the buyer may, if he thinks proper, treat the repudiation of the seller as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it, and in such action he will be entitled to such damages as would have arisen from non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his damage: *Frost* v. *Knight* (3), *Cort* v. *Ambergate &c. Railway Company* (4), *Braithwaite* v. *Foreign Hardwood Co.* (5); *Melachrino* v. *Nickoll* (6). Such being the law, it has to be determined whether when the plaintiffs gave notice to the defendants by their letter of July 3, 1917, that they would not make further deliveries, the defendants treated the repudiation as a wrongful putting an end to the contracts. On behalf of the defendants it is contended that the contracts being for the supply of lime from time to time to the plaintiffs as required by the defendants, the defendants' letter of July 6 amounted to an acceptance of the plaintiffs' refusal as a breach not to the extent of the entire residue of lime to be supplied under the said contracts, but to the extent of such quantity only as they required by their letter of June 23. By that letter the defendants required the plaintiffs to send twenty-five carts per day for the Planet Mills, and threatened that in default they would buy "the lime" in the market on account and at the risk of the plaintiffs. In their letter of June 29 the defendants' Attorneys wrote: "Our clients have waited long enough for the supply of lime, and please note that if your clients do not supply lime to our clients by to-morrow our clients will purchase the same from the market at

(3) (1872) 7 Ex. 111; 41 L. J. Ex. 78; 26 L. T. 77; 20 W. R. 471.
(4) (1851) 17 Q. B. 127; 20 L. J. Q. B. 460; 15 Jur. 877; 117 E. R. 1229; 85 R. R. 369.
(5) (1905) 2 K. B. 543; 74 L. J. K. B. 688; 92 L. T. 637; 10 Com. Cas. 189; 10 Asp. M. C. 521; 21 T. L. R. 413.
(6) (1920) 1 K. B. 693; 122 L. T. 545; 25 Com. Cas. 103, 36 T. L. R. 143; 89 L. J. K. B. 906.

your clients' risk and on their account. Please treat this notice as final." To the said letter the plaintiffs replied on July 3, stating that as the defendants had not paid the amount due to them they would not make further deliveries. This was a clear and unequivocal expression of intention on the part of the plaintiffs not to supply any further lime. According to the defendants' case, they started buying lime in the market from July 4, 1917, and continued to do so until July 13, 1917. To the said letter of July 3, the defendants through their Attorneys replied on July 6, as follows:—

"As your clients have declined to carry out their part of contract and have committed a breach thereof our clients have purchased lime from the market on your clients' account and at their risk at Rs. 4-14-0 per candy and they hold your clients liable for the consequences thereof. Our clients hold your clients' deposit for the damages they are likely to suffer."

The impression produced on my mind after perusing that letter was that the defendants treated the plaintiffs' repudiation as an immediate breach putting an end to the said contracts in their entirety. Thereafter the defendants were not bound to accept any lime from the plaintiffs under the said contracts, and they could have at once sued the plaintiffs for damages for failure to deliver the rest of the lime under the said contracts. I therefore, hold that the breach, if any of the said contracts took place on July 6, 1917. But even if it be not so, I think that the defendants' letter of August 13, is a clear intimation to the plaintiffs that unless the plaintiffs supplied further lime within forty-eight hours, the defendants would treat the plaintiffs' repudiation as a breach of the contracts in their entirety. The defendants in fact did so. They did not order any more lime from the plaintiffs and they started buying against the plaintiffs from October 3, 1917. Therefore, even if the defendants did not, by their letter of July 6, accept the plaintiffs' refusal as a breach of the contracts for the entire residue of the lime to be delivered thereunder, they did so by their letter of August 13, in which case the date of the breach would be August 15, 1917. I prefer to hold that the breach took place on July 6, 1917.

But though the date of the breach be July 6, or August 15, 1917, it does not follow that the whole of the defendants' counter-claim is time barred, for it is possible to look at the matter from another point of view.

The defendants' cross-claim for damages amounts to Rs. 2,716. The plaintiffs' claim is for Rs. 1,800. The defendants in their pleading gave credit to the plaintiffs for Rs. 221 admitted by them to be due to the plaintiffs and they counter-claimed for the balance, *viz.*, Rs. 2,494. Had the defendants' pleading been properly drawn, the defendants would have in their written statement claimed to set off against the amount that might be awarded by the Court to the plaintiffs an equal amount of their claim, and they would have counter claimed for the balance. (See Bullen and Leake's Precedents of Pleadings, 6th Edition page 775). I do not think that the fact that the defendants have not pleaded a set-off by their written statement precludes them from pleading a set-off now: see *McGowan* v. *Middleton* (7). I think it the defendants' cross-claim against the plaintiffs can be treated partly as a set off and partly as a counter claim, the defendants are entitled to ask the Court, even at this stage, to treat it as such. The omission to plead part of the cross-claim as a set-off amounts merely to a technical defect which can be cured, if necessary, by an amendment of the pleading.

The defendants having given up their contention as to limitation, the amount now admittedly due by them to the plaintiffs is Rs. 1,385. The defendants are, therefore, entitled to ask the Court to treat their cross-claim to the extent of Rs. 1,385 or such larger sum as might be awarded by Court to the plaintiffs as a set-off, and to treat the balance as a counter-claim. It is clear that the defendants cannot claim a set-off in the present case under the Code of Civil Procedure, O. VIII, r. 6, because the defendants' claim is

(7) (1883) 11 Q. B. D. 464; 52 L. J. Q. B. 355; 31 W. R. 835.

not for an 'ascertained' sum within the meaning of that rule, but for unliquidated damages for alleged breaches of the said contracts. But the Code does not exclude what is called an equitable set-off provided the defendants' cross-demand arises out of the same transaction as the plaintiffs' claim: *Stephen Clark* v. *Ruthnavaloo Chetti* (8). In the present case it is not denied that the defendants' cross-demand arises out of the same transaction. The defendents, therefore, are entitled to claim an equitable set-off in the present case: *Kishorchand Champalal* v. *Madhowji Visram* (9). The provisions of O. XXI, r. 19, clearly show that an equitable se-off may be allowed by the Courts of British India: see *Panuganti Narasimha Rao* v. *Zamindar of Tiruvur* (10).

Under r. 118 of the Bombay High Court Rules (which is taken from R. S. C., O. XIX, r. 3) a defendant may set up by way of set-off or counter-claim, against the claims of the plaintiff, any right or claim whether such set-off or counter-claim sounds in damages or not. It must, however, be observed that nothing which was not a good set-off before the passing of the said rule can be a good set-off under the said rule, the set-off must still be for an ascertained sum or it must arise out of the same transaction as the plaintiff's claim. A counter-claim, however, need not arise out of the same transaction. Set-off is a ground of defence and it should be pleaded in the written statement. Counter-claim does not afford any defence to the plaintiff's claim; it is a weapon of offence which enables a defendant to enforce a claim against the plaintiff as effectually as in an independent action: *Stooke* v. *Taylor* (11).

The above distinction betwen set-off and counter-claim has an important bearing on the question of limitation, for if the Statute of Limitations is pleaded to a defence of set-off, the plaintiff, in order to establish his plea, must prove that the set-off was barred when the plaintiff commenced his action, it is not enough to prove that it was barred at the time when it was pleaded: *Walker* v. *Clements* (12) In the case, however, of a counter-claim, it is enough for the plaintiff to prove that the counter-claim was barred when it was pleaded: *McGowan* v. *Middleton* (7). The case of *Walker* v. *Clements* (12), referred to above, was one of legal set-off. But the same principle has been held to apply to cases of equitable set-off: *Narasimha Rao* v. *Zamindar of Tiruvur* (10), *Pragji Lal* v. *Maxwell* (13).

I have already held, upholding the plaintiff's contention that the breach (if any) on the part of the pleintiffs, which gave rise to the defendants' counter-claim for damages, arose on July 6, 1917. The present suit was instituted on June 8, 1920. Therefore, the defendants' cross-claim to the extent of the amount that may be decreed to the plaintiffs in this suit, is not barred by the law of limitation. As regards the balance of the defendants' cross-claim, I hold that it is barred by limitation as the counter-claim was not filed until September 14, 1920. The same view was taken by the High Court of Madras in *Narasimha Rao's case* (10) referred to above.

Suit partly decreed.

K. S. D.

(8) 2 M. H. C. R. 296 at p. 303.
(9) 4 B. 407; 3 Ind. Jur. 320; 2 Ind. Dec. (N. S.) 777.
(10) 53 Ind. Cas. 234; 42 M. 873; 37 M. L. J. 293; 10 L. W. 183; (1919) M. W. N. 628; 26 M. L. T. 276.
(11) (1880) 5 Q. B. D. 569; 49 L. J. Q. B. 857; 43 L. T. 200; 29 W. R. 491; 44 J. P. 748.
(12) (1850) 15 Q. B. 1046; 17 R. R. 755; 81 R. R. 882.
(13) 7 A. 284; A. W. N. (1885) 40; 4 Ind. Dec. (N. S.) 543.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 613 OF 1922.
August 28, 1923.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Panton.

HABIBAR RAHAMAN—PETITIONER
versus
SAIDANNESSA BIBI AND ANOTHER—OPPOSITE PARTY.

Muhammadan Law—Wakf—Mutwalli—Permis-

sion to lease wakf *property*—Kazi—*District Judge, powers of—Practice of Court.*

A District Judge has jurisdiction, on the application of a *mutwalli* to authorise dealings with *wakf* property in the same way as a *kazi* might have done under the Muhammadan Law. [p. 950, col. 1.]

Where a practice has existed, it is convenient, except in cases of extreme urgency and necessity, to adhere to it, because it is the practice, even though no reason can be assigned for it. [p. 951, col. 2.]

Case-law discussed.

Civil Rule against an order of the District Judge, Hughli, dated the 24th July 1922.

Dr. *Jadu Nath Kanjilal* and Babus *Pramatha Nath Bandopadhya* and *Benode Lal Mukherjee*, for the Petitioner.

Babus *Mahendra Nath Ray* and *Apurba Charan Mukherjee*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to consider the legality of an order made by the District Judge in favour of two *mutwallis* of a Muhammadan *wakf*, authorising them to grant a lease of the *wakf* property. The petitioner before us, who is another *mutwalli*, preferred an objection, but did not appear to support it, with the result that an order in favour of the applicants was made *ex parte*. The petitioner thereupon appealed to this Court but the appeal was dismissed as incompetent: *Habibar Rahman* v. *Saidannssa Bibi* (1). The petitioner now assails the order of the District Judge as made without jurisdiction, because he dealt with the matter on the basis of an application and not of a plaint.

It is well settled that the District Judge has jurisdiction to authorise dealings with *wakf* property in the same way as a *kazi* might have done under the Muhammadan Law; see the judgment of Ameer Ali and Pratt, JJ., in *Shama Churn Roy* v. *Abdul Kabeer* (2). This was followed by Woodroffe, J. in *In re Woozatunnessa Bibee* (3), where it was mentioned that a similar view had been taken by Stephen, J., on the 2nd July 1906, in an unreported case; *In the matter of a Wakfnama*. Two years later, however, Pugh, J., declined in *In re Halima Khatun* (4) to assume jurisdiction as extensive as that of the *kazi*, and held that, in the absence of statutory authority, a sanction to sell *wakf* property could be obtained by a *mutwalli* only by means of a suit. This case stands by itself and does not appear to have been followed. On the other hand in the decisions in *Nimai Chand* v. *Mir Golam Hosseln* (5) and *Atimannessa Bibi* v. *Abdul Sobhan* (6), where the powers of a *kazi* were fully examined, the view taken in *Shama Churn Roy* v. *Abdul Kabeer* (2) and *In re Woozatunnessa Bibee* (3), was followed as correct. A similar view appears to have been incidentally adopted by the Judicial Committee in *Mahomed Ismail Ariff* v. *Ahmed Moolla Dawood* (7) where it was stated by Mr. Ameer Ali that the place of the *kazi* in the British Indian system is taken by the Civil Court. The decision in *Jamila Khatun* v. *Abdul Jalil Meah* (8), is not really opposed to this view, as that was not a case of a *mutwalli* seeking sanction to deal with *wakf* property. There it was ruled that if a person desires to be appointed a *mutwalli* of a public *wakf*, he should proceed preferably by a suit. On the other hand, in *Fakhrunnessa Begam* v. *District Judge of the 24-Pargunnas* (9) it was pointed out that the powers of the *kazi* are ordinarily exercised by the District Judge and the sanction given by him on an application by the *mutwalli* is sufficient authority for the *mutwalli* for letting out the property. Reference was made to the view of Mr. Ameer Ali as set out in his work on Muhammadan Law, 4th Edition, Volume 1, page 480: "The application for sanction should be made to the District Judge if the property is situated in the *mofassil* or to the Judge on the Original Side of the High Court, if it is within a

(1) 77 Ind. Cas. 907; 38 C. L. J. 358.
(2) 3 C. W. N. 158.
(3) 1 Ind. Cas. 512; 36 C. 21.
(4) 7 Ind. Cas. 331; 37 C. 870;
(5) 3 Ind. Cas. 353; 37 C. 179; 11 C. L. J. 317; 14 C. W. N. 535.
(6) 32 Ind. Cas. 21; 43 C. 467; 22 C. L. J. 577; 20 C. W. N. 113.
(7) 35 Ind. Cas. 30; 43 I. A. 127; 43 C. 1085; 24 C. L. J. 198; 14 A. L. J. 741; (1916) 1 M. W. N. 460; 20 C. W. N. 1118; 20 M. L. T. 110; 18 Bom. L. R. 611; 31 M. L. J. 290; 4 L. W. 269; 9 Bur. L. T. 141; 8 L. B. R. 517 (P. C.).
(8) 49 Ind. Cas. 799; 23 C. W. N. 138.
(9) 56 Ind. Cas. 475; 24 C. W. N. 339; 47 C. 592.

Presidency Town. It is not necessary to bring a suit for obtaining such sanction, it will be granted upon a proper application being made by the *mutwalli*." This appears to be in agreement with the view adopted by West, J., in *In the matter of Kahandas Narrandas* (10), though a doubt appears to have been suggested in *Mahamad Haji Zakeria* v. *Ahmadbhai* (11). Consequently, the position is that, so far as the Courts of this Presidency are concerned, with the solitary exception of the dissentient note sounded by Pugh, J., in *In re Halima Khatun* (4), it has been uniformly held for at least a quarter of a century that the requisite sanction of the District Judge may be obtained on an application to him by a *mutwalli* who finds it necessary to make an alienation of the *wakf* property. No substantial reason has been assigned why we should depart from this well established rule and direct that in future all such sanction should be obtained by recourse to the expensive and dilatory machinery of a regular suit. We are not now called upon to consider whether a convenient method would not be to introduce in the subordinate Courts the procedure by originating summons, more or less on the lines prescribed by the Rules of the Supreme Court in England and the Rules of this Court on the Original Side. But it may be pointed out, that even if such a new procedure were introduced, it is at least doubtful whether the Court would enquire into questions of fact in addition to questions of law: *Lewis* v. *Green* (12). This, however, is only by way of paranthesis.

In this connection it may be usefully re-called that sanctions are obtained from the District Judge on applications in other classes of cases which may to some extent be regarded as analogous. Under section 29 of the Guardians and Wards Act, 1890, a transfer of the immoveable property of a ward (except leases for periods shorter than five years) cannot be made without the previous permission of the Court. Under section 90 of the Probate and Administration Act, 1891, an administrator may not effect a similar transfer of the estate under his charge without the previous permission of the Court. Under section 75 of the Indian Lunacy Act, 1912, a manager of the estate of a lunatic outside a Presidency Town cannot effect a similar alienation of the estate without the permission of the Court. In these classes of cases, the practice is for the petitioner to obtain the requisite sanction upon an application to the Judge. Reference may also be made to section 32 of the Land Acquisition Act, 1894, which deals with the question of investment of compensation money awarded in respect of lands belonging to persons incompetent to alienate absolutely. The matters which require adjudication in such a contingency are dealt with on applications.

We are consequently of opinion that till a new procedure is introduced by competent authority, the Court should not deviate from its established practice. We may usefully re-call the famous maxim of Coke, C. J., in *Burrowes* v. *High Commission Court* (13), "*Cursus curiae est lex curiae*", the practice of the Court is the law of the Court; or, as we have it in the words attributed to Tindal, C. J., by Cresswell, J., "the course of the Court is the practice of the Court": *Freeman* v. *Tranah* (14). From this point of view, it has been maintained by high authorities that where a practice has existed, it is convenient, except in cases of extreme urgency and necessity, to adhere to it, because it is the practice, even though no reason can be assigned for it, see the observations of Lord Ellenborough in *Bovill* v. *Wood* (15), and of Lord Campbell in *Edwards* v. *Martyn* (16). As Lord Abinger said in *Jacobs* v. *Layborn* (17), an inveterate prac-

(10) 5 B. 154; 5 Ind. Jur. 589; 3 Ind. Dec. (N.S.) 103.
(11) 25 B. 327; 3 Bom. L. R. 368.
(12) (1905) 2 Ch. 340; 74 L. J. Ch. 682; 93 L. T. 303; 54 W. R. 93.
(13) (1701) 3 Bulst. 48 at p. 53; 81 E. R. 42.
(14) (1852) 12 C. B. 406 at p. 414; 92 R. R. 754; 21 L. J. C. P. 214; 16 Jur. 1141; 138 E. R. 964.
(15) (1813) 2 M. & S. 23 at p. 25; 1 Rose 155; 105 E. R. 291.
(16) (1851) 17 Q. B. 693; 21 L. J. Q. B. 86; 117 E. R. 1448.
(17) (1843) 11 M. & W. 685 at p. 690; 1 D. & L. 352; 12 L. J. Ex. 427; 7 Jur. 562; 152 E. R. 980.

tice in the law generally stands upon principles that are founded in justice and convenience; and the Court will not sanction a speculative novelty for the sake of novelty without the warrant of any principle, precedent or authority: *Ex parte Overseers of Tollerton* (18), *Cowan* v. *Duke of Buccleuch* (19), *Attorney-General* v. *Marquis of Aylesbury* (20), *Ex parte James Bell Cox* (21), *Liverpool and Manchester Aerated Bread Co.* v. *Firth* (22).

We are of opinion that the order of the District Judge was not made without jurisdiction and the Rule must be discharged. There will be no separate order for costs, as the Rule was taken as an alternative to the appeal which has been dismissed with costs.

Rule discharged.

Z. K.

(18) (1842) 3 Q. B. 792 at p. 799; 114 E. R. 711.
(19) (1876) 2 App. Cas. 344.
(20) (1887) 12 App. Cas. 672; 57 L. J. Q. B. 831; 58 L. T. 192; 36 W. R. 737.
(21) (1888) 20 Q. B. D. 1 at p. 19; 57 L. J. Q. B. 103; 58 L. T. 323; 36 W. R. 213; 52 J. P. 484.
(22) (1891) 1 Ch. 367; 60 L. J. Ch. 153; 63 L. T. 677; 39 W. R. 269.

BOMBAY HIGH COURT.

LETTERS PATENT APPEAL NO. 6 OF 1922.
September 22, 1922.

Present:—Sir Lallubhai Shah, Acting Chief Justice, and Mr. Justice Crump.

CHATURBHAI LALLUBHAI PATEL—APPELLANT

versus

MOTIBHAI BAPUJI PATEL AND OTHERS—RESPONDENTS.

Deccan Agriculturists' Relief Act (XVII of 1879), s. 10A—Alienaton of right to hold land for 500 years, nature of—Alienee, possession of, when adverse.

In 1892 the owners of a certain land executed a document whereby they conveyed to the defendants the right to hold the land for 500 years. Plaintiffs as assignees of the owners sued to recover possession on the ground that the transaction of 1892 was a mortgage;

Held, (1) that the defendants were entitled to such rights as they had acquired by the document of 1892 by adverse possession, namely, the right to hold the land for 500 years as against the plaintiffs; [p. 953, col. 1.]

Adam Umur Sale v. *Bapu Bawaji*, 33 B. 116; 10 Bom. L. R. 1128, applied.

(2) that section 10A of the Deccan Agriculturists' Relief Act did not apply to the transaction, and as the document did not on the face of it purport to be a mortgage, extraneous evidence could not be admitted to establish that it was a mortgage; [p. 953, cols. 1 & 2.]

Sawantrawa Fakirappa v. *Girlappa Fakirappa*, 21 Ind. Cas. 4; 38 B. 18; 15 Bom. L. R. 778, followed.

(3) that the transaction must be taken to be an alienation by way of a lease for a long term. [p. 953, col. 1.]

Mahmad v. *Bagas*, 32 B. 569; 10 Bom. L. R. 742, distinguished.

Letters Patent Appeal from the decision of Mr. Justice Coyajee, in Appeal from Order No. 77 of 1922.

Mr. *N. M. Desai*, for the Appellant.

Mr. *R. J. Thakor*, for the Respondents.

JUDGMENT.

Shah, Acg. C. J.—The plaintiffs filed the present suit as the assignees of the original owners of the land in suit to recover possession of the property, and for accounts on the footing that the transaction of April 22nd 1892 was a mortgage. The original owners passed a document in 1892 in favour of the father of the present defendant No. 1 and the husband of the present defendant No. 2 whereby they purported to convey to these persons the right to hold the land for 500 years in consideration of their having received at the time a sum of Rs. 180 (Babashahi coins). The defendants contended that the plaintiffs had no right to the land, and that in any case the plaintiffs were not entitled to recover possession before the expiry of the period mentioned in the document. Various issues were raised in the Trial Court, one of which was, whether the plaintiffs' claim was time-barred. The Trial Court held that the alienation evidenced by this document of 1892 was void in consequence of the provisions of the Bhagdari Act (Bom. Act V of 1862) and that from the date of the document the defendants had held possession of this land adversely to the rightful owners. It accordingly dismissed the plaintiffs' suit. On Issue

No. 3, which related to the assignment in favour of the plaintiffs, it was found that the assignment was proved. No findings on the second part of Issue No. 3 and other issues were recorded.

The plaintiffs appealed to the District Court, and the only point before the learned Judge was whether the lower Court had erred in holding that the plaintiffs' claim was barred by limitation. It found that the lower Court had erred in doing so. The learned Assistant Judge was of opinion that the defendants acquired title by adverse possession only to the limited interest evidenced by the document of 1892, and that as it was not a sale, it was necessary to determin whether it was a lease or a mortgage. The learned Judge on that footing reversed the decree of the Trial Court and remanded the suit for decision on all the issues.

From that order of remand the present appeal is preferred to this Court, and it is urged in support of the appeal that by adverse possession the defendants have acquired such right as is conveyed by the document of 1892, and further that section 10A of the Dekkhan Agriculturists' Relief Act would not apply to this transaction, and that, therefore, the document must be read according to its terms, and the transaction evidenced by it must be taken to be what it purports to be, namely, an alienation of the right to hold the land for 500 years. It is not disputed before us, and cannot be disputed, that the defendants are entitled to such rights as they have acquired by the document of 1892 by adverse possession. The principle of the decision in *Adam Umar Sale* v. *Bapu Bawaji* (1) applies, whether the document is a sale or purports to convey a limited interest. It cannot be disputed, and it has not been disputed, that section 10A of the Dekkhan Agriculturists' Relief Act cannot apply to this transaction having regard to the decision in *Sawantrawa Faklrappa* v. *Girlappa Faklrappa* (2). When these two propositions are accepted, it is difficult to understand why the case should have been remanded. The learned Judge appears to have remanded the case to the Trial Court possibly on the understanding that in virtue of the provisions of section 10A the plaintiffs may be able to establish that the transaction was intended to be a mortgage by means of extraneous evidence. But no such evidence would be admissible as section 10 A of the Dekkhan Agriculturists' Relief Act does not apply; and the document on its face does not purport to be a mortgage. Whether it may be called a sale of a limited interest or a lease for 500 years, it undobtedly gives the defendants a right to hold the land for 500 years for a certain consideration and that is the right which they have acquired by adverse possession, and that is the right to the enjoyment of which they are entitled as against the plaintiffs. Apart from the provisions of section 10A, the contention of the plaintiffs that the transaction was a mortgage and not a lease does not present any difficulty. The *patta* in this case has no resemblance to the *patta* which the Court had to consider in *Mahmad* v. *Bigas* (3); and it must be taken to be an alienation by way of a lease for a long term, though not an out and out sale.

It is hardly necessary to point out that we are not concerned in this case with any action that the Collector may deem it right to take, if at all, under the Bhagdari Act. In connection with this aspect of the case it is significant to note that we do not know whether the assignment in favour of the plaintiffs is subject to the same infirmity as the transaction of 1892 under the Bhagdari Act. This point was raised as part of Issue No. 3 but there is no finding upon it. It is an essential point as affecting the title of the plaintiffs to maintain this suit.

It is clear, however, that the decree of the Trial Court dismissing the suit on the ground of limitation was right. No doubt after the lapse of 500 years from the date of the document the original owners or their representatives-in-title would be entitled to get possession of

(1) 22 B. 216; 10 Bom. L. R. 1128.
(2) 21 Ind. Cas. 41 38 B. 18; 15 Bom. L. R. 778.
(3) 24 B. 569; 10 Bom. L. R. 748.

this land. It is hardly necessary to make any provision for it in the decree. The document makes that position clear. The dismissal of the suit involves the result that the plaintiffs are not entitled to any immediate relief on the footing of its being a mortgage. We, therefore, reverse the order of the lower Appellate Court and restore the decree of the Trial Court. The plaintiffs to pay the costs here and in the lower Appellate Court.

K. S. D.

Order reversed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 763 OF 1906.

February 21, 1908.

Present:—Mr. Justice Rampini and Mr Justice Sharfuddin.

SURJA PROSAD SUKUL AND OTHERS —DEFENDANTS—APPELLANTS

versus

MIDNAPUR ZEMINDARI COMPANY, LTD.—PLAINTIFFS—RESPONDENTS.

*Bengal Tenancy Act (VIII of 1885), s. 7—Landlord and tenant—Enhancement of rent—*Kabuliyat, *construction of—Tenant liable to pay rent for excess area—Fixity of rent.*

A stipulation in a *kabuliyat* that the tenure-holder is to pay rent for lands besides those mentioned in the *kabuliyat* which may be under his cultivation, or which may be found to be excess lands upon measurement at the rate mentioned in the *kabuliyat*, does not imply that the rate of rent is to be fixed in perpetuity and would not be liable to enhancement. [p. 954, col. 2.]

Appeal against a decree of the District Judge, Midnapur, dated the 7th February 1906, affirming that of the Subordinate Judge, First Court, Midnapur, dated the 22nd August 1905.

Mr. *Hill* and Babu *Digambar Chatterjee*, for the Appellants.

Babus *Jogesh Chandra Roy* and *Rajendra Chandra Chatterjee*, for the Respondents.

JUDGMENT.—This is an appeal against a decision of the District Judge of Midnapore, dated the 7th February 1906.

The appeal arises out of a suit for enhancement of the rent of a tenure under section 7 of the Bengal Tenancy Act. The Subordinate Judge enhanced the rent from Rs. 667-15 to Rs. 1,242 which he considered to be fair and equitable rent. He found that there was no customary rate and assessed the gross rental of the tenure at Rs. 2,237-10-2 and after deducting Rs. $7\frac{1}{2}$ per cent. as the cost of collections, allowed the tenure-holder a profit of 40 per cent. of the collections, and gave the balance of Rs. 60 per cent. as enhancement payable to the landlord.

There was an appeal to the District Judge, and the District Judge affirmed the decree of the First Court.

The defendants now appeal to this Court and urge that by their *kabuliyat* of 1875, the rate of rent was fixed in perpetuity and that they were not bound to pay any further rent for the land for which they then agreed to pay rent but that they were only liable to pay additional rent for additional land and liable to pay rent for this additional land only at the rate fixed in the *kabuliyat*. Then it is urged that the learned District Judge has made a mistake in his decree if as he says 60 per cent. should be the profit allowed to the tenure-holder. It is further urged that the District Judge has not allowed a sufficient amount for the cost of the collections. No attempt is made to improve the finding of the lower Appellate Court as to the gross collections of the tenure.

Looking at the terms of the *kabuliyat* we see nothing in it which makes the rate of rent a fixed rate that cannot be enhanced. We do not think that the rate is fixed in perpetuity. The stipulation that the tenure-holder is to pay rent for lands besides those mentioned in the *kabuliyat* which may be under his cultivation, or which may be found to be excess lands upon measurement at the rate mentioned in the *kabuliyat* does not seem to imply that the rate of rent is to be fixed in perpetuity. The learned Counsel for the appellants urges that this rate was fixed by the decree of the Principal Sudder Ameen dated the 30th December 1861. That is so but there is nothing in this decree which leads us to suppose that the rate then fixed was fixed

in perpetuity. This decree is dated 1861 and the *kabuliyat* is dated 1875, fourteen years later. The fact of the decree having been given in 1861 for an enhanced rate of rent shows that the rent of this tenure was not a fixed rent but an enhanceable rent. We may also mention that the terms of the *kabuliyat* in this case are very similar to the terms of the *kabuliyat* in the case of *Ram Kumar Singh* v. *Messrs. Robert, Watson & Co.* (1), and the rent of the tenure to which the *kabuliyat* in that case related was held to be enhanceable. We, therefore, affirm the decision of the lower Appellate Court and hold that the rent and the rate of rent fixed in the *kabuliyat* in the present case are enhanceable.

The learned District Judge has made a clerical mistake in saying that the profit allowed to the tenure-holder on the gross collections is 60 per cent. This profit has been allowed to the landlord by the Subordinate Judge and the balance of Rs. 40 is the profit allowed to the tenure-holder. We see no reason to think that too low a rate has been allowed for the costs of collection.

On the whole we think, seeing that there is no proof of any customary rate, the rate allowed is fair and equitable.

The appeal is dismissed with costs.

Appeal dismissed.

Z. K.

(1) 9 C. W. N. 234.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 544 OF 1921.

November 22, 1922.

Present:—Mr. Justice Stuart.

Lala BHAGWAN DAS—PLAINTIFF—APPELLANT

MOHABBAT SHAH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 5—Appeal filed before Commissioner within time—Cross-objections raising question of proprietary title—Appeal returned for presentation to District Judge—Delay, whether can be excused—Sufficient cause,

An appeal was filed before the Commissioner from an order of an Assistant Collector in which no question of title was raised. The appeal was within time if it lay to the Commissioner, it was not within time if it lay to the Court of the District Judge. On notice of appeal being served on the respondents they filed cross-objections which raised a question of proprietary title. The Commissioner thereupon returned the appeal and the cross-objections to the parties to be filed before the District Judge, which was done. It was objected that the appeal was barred by time inasmuch as at the time it was presented to the Commissioner the period of limitation for filing it before the District Judge had already expired:

Held, that the appeal having in the first instance been properly filed before the Commissioner, and the latter having been deprived of jurisdiction to hear the appeal by the action of the respondents in filing cross-objections raising a question of proprietary title, this was a fit case for extending the limitation for presenting the appeal to the District Judge under section 5 of the Limitation Act. [p. 956, col. 2.]

Appeal from a decision of the Additional District Judge, Moradabad, dated the 20th January 1921.

JUDGMENT.—The plaintiff-appellant instituted a suit under sections 150 and 154 of the Tenancy Act against the defendants for the resumption of what purported to be rent free land in his *mahal* on the allegation that the land in question was granted for the performance of a specific service which he no longer required.

The defendants asserted that the grant had been made to them unconditionally and that it was thus not resumable under section 154, and further that it had been held rent-free for 50 years by two successors of the original grantee, and that thus they held proprietary rights in the same. The Assistant Collector decided that the grant was unconditional and as such, not resumable, but that it had not been held rent-free for 50 years by two successors of the original grantee. He, therefore, assesed rent thereon under section 157. The judgment is dated the 15th April 1920. On the 16th June 1920 the plaintiff appealed to the Commissioner on the ground that the land had been granted for the performance of a specific service which he no longer required and demanded the ejectment of the defendants. He further appealed that, in any circumstance, the status of the defendants had been incor-

rectly determined and that the rent fixed was not sufficient. This appeal was within time if it lay to the Commissioner. It was not within time if it lay to the Court of the District Judge. It was not an appeal against a decree in a suit included in groups A and B, or in a suit under sections 159, 160, 161, 162, 164 and 165 and it raised no question of proprietary title. It would, therefore, appear that the appeal lay to the Commissioner. When the appeal was filed there was no question of proprietary title in issue in the appeal although such a question had been in issue in the Court of first instance.

On the 31st of August 1920 the defendants having received notice of the appeal, filed, as they were entitled to do, a cross-objection under O. XLI, r. 22 in which they requested the Court to dismiss the suit altogether because, on their allegations, it was established that they had proprietary title in the plot inasmuch as the grant was for more than 50 years and held by two successors to the original grantee. The filing of this cross-objection introduced a question of proprietary title as an issue in the decision of the appeal. The Commissioner then took the course (which was the only possible course) of returning the appeal and the cross-objection to the parties with directions to file them before the District Judge. As he was precluded from deciding the question of proprietary title and as the cross-objection had now become merged in the appeal and he had to decide every point raised in both, he took a correct view of the law. He does not refer to the decision in *Raja Partab Bahadur Singh* v. *Abdus Salam* (1) which is a decision of the Board of Revenue. That decision undoubtedly supported his view and lays down the only feasible procedure as to what is to be done in such circumstances.

The plaintiff-appellant then proceeded to present his appeal to the District Judge. He was late by two days through unavoidable causes and this District Judge has condoned the lateness of two days. But the District Judge has dismissed the appeal on the ground that at the time it was presented to the Commissioner the period of limitation for filing it before the District Judge had already expired. He considered that there was no sufficient cause under section 5 of the Limitation Act justifying extension of the time. His view was that the appellant was ignorant of the law and that ignorance of the law was no excuse. I do not propose to discuss how far the appellant would be excused if he had accepted in good faith the honest, though mistaken, advise of his Counsel, because in this particular case the appellant's Counsel was right. The appeal did lie to the Court of the Commissioner and it was not until some two months had elapsed that a situation arose which prevented the Commissioner from proceeding with its decision. Had the cross-objection not been filed, or had a cross-objection been filed which did not raise a question of proprietary title, the Commissioner would have been seized with the appeal and his Court would have been the proper Court to decide it, and the circumstance which deprived the Commissioner of his jurisdiction was one which could not possibly have entered into the calculations of the appellant at the time the appeal was instituted. I, therefore, find that the appellant had sufficient cause under section 5 of the Limitation Act for presenting his appeal beyond time in the Court of the District Judge. I, therefore, allow this appeal and send back the appeal and the cross-objection to be decided by the learned District Judge on the merits according to law. Costs here and hitherto will follow the result.

Appeal allowed.

Z. K.

(1) 31 Ind. Cas. 857.

PATNA HIGH COURT.

LETTERS PATENT APPEAL NO. 94 OF 1921.

July 10, 1923.

Present :—Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K. Mullick, KT.

RAMDHURI CHOWDHURI—APPELLANT

versus

DEONANDAN PRASAD SINGH—RESPONDENT.

Limitation Act (IX of 1908), s. 10, Sch. I, Arts. 166, 181—Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 90—Execution of decree—Sale, application to set aside—Limitation—Fraud, application based on—Burden of proof—Sale proclamation—Mis-statement of value, whether fraud.

Article 181 of Schedule I to the Limitation Act applies only to applications for which no period of limitation is provided elsewhere in the Schedule. [p. 959, col. 1.]

All applications for setting aside a sale in execution of a decree under the Civil Procedure Code are governed by Art. 166 of Schedule I to the Limitation Act, even though the ground for setting aside the sale should be fraud or any other reason, and the effect of the Article cannot be evaded by merely stating in the application itself that it is brought under section 47 as well as under O. XXI, r. 90 of the Civil Procedure Code. [p. 959, col. 1]

Under Art. 166 of Schedule I to the Limitation Act the period of limitation for an application to set aside an execution sale runs from the date of the sale unless the knowledge of his right to apply was fraudulently concealed from the applicant. [p. 959, col. 1.]

A mis-statement by the decree-holder of the value of the property in the sale proclamation does not necessarily constitute fraud. [p. 960, col. 1.]

Letters Patent Appeal against the judgment of Mr. Justice Ross, dated the 6th November 1921.

Messrs. *S. Ahmad, K. Sahai* and *S. Dayal*, for the Appellant.

Messrs. *P. K. Sen* and *S. N. Bose*, for the Respondent.

JUDGMENT.

Miller, C. J.—This is an appeal under the Letters Patent from a decision of Mr. Justice Ross, dated the 6th November 1921. The appellants, as first mortgagees of certain property, sued and obtained a decree in execution of which, on the 31st January 1918, they put up the property for sale and purchased it themselves. About two years later, in February 1920, the respondent, one of the judgment-debtors, applied to set aside the sale under O. XXI, r. 90 and section 47 of the Civil Procedure Code. At the hearing of the application no point was made by the judgment-debtor, the present respondent, that notice of the application for execution required by O. XXI, r. 22 of the Code was not issued or properly served, and no evidence was taken before the Munsif, who heard the application, on this point. It was contended, however, that the order of attachment was not properly proclaimed, nor a copy deposited in the Collectorate as required by O. XXI, r. 54, and that the notice of the sale proclamation required by r. 66 of that Order was not properly served upon the respondent or a copy deposited at the Collectorate. The respondent also alleged fraud on the part of the appellant in concealing from him the fact of the sale and claimed that the limitation period for his application did not begin to run until he became aware of the sale, which was less than a month before the application was made. The Munsif found that the notice required under O. XXI, r. 66 was served on the *karpardaz* of the respondent and not on the respondent personally, and that the sale proclamation was not sent to the Collector of the District for publication under O. XXI, rr. 67 and 54. He also found that the property was purchased at a very low price by the appellant and, from the way the processes were served and the inadequate price, he concluded that fraud had been practised on the respondent. There was no evidence as to when the respondent first obtained knowledge of the sale but he accepted the statement in his petition that he obtained this knowledge for the first time on the 2nd February 1920, which was less than a month before the application was filed. He accordingly held that the application was not time-barred and set aside the sale.

The Subordinate Judge on appeal found that the sale proclamation was duly made and published, but that a copy was not sent to the Collector of the District as required by rr. 54 and 67 of O. XXI. He also found that the notice required under r. 66 was not served upon the respondent but upon his *karpardaz*. These defects he considered to be irregularities, but not sufficient to vitiate the sale. He further

found that the price which the property fetched at the sale was lower than its fair price, but did not consider that there was any evidence proving anything done by the decree-holder which had the effect of reducing the price. It must be taken, therefore, in my opinion, that he considered the respondent had suffered no substantial injury, within the meaning of O. XXI, r. 90, by reason of such irregularities as existed. He also found that there was no evidence on the record to prove any fraud practised by the appellant, and that there was no proof that the respondent was kept from knowledge of the sale by any fraud of the decree-holder. In considering the question of the inadequacy of price, he stated that he could not agree with the learned Munsif in holding that fraud was practised simply because the property sold did not fetch its proper price at the sale. On the question of limitation, he pointed out that there was no evidence to prove how and when the judgment-debtor got knowledge of the sale and that the allegation made in the petition had not been substantiated, and the respondent himself gave no evidence. He accordingly held that the application was barred by limitation and rejected it, allowing the appeal.

The respondent then moved this Court in revision to set aside the Subordinate Judge's order relying mainly upon the ground, which had not been urged either before the Munsif or the Subordinate Judge, that notice of the application for execution, which was made more than a year after the decree, had not been properly served upon him, and that the sale was accordingly made without jurisdiction and void. He also contended, that, upon the findings come to fraud ought to have been presumed. The learned Judge considered that on the facts disclosed, a case of fraud had not been made out and agreed with the lower Appellate Court that irregularity in the service of notice, in itself, did not amount to fraud. He stated, however, that in the absence of any finding of the actual value of the property he would have remanded the case for a finding on this question had it been necessary to do so, but as he set aside the sale upon the ground next mentioned, he did not take this course. On the question of non-service of the application for execution he was referred to the peon's return of service which had been accepted by the Executing Court as a proper service when it was made and had not been put in evidence at the trial. From this it appeared that the notice had been tendered to the respondent's *karpardaz* who refused to accept it and that it was afterwards served by affixing it to the door of the respondent's house. In certain circumstances, such a service might be regular and effective but there was nothing to show, on the face of the return, whether the respondent himself had refused to accept it or whether any attempt had been made to ascertain his whereabouts before affixing it to the door of his house and no evidence was before the Court to show the exact circumstances under which the service came to be made. The learned Judge, however, considered himself justified in deciding this question upon the peon's return alone, and came to the conclusion that no proper service had been made, with the result that the sale was bad for want of jurisdiction. He appears to have treated the application, which was in fact an application to set aside the sale, as an application of some other nature. Although it seems clear that the limitation period for an application to set aside a sale under the Civil Procedure Code is 30 days under Art. 166 of the Limitation Act, the learned Judge thought that, as the case was one coming under section 47 of the Act, it was not governed by Art. 166 but by Art. 181 for which the limitation period was three years and the application was, therefore, not barred by limitation. He considered, further, that the proper procedure was by way of appeal and not by way of revision and, treating the application as an appeal, he allowed it and ordered the sale to be set aside. From this decision the present appeal is brought.

The first observation which falls to be made upon this judgment is, that the application now under consideration was both in form and substance an application for setting aside a sale in execution of decree under the Civil Procedure Code. There was no contention, from first to

last, either in the Trial Court or before the Subordinate Judge, that the sale was void *ab initio*, and there was not a scrap of evidence to support such a contention. The fact that the application itself was headed as one under O. XXI, r. 90 and section 47 of the Code can make no difference in this respect. Article 181 of the Limitation Act applies only to applications for which no period of limitation is provided elsewhere in the Schedule, but all applications for setting aside a sale in execution of a decree under the Code are governed by Art 166, even though the ground for setting aside should be fraud or any other reason. All applications to set aside a sale, in one sense, come within section 47 of the Code, as that section provides that all questions arising between the parties and relating to the execution of the decree shall be determined by the Executing Court. The effect, however, of Art. 166 of the Limitation Act cannot be evaded merely by stating in the application itself that it is brought under section 47 as well as under O. XXI, r. 90. It would appear, therefore, that the present application is time-barred, unless it can be shown that the respondent's right to set the sale aside was concealed from him by the fraud of the appellant. In such a case, under section 18 of the Limitation Act the time would only begin to run when the respondent first became aware of the fraud. This he alleged in his petition was less than a month before he filed the application although the property had been sold two years earlier. Fraud has been negatived by each of the Courts before whom the case came and the respondent has, therefore, failed to lay the foundation necessary to support the application of section 18 of the Limitation Act. Unless the knowledge of his right to apply was fraudulently concealed from him the period of limitation runs from the date of the sale. It is immaterial, therefore, when he first became aware of the sale, although in fact, as the Subordinate Judge points out, there is no evidence of the date when he first became aware of it. With respect to the learned Judge, whose decision is now under appeal, I do not think that he was entitled to treat the present application which, as I have already said, was in form and substance an application to set aside a sale, as a proceeding of a different nature and to hold that Art. 166 of the Limitation Act had no application. The evidence was confined to such matters as would entitle the Court to set aside the sale on the assumption that it was valid until so set aside, and the only evidence before the Court was that which went to show that the sale was voidable and not void. It may be, when the facts are accurately ascertained, that the sale was void. I express no opinion upon that point, but I consider in the present case we are not in a position to decide it. The evidence is not before us to enable us to arrive at a proper conclusion and it would, in my opinion, be a dangerous precedent to establish if we were to treat the application now under consideration as one of an entirely different nature from that which it purports to be, and without any evidence at all as to the exact circumstances under which the service of the notice of the application for execution was effected, hold that the sale was a nullity merely because the peon's return, which was not put in evidence or relied upon at the trial, indicates that the service may not have been properly effected. It may be assumed that, if the service of this notice had been put in issue at the hearing, the proof of the peon's return would not have been sufficient to discharge the onus cast upon the appellant but, for aught we know, there may have been circumstances, which when known, would show that the service was regular and that the respondent, although the notice was not delivered into his hand by the peon, had received it or had refused to accept it or could not be found. To justify us in declaring a sale made by the Court, in execution of its decree, to be null and void, I think we should require more cogent proof than anything which appears in the circumstances of the present case. The respondent did not put the appellant to proof of the validity of the service of notice which is now impugned, and no evidence upon the question was gone into as the appellant had no case to meet in this respect. How then can we hold that the sale was a nullity merely because a

document on the record, but not used at the trial or in any way questioned, fails to establish conclusively that the service was regular. In my opinion, it would be improper to do so.

The learned Counsel for the respondent further argued that, upon the facts found the learned Subordinate Judge ought to have come to a conclusion that there was fraud in publishing and proclaiming the sale, and that once fraud is proved which kept the sale from the knowledge of the person entitled to question it, the onus lies upon the person committing the fraud to show that the person injured thereby and suing to recover the property had clear and definite knowledge of the facts which constitute the fraud at a time which is too remote to allow him to bring the suit, as laid down by Lord Hobhouse in delivering the judgment of the Judicial Committee in *Rahimbhoy Habibhoy* v. *Turner* (1). Before, however, any question of onus of proof arises it must be established that a fraud was committed. The First Appellate Court, which is the ultimate judge of fact in the present case, has come to the conclusion that the evidence of that which was done by the appellant does not amount to fraud. It is contended, however, that the value of the property mentioned in the proclamation was so much below its real value that fraud must necessarily be imputed. I entirely agree that a wilful misstatement by a decree-holder in the sale proclamation of the value of the property may be sufficient evidence in particular cases, to justify an inference of fraud. I further agree that, where certain facts are found and inference of fraud is drawn, based upon the facts so found, it is open to the Court in second appeal to consider whether, as a matter of law, such an inference is justified by the facts found. If, however, the First Appellate Court, which is the ultimate judge of fact, refuses to draw an inference of fraud upon the facts so found by it, that decision cannot be questioned in second appeal unless the facts found necessarily amount to fraud. The misstatement of value in the sale proclamation is not, in my opinion, necessarily a fraudulent act, nor do the other irregularities complained of at the hearing of themselves necessarily constitute fraud. Whether, upon the whole of the circumstances disclosed, it could be inferred that fraud had or had not been committed was, in my opinion, entirely a question for the Subordinate Judge to determine and even if, upon a consideration of all the circumstances, we might have drawn a different inference and come to a different conclusion, unless that inference necessarily followed from the facts proved, we should not be entitled to disturb the findings of the First Appellate Court. In the present case I think we are bound by those findings and as there is no finding which will bring into operation the provisions of section 18 the application is, in my opinion, governed by Art. 166 of the Limitation Act and was time barred at the time when it was presented.

Whether the respondent is still in a position to treat the sale as a nullity or whether he still has any remedy open to him whereby he may obtain a declaration in favour of his title and possession on the ground that the sale was void are matters which I expressly leave open, but, so far as the present application is concerned, in my opinion, it must be dismissed and the appeal allowed with costs here and before Mr. Justice Ross. The judgment and decree appealed from will be set aside and the order of the learned Subordinate Judge restored.

Mullick, J.—I agree.

Z. K. *Appeal allowed.*

(1) 17 B. 341; 20 I. A. 1; 6 Sar. P. C. J. 256; 17 Ind. Jur. 401; 9 Ind. Dec. (N. s.) 228.

ALLAHABAD HIGH COURT.

GOVERNMENT APPEAL NO. 497 OF 1922.

November 17, 1922.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Piggott.

EMPEROR—PROSECUTOR

versus

HAR PRASAD BHARGAVA—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 337, scope of—Accomplice, whether competent witness.

Section 337 of the Code of Criminal Procedure empowers certain Courts of Justice, *viz.*, Magistrates exercising certain powers or specially empowered *ad hoc* by an order of sanction, to pass a judicial order, the effect of which is that a "person supposed to have been directly or indirectly concerned, in, or privy to, the offence under inquiry" who chooses to accept the pardon tendered by the said order, can give his evidence "as a witness in the case," with the knowledge and assurance that the order will operate as a bar to his own subsequent prosecution or trial for the offence in respect of which the pardon was tendered, or for any other offence of which he appears to have been guilty in connection with the same matter. [p. 976, col. 2.]

There is no provision of Indian Statute Law, nor is there any principle of natural justice, which makes an accomplice, as such an incompetent witness at the trial of another person in respect of the offence in the commission of which he was an accomplice. [p. 977, col. 1.]

Mohesh Chunder Kopali v. *Mohesh Chunder Dass*, 10 C. L. R. 553, *Queen-Empress* v. *Tirbeni Sahai*, 20 A. 426; A. W. N. (1898) 102; 9 Ind. Dec. (N. S.) 632, *Banu Singh* v. *Emperor*, 33 C. 1353; 10 C. W. N. 962; 4 Cr. L. J. 145, *Queen* v. *Behary Lall Bose*, 7 W R. Cr. 64, *Queen-Empress* v. *Mona Puna*, 16 B. 661; 8 Ind. Dec. (N. S.) 919, relied on

Empress of India v. *Asghar Ali*, 2 A. 260; 4 Ind. Jur. 250; 1 Ind. Dec. (N. S.) 727, distinguished.

Mahandu v. *Emperor*, 57 Ind. Cas. 167; 1 L. 102; 1 L. L. J. 182; 21 Cr. L. J. 599; 89 P. L. R. 1920, dissented from.

Appeal by the Government against the acquittal by the Sessions Judge, West Berar, Akola, in Criminal Appeal No. 1 of 1922, dated the 6th March 1922.

The Government Advocate, for the Crown.

Messrs. *C. C. Dillon, G. W. Dillon, Durga Prasad* and *M. P. Bhargava*, for the Accused.

JUDGMENT.—This is an appeal of the Central Provinces Government against a decision of Mr. Prem Narain, Sessions Judge of West Berar, Akola, who on the 6th of March 1922, set aside the conviction of Har Prasad Bhargava, who had been found guilty of an offence under section 161 of the Indian Penal Code by Khan Bahadur Jacob, a Magistrate of the First Class, and who was sentenced by the latter to 2½ years' rigorous imprisonment and a fine of Rs. 15,000.

We now propose to give in chronological order, as far as possible, a summary of the principal events which are said to have occurred and which culminated in the conviction of Har Prasad Bhargava. In August of 1921 Har Prasad Bhargava was the Subordinate Judge of Akola. On the 9th of August Gajadhar and others filed a suit against Bhagirath and others in the matter of an alleged partnership and claimed from the defendants upwards of Rs. 50,000. On the 29th of August, the plaintiffs filed an application for the immediate attachment of the property of the defendants and for seizure of account-books, alleging in an affidavit reasons why such order should be made. The application came before Har Prasad Bhargava on the 31st of August, and he made an order for the seizure of the account-books and the attachment of all moveable and immoveable property of the defendants, if they failed to furnish security for an amount of Rs 54,000. The Judge accepted the allegations made by the plaintiffs in their affidavit, and the order was in emphatic terms.

Beyond question, this order caused Bhagirath the gravest anxiety. The books were handed over to an officer of the Court and to furnish security for the Rs. 54,000, Bhagirath borrowed Rs. 20,000 from certain persons and deposited that sum with Sheoraj Mal, who on its receipt agreed to become surety for one month, and one month only. Bhagirath knew that one Mangal Chand was on friendly

terms with Har Prasad Bhargava and he determined to approach the Judge through Mangal Chand and to offer him a bribe to secure the reversal of the order of the 31st of August. As between Bhagirath and Mangal Chand there was a difficulty, because in a previous transaction relating to cotton seeds, Mangal Chand was of opinion that Bhagirath had cheated him in respect of 10 bags of cotton seeds, short delivered. Whether Bhagirath had really done this, or the cotton seed had been lost in transit, has no importance in this case. Bhagirath, however, being aware of this ill-feeling, rightly judged that Mangal Chand might hesitate to help him. He, therefore, chose a mutual friend, by name Radha Kishen, laid the circumstances before him, and asked him to induce Mangal Chand to interview the Judge.

Mangal Chand expressed his readiness to negotiate with the Judge, provided Bhagirath undertook to replace, in the ensuing season, the disputed cotton seed, and, according to Radha Kishen, stipulated for Rs. 500 as his fee.

Whether Bhagirath instructed Mangal Chand that nothing else than the complete reversal of the order would satisfy him, or whether he (if that, should in the opinion of the Judge, be impossible), expressed a readiness to give a charge upon his property is not clear. At any rate Mangal Chand, according to his own evidence, had, on the evening of the 7th of September an interview with Har Prasad Bhargava who seems to have told him in general terms that he would do what was wanted on payment of Rs. 2,000. The result of that interview was reported by Mangal Chand to Bhagirath who thereupon paid Rs. 200 to Mangal Chand and quite early on the morning of the 8th of September went to Mangal Chand whilst he was still in bed and handed him over Rs. 2,000. This Rs. 2,000 was made up of 12 notes of Rs. 100 each, which had been paid into his shop by various customers during the preceding day and of Rs. 800 in notes which he had purchased for cash from the firm of Ram Chand-Ramgopal and in this Rs. 800 were also five Rs. 100 notes. Therefore, Mangal Chand had in his possession 17 notes each of the value of Rs. 100. Bhagirath before handing over the 12 notes previously mentioned, took the precaution to write down their numbers. This fact is of prime importance in the case. Bhagirath and Mangal Chand then set out for the house of Har Prasad Bhargava. Mangal Chand entered, Bhagirath remained in the road. Mangal Chand paid over the 17 notes of Rs. 100 each to Har Prasad Bhargava, who thereupon told Mangal Chand that Bhagirath should make an application to have the order of the 31st of August cancelled. We might conclude this question of receipt of money by stating that on the 10th of September Bhagirath handed to Mangal Chand Rs. 200, and on the 14th a further Rs. 100, thus making up the whole Rs. 2,500. These two sums of Rs. 200 and Rs. 100 were paid according to Mangal Chand, on the direct instructions of the Judge, to the shop of Onkar Das Bagdia, the employer of Mangal Chand, with whom Har Prasad Bhargava had an account, and credit entries of the two payments, were made in the said account. To this we may add that Bhagirath did give to Mangal Chand an undertaking in writing to replace the 10 missing bags of cotton seed in the forthcoming season.

Bhagirath lost no time in adopting the suggestion of the Judge. He went at once to his Counsel, Mr. Damle, a gentleman of high social position and unimpeachable integrity, and the latter, knowing, of course, nothing of what had happened, went with Bhagirath to the Court of Har Prasad Bhargava. It did not appear to Mr. Damle convenient to file the application on that day. He told Bhagirath that it could not be done and advised him to wait until the 10th of September, two days later. Bhagirath disregarded this advice and managed to file on that day, without the knowledge of Dr. Damle, an application for the cancellation of the order. That application came up for hearing on the 10th. News was brought to Mr. Damle that the application was coming on. This surprised him a good deal but he proceeded to the

Court, and he and Counsel for the plaintiffs addressed the Court on behalf of their respective clients. As often happens in these cases, a middle course was suggested and Mr. Gupta for the plaintiffs said that his clients were willing for the surety to be released, if the defendants were able to disclose immoveable property to the value of Rs. 54,000 and were willing to give a charge upon it, and his clients were also willing, not that the books should be removed from the custody of the Court, but that copies should be made for the use of the defendants at the plaintiffs' cost. Mr. Damle, whilst still asking the Court for a decision on the merits of the application stated in effect that, if the previous order could not be set aside in its entirety, then his client was prepared to give a charge for Rs. 54,000 over his immoveable property, and that if the account-books could not be ordered to be returned, his clients would accept the copies as suggested by the plaintiffs. Thereupon the application stood adjourned until 15th of September, the Judge having announced that he would on that day pass an order.

On coming out of Court, Mr. Damle was clearly puzzled as to how it happened that Bhagirath had filed the application on the 8th, and more puzzled still when he, having told Bhagirath that he, Mr. Damle, could not attend on the 15th was informed that that would not matter. Mr. Damle then asked Bhagirath directly if he had approached the Judge and was told by Bhagirath that he could take it that way if he liked. In reply to a further question, Bhagirath said he had hopes that his application would be granted. The course which the arguments had taken on the 10th made it an easy task for the Judge to modify his previous order, and he did so modify it along the lines of the suggestions which had been made to him in Court.

We entertain no doubt that Bhagirath wanted nothing short of the complete reversal of the order, and the modification was far less than he had hoped to obtain. He was inclined to believe that Mangal Chand had not paid the money to the Judge. At an interview between Bhagirath and Mangal Chand at which the former expressed his dissatisfaction, Mangal Chand agreed to go and see the Judge, and this according to Mangal Chand having been done, the Judge assured him that, when Bhagirath showed his immoveable property to be worth Rs. 54,000 the surety would be released and he, the Judge, had done all that Bhagirath wanted.

At this time the Officiating District and Sessions Judge was Mr. Lachmi Narain. He had known Har Prasad Bhargava for four or five years and was on terms of friendship with him. At some time after 8 o'clock on the evening of the 19th of September, Mr. Lachmi Narain received information from a person, whose name in the public interest has not been disclosed, which led him to believe that Gajadhar, who was the plaintiff in the suit already mentioned, was going that night to the house of Har Prasad Bhargava, there to pay him a bribe of Rs. 5,000 in respect of a case in which the litigants came from the village Agar. Mr. Lachmi Narain went at once to the District Superintendent of Police but finding his gate closed proceeded to the bungalow of Mr. James the Deputy Superintendent of Police and together they returned to the house of the Superintendent of Police. His name is Mr. Neilson. Mr. Lachmi Narain narrated what he had been told, and the three of them proceeded towards the house of Har Prasad Bhargava. Enquiries from a waiting *tonga-walah* showed that Gajadhar had engaged him. Mr. Lachmi Narain went ahead of the other two men into the bungalow of Har Prasad Bhargava. On reaching the verandah he found Har Prasad Bhargava and Gajadhar together. At this time it was nearly 11 o'clock at night. He appears to have spoken rather sternly to Gajadhar for being there at that time of night, and Mr. Lachmi Narain then returned to the road where Mr. Neilson and Mr. James were standing. The sinister fact of Gajadhar, a litigant in at least two cases pending before Har Prasad Bhargava, being present in the house, confirming as it did, at least, a part of the truth of the information given to Mr. Lachmi Narain, determined these three gentlemen, after some consultation, to procure a search warrant. Mr. Neilson went to the District Magistrate for that purpose, whilst Mr. Lachmi Narain and

Mr. James went into the hall of the bungalow of Har Prasad Bhargava and sat there. After a short time Mr. Lachmi Narain feeling thirsty, went away, leaving Mr. James alone with Har Prasad Bhargava in the house. After having refreshed himself and rested Mr. Lachmi Narain proceeded on his bicycle to the bungalow of the District Magistrate. By this time the warrant was prepared, and he and Mr. Neilson returned to the bungalow of Har Prasad Bhargava in a tonga.

On Mr. Lachmi Narain's departure, Mr. James sat with Har Prasad Bhargava and Gajadhar, and during the period of waiting Har Prasad Bhargava said that he wanted to speak to Mr. James in confidence and asked him to go outside. Mr. James objected to his leaving the house, Har Prasad Bhargava said he could not speak in the presence of Gajadhar. Mr. James told Gajadhar to stand in the verandah. Before going out Gajadhar offered to be searched. Mr. James declined to do this. Gajadhar went out to the verandah and a moment later Har Prasad Bhargava said to Mr. James "Gajadhar is bolting, shall we run and catch him." Mr. James negatived the suggestion and Gajadhar did in fact run away. Har Prasad Bhargava became increasingly nervous at the absence of Mr. Lachmi Narain, and on two occasions wanted to leave the house to search for him. Mr. James stated that he himself was not going to leave the room, neither would he permit Har Prasad Bhargava to do so. Har Prasad Bhargava then suggested that a servant should be sent to look for Gajadhar (*sic*) "Gajadhar" may possibly be a lerical error for Mr. Lachmi Narain but it is unimportant. As the servant was going out, Har Prasad Bhargava followed the servant and whispered something to him which Mr. James did not hear. A door which had previously been shut was noticed by Mr. James to be open and from the place where he was seated he could see a bed and underneath it certain boxes. The servant was in that room, and he became suspicious of the servant's movements. In Mr. James's belief, Har Prasad Bhargava got up and seated himself in a chair directly between Mr. James and the open door, so as to shut out from him a view of the interior of the room. Thereupon Mr. James told that "that game" would not do with him and that he intended to watch the servant and the boxes. Har Prasad Bhargava enquired whether it was absolutely necessary that the search should be made that very night and proposed that the room should be looked and a Police guard put over it. Being told that the search would take place that night Har Prasad Bhargava said that he would like a friend, who lived in the same compound to be present. The friend was sent for, came and asked, why he was wanted. Har Prasad Bhargava did not explain why the friend had been sent for, apologised for sending for him and told him to go back to bed.

At about 1 o'clock in the morning of the 20th of September, Mr. Lachmi Narain and Mr. Neilson returned with a search-warrant. That search-warrant did not specify the sum of Rs. 5,000 as the amount of the bribe which Gajadhar was suspected to have paid to the Judge but did specify Gajadhar by name as the suspected bribe-giver. Har Prasad Bhargava was informed of the search-warrant, asked to see it, and was shown it, and Mr. Lachmi Narain then told Har Prasad Bhargava that, if he would tell them about the matter and give up any money that he had received, or produce any large sums of money that he had in his house, it would obviate the trouble and disgrace of a search. According to Mr. Lachmi Narain, Har Prasad Bhargava told him that he had no money in the house. Mr. Neilson says that in the discussion with regard to the procedure of search 'Mr. Bhargava said that he had not taken money in his life, and various things like that. He said that we would not find any money.' Mr. James confirms these two witnesses, asserting that Har Prasad Bhargava said that he had no large sums of money in his boxes. There is no doubt that Har Prasad Bhargava did deny strenuously that he had received any money from Gajadhar that night or on any other occasion. There seems equally to be no doubt that he denied in the plainest terms that any considerable sum of money would be found in his house. Thereupon with a view to avoid publicity Har Prasad Bhargava was asked to choose whether the search should be

made in the formal manner by the introduction of two independent witnesss, in which event the search of his house would become a matter of general knowledge, or whether he was prepared to allow the search to be made by the three gentlemen then present. He expressed his willingness to the latter course, and thereupon the search began. The boxes were found to contain clothes. Amongst these clothes certain securities were found with which we need not concern ourselves. No less than Rs. 14,000 were found in notes of various denomination in the pockets of a trouser, a coat and an overcoat, and in all Rs. 15,090 were found. A list of actual number of the notes and the value of them was prepared by Mr. James and signed by Har Prasad Bhargava. Owing to the pressure of time, the individual number of each note was not taken. Whilst these lists were being made out Mr. Lachmi Narain hurried away to catch train for Nagpur to see the Judicial Commissioner. As he was going he was asked to send a seal from his house and did so.

The garments which had contained the notes, the securities and the notes themselves were placed in a box provided by Har Prasad Bhargava, who locked it, sealed it with Mr. Lachmi Narain's seal and retained the key and the seal in his possession. The box was taken away to the Police Magazine. Mr. James locked the Magazine and retained the key of that Magazine until the 26th of October on which day the box was opened.

When Mr. Lachmi Narain arrived at Nagpur, Mr. Hallifax was acting as Judicial Commissioner, and he suspended Har Prasad Bhargava. He ordered him to come to Nagpur, and he undoubtedly made every proper endeavour to bring home to Har Prasad Bhargava the great importance of his accounting for the possession in his house of so large a sum of money. Har Prasad Bhargava had at the time of the search given to Mr. Lachmi Narain, Mr. Neilson and Mr. James no explanation of any kind as to how it happened that so much money was found; he having a few minutes previously asserted that no money was in the house. He maintained the same attitude of reserve and silence with Mr. Hallifax, and on the 25th of September, Mr. Hallifax put in writing a plain definite question, asking him as to the way in which this money came into his possession, and he warned him that a failure to answer would be very much to his disadvantage. On the 30th of September at an interview with Mr. Hallifax, when the inferences to be drawn against Har Prasad Bhargava from his obdurate silence were clearly pointed out to him, he expressed his willingness to put in a written explanation, which would be sent in a sealed envelope, not to be opened unless and until a criminal case was instituted and proceeding started against him, and he said he would send that explanation during the course of the day. That sealed explanation was before Khan Bahadur Jacob, and we will refer to it at the proper time.

It is now necessary to go back to the 20th of September and succeeding days, and mention one or two other details. Not the least important of these is that on the morning of the 20th of September Ram Partap, the servant of Har Prasad Bhargava, came to Mangal Chand and said that Har Prasad Bhargava wanted to see him. Mangal Chand said that he would go to Har Prasad Bhargava but in the meantime Mangal Lal (presumably another servant of the Judge) came with a letter asking Mangal Chand to proceed to Seoni and bring back to Akola the brother of Har Prasad Bhargava, by name Ajudhia Prasad, a Barrister. Mangal Chand undertook the commission and Ajudhia Prasad came to Akola, had an interview with the Judge, and left immediately for Bombay. It is important to notice that he returned from Bombay to Akola before Har Prasad Bhargava expressed his intention of giving an explanation in a sealed cover. Certain comments were made by the learned Government Advocate as to the object of Mr. Ajudhia Prasad's visit to Bombay and the character of the evidence given by him, which we shall discuss later.

On the 23rd of September the District Judge caused to be circulated a notice from the Local Government that no proceedings would be taken against any persons giving evidence of having bribed the Judge. The exact text of the telegram

sent by Mr. Hallifax to the District Judge was "Inform all concerned in bribery case that no criminal action will be taken by Government against any witness who makes full and true disclosure." On that same day, the 23rd, the members of the Akola Bar Association chose three prominent members, who were to sift such evidence as might be forthcoming and render such assistance to the Police as they might require.

On the evening of the 26th of September, Bhagirath with two companions came to consult Mr. Damle in connection with another case, not that of Gajadhar against Bhagirath. At the conclusion of this particular business, Mr Damle asked Bhagirath to remain behind as he wished to speak to him privately. He asked Bhagirath whether he knew that the house of Har Prasad Bhargava had been searched, whether he knew that Gajadhar was found at the house of Har Prasad Bhargava, that the search was instituted by Mr. Lachmi Narain, and whether he was aware of the undertaking given by Government not to prosecute any witness who made true disclosure. Bhagirath replied that he knew all of those things. He was then asked if he was the man who had given the information to Mr. Lachmi Narain as to the intended visit of Gajadhar on the night of the 19th of September and the alleged intended bribe. To that he made no answer. Mr. Damle seems to have said to Bhagirath that the search of the house was a good thing for the litigant public, and Bhagirath agreed that it was. Mr. Damle, who had, of course, in his mind the curious proceedings with reference to the application filed on the 8th, heard on the 10th and decided on the 15th, pressed Bhagirath about this. He explained that he Mr. Damle, was one of the three members appointed by the Bar Association to look into the matter. He referred to the effect of the Government's undertaking and eventually Bhagirath told Mr. Damle the story which forms the backbone of the criminal charge ultimately preferred against Har Prasad Bhargava. He explained the giving of the Rs. 2,500 to Mangal Chand and the promise of an order in his favour, of his dissatisfaction with the order, of his interview with Mangal Chand at which Mangal Chand said that of Rs. 2,500 he had given the Judge Rs. 2,000 and then and there he, Bhagirath, having come to the interview, quite unaware that Mr. Damle would touch on this matter, produced a note-book and showed to Mr. Damle the numbers of 12 notes each of the value of Rs. 100 which he said he had himself written in that book, and he stated that these were amongst the notes handed by him to Mangal Chand for delivery to the Judge. Bhagirath added that it was probable that those notes might be found in Har Prasad Bhargava's possession. Mr. Damle took the book, looked at the numbers and saw that they were written in ink. Mr. Damle wished to retain possession of the book but Bhagirath could not at the moment make up his mind as to whether he was going to make disclosure or hold his tongue and he went away. He did not return to Mr. Damle to say whether he would give evidence but by the 4th of October the Police, acting on information, interviewed him. He then handed over a slip of paper (Exhibit P. III) and later in the same day through his nephew Phul Chand made over a note-book (Exhibit P.-V) to Inspector Anant Ram Joshi. When giving evidence before Khan Bahadur Jacob, Bhagirath said that (Exhibit P.-V) was the very book which he had shown to Mr. Damle and he stated that the page upon which the numbers were written by him had become loose and he had instructed Phul Chand to rewrite the numbers of the notes on a firm sheet of the same book and that that had been done. That was done on the same day, namely, 4th of October on which day undoubtedly Bhagirath did hand to the Police a slip of paper containing the numbers of 12 notes. Of that latter fact there can be no question. Mr. Damle is of opinion that the book which he took in his hand was a book with a paper cover, whereas this book has a flexible leather cover. There has been considerable argument on the question of the non-production of the page upon which the numbers were originally written in with ink which we will deal later. The fact, however, is undoubted that Bhagirath was able to hand to the

Police Inspector on the 4th of October a piece of paper (Exhibit P. III) on which was written a detailed specification of 12 notes each of Rs. 100 by their serial numbers and places of original issue.

On 19th of October, Har Prasad Bhargava tendered his resignation to the Local Government on the ground of alleged ill-health. That resignation was not accepted.

On the 22nd of October, Har Prasad Bhargava having apparently learnt that the Police had numbers of certain notes, asked that these numbers might be disclosed to him. The Police, however, preferred that the box should be opened and the numbers of the notes then and there read out and compared with the list. A meeting was arranged for the 26th of October, and on that date Har Prasad Bhargava attended, and there were present Mr. Lachmi Narain, Mr. Neilson, Mr. James, Mr. Rachpal Singh, the Deputy Superintendent of Police, Mr. Abdul Rahim, Khan Sahib Aman Khan and Anant Ram Joshi of the C. I. D. The box having been brought from the Police Magazine was examined by Har Prasad Bhargava, a comparison made of the seal and its imprint with the original seal, and Har Prasad Bhargava produced the key and opened the box. No suggestion was made by him that the box had been in any way tampered with. The taking of an inventory was commenced. The number of each note was called out and taken down and there were found to be in the box 10 notes each of Rs. 100 in value which exactly corresponded with the numbers given on the slip (Exhibit P, III) by Bhagirath to the Police on 4th of October. These 10 notes were absolutely correct both as regards the serial number of the note and as regards the letters and figures which are placed upon the note for the purposes of identifying the place of original issue, and as regards value also. When the note for Rs. 100 and numbered P. D/37-25092 (found in the box) was read out, it was remarked that in the list given by Bhagirath, as aforesaid, there was a number P. D/37-27092, that is to say the figure 7 was on the slip whereas it should have been 5 to make it in conformity with the note found. Again, when T. D/81 89981 (also found in the box) was read out there was found on the slip T. D/89-88981, Therefore, there was a discrepancy between the serial number of the note and also 89 was given instead of 81 as the denominator over T. D. When the fact became officially known that the numbers of ten of the notes found in the box tallied precisely with the numbers given by Bhagirath and that as regards two others there were discrepancies of a minor character, which might be attributed to carelessness in copying, the Government ordered the prosecution of Har Prasad Bhargava.

The case for the prosecution was prepared with the utmost care. Every witness who could throw any light upon the charge was put into the witness-box. Ancillary matters, such for instance as the purchase of notes worth Rs. 800 from the shop of Ram Chand-Ram Gopal to supplement the Rs 1,200 available in Bhagirath's shop on the evening of the 7th of September, were put before the Magistrate, as were each and every of the matters to which we have hitherto referred.

Har Prasad Bhargava was asked by the learned Magistrate at the proper time and in the proper way whether he received in his capacity as a public servant a bribe of Rs. 2,000 from Bhagirath. He adopted the same course before the Magistrate as he adopted before the acting Judicial Commissioner. He wished to reserve his statement and his answers until he had heard the whole of the prosecution evidence, including cross-examination. He alleged, however, that he was wholly innocent, and the evidence relating to the alleged bribery was false, concocted, fabricated and obtained under very extraordinary circumstances. We must mention at once that his attitude of silence in this matter has extended even up to this day as to the circumstances under which the evidence was false, concocted, fabricated. Beyond his mere assertion there is no trace or suggestion of any truth in this allegation. When examined under section 364 of the Code of Criminal Procedure, he reserved his answers as to

whether 10 specified notes bearing specified numbers were found amongst the notes at his house, also as to whether the notes and securities were on the 26th of October found in the box which had been locked and sealed in his presence, whether he had the key and seal always with him, whether the locked and sealed box was opened in his presence, and although he had on 26th of October signed the inventory which correctly recorded the numbers of these ten notes, he reserved his answer to the question as to whether the numbers of the 10 notes of Rs. 100 each tallied with the numbers which Mr. Anant Ram Joshi who was the C. I. D. Inspector, had read out.

The prosecution called upwards of 40 witnesses, and these witnesses if truthful, presented an overwhelming case against Har Prasad Bhargava. The question for our decision is precisely the same as that which was before Khan Bahadur Jacob and Mr. Prem Narain. Does the evidence show beyond any reasonable doubt that Har Prasad Bhargava on the dates alleged received in all a sum of Rs. 2,000 as a bribe from Bhagirath through the hand of Mangal Chand? We have listened to the evidenee and arguments for $2\frac{1}{2}$ days, and we are satisfied without the slightest doubt of any kind that the answer to that question must be in the affirmative and that the admirable judgment of the learned Magistrate, Khan Bahadur Jacob, is correct. In this Court Har Prasad Bhargava had the advantage of the advocacy of Mr. Dillon, and appreciating as we did the great difficulties with which he had to contend principally as regards the assertion by Har Prasad Bhargava that no money would be found in his house, the immediate finding of the money, the giving of the slip by Bhagirath to the Police on the 4th of October, the fact that that slip contained accurately the numbers of 10 notes found in Har Prasad Bhargava's box, and the amazingly determined silence throughout of Har Prasad Bhargava, we encouraged Mr. Dillon to elaborate his client's case from any point of view, in any direction, in any way that he could. He chose the line which had for some reason appeared convincing to Mr. Prem Narain, that is to say he picked out from this record of 70 printed foolscap pages of evidence and voluminous accounts and other documents some diserepancies in the evidence of the various witnesses. As regards Bhagirath and Mangal Chand, Mr. Dillon rightly said that if we disbelieved them the whole case would fall to the ground. But we see no reason whatever to disbelieve them. Bhagirath was undoubtedly a litigant in the Court of the Judge. He was undoubtedly seriously oppressed by the order of attachment. He knew of the friendship between Mangal Chand and the Judge, a friendship evidenced by the fact that on the morning of September 20th, it was Mangal Chand and not any other person that the Judge chose to send to Seoni for his brother. That there were on the evening of the 7th of September amongst the monies taken during the day twelve 100 rupee notes, admits of no doubt. That Bhagirath bought Rs. 800 worth of notes from Ram Chand-Ram Gopal is proved, and these were the notes worth Rs. 2,000 which Bhagirath says he handed to Mangal Chand on the morning of the 8th of September. Mangal Chand produces the undertaking by which he secured the promise of Bhagirath to make good the 10 bags of cotton seed. Mangal Chand says that he handed over 17 notes, each of the value of Rs. 100 to the Judge on the morning of the 8th. Neither Mangal Chand nor the Judge knew that Bhagirath had taken the numbers of the 12 notes which he found to be in his shop on the evening of the 7th, amongst other monies as the result of the day's trading.

Mr. Damle corroborates Bhagirath with regard to the conversation between them on the 10th of September, in which Mr. Damle asked Bhagirath definitely if he had approached the Judge. Bhagirath and Mr. Damle are agreed that on the 26th Mr. Damle without any previous intimation, kept Bhagirath back after his consultaion had finished and questioned him in the manner we have described. The Police, Phul Chand and Bhagirath are in agreement when they say that the slip containing the ten correct numbers was handed to the Inspector by Bhagirath on the 4th of October. When Mr. Dillon had to

approach this question of the ten numbers, he dealt with it in this way. He said definitely that there were only two alternatives, one was that the case of the prosecution was true, the other was that Har Prasad Bhargava had in fact engaged in some honest but undisclosed transaction with some body unnamed had unknown, whereby he had acquired these ten notes, and that in some unexplained way Bhagirath had come to know of these numbers and had given them to the Police in the belief that those notes would be in Har Prasad's possession. The immense difficulty in the way of that explanation is that if it were the fact, Har Prasad Bhargava would himself know with whom he had been doing so substantial a business as to receive the notes of Rs. 100 each, and it must be said at once that this suggestion was not put to Bhagirath in cross-examination, nor is it supported by the slightest shred of evidence, and indeed as we shall see later when the so-called explanation of Har Prasad Bhargava contained in the sealed envelope was opened, that explanation, kept back as it was until the last moment, was most designedly vague and as regards the material paragraph is most certainly untrue. The one outstanding feature of this matter is that the plain direct evidence of Bhagirath and Mangal Chand has never been and cannot be effectively challenged. It is said that Mangal Chand has made the evidence of his negotiations with the Judge as regards the terms of the desired order, fit in with the order sheet. That is, of course, possible, but the much more probable view is that at his interview with the Judge it was made quite clear by the Judge that he, having spoken in such emphatice terms when passing the order of the 31st of August, and having expressed his belief in the plaintiffs' affidavit, could not rescind the order in its entirety, and Mangal Chand, even if he were exceeding his instructions which he received from Bhagirath, may well have discussed with the Judge the charge on the immoveable properties as a security and the release of the surety.

Mr. Prem Narain seems to us to have been looking at the matter, not in a broad manner at all but to have been seeking for tiny discrepancies such as must inevitably occur, and on them to have come to the conclusion that Bhagirath and Margal Chand were not telling the truth. A comparison of his judgment and his reasoning with that of the judgment and reasoning of Khan Bahadur Jacob will show how much greater care and thought the latter gave to his decision than did Mr. Prem Narain. Mr. Prem Narain omitted to make any reference to the incidents to which Mr. James had spoken when he was left alone with Har Prasad Bhargava, on the night of the 19th of September. He omitted to make any reference to the appeals of Har Prasad Bhargava to Mr. Lachmi Narain to save his honour. He omitted also the most important statement that Har Prasad Bhargava asserted that no money would be found in the house. He does not discuss the immense significance and bearing of the fact that by some means or other Bhagirath was able to furnish to the Police on the 4th of October the slip containing the number of ten notes in every way correct. He looks with great gravity upon the circumstances, already pointed out by us, that, of the 12 notes on the slip Exhibits P-III) one was incorrect in one figure and the other incorrect in two. He does not discuss the likelihood of these being mistakes, made either in the original pencil entry or made when copying out the slip or in making the original entry. He does not consider whether they were clerical errors, although the frequency of clerical errors in almost every document copied in this country might easily have led him to that conclusion. On the other hand he assumes $\frac{TD}{89}$ 889o1 to have been an invented number because evidence was given to show that the note of that particular number had been destroyed by the Currency Office of Madras on the 20th of January 1920. He makes no mention of the conduct of Har Prasad Bhargava who obstinately from the first withheld all information, and who as we shall show not only set up in the sealed envelope a designedly incomplete statement lacking in particularity but cross-examined a witness to bring out a story which he must have known to have been untrue. Without wishing to do Mr. Prem Narain any injus-

tice, we have an uncomfortable feeling that he did not deal with these aspects of the case, because he appreciated that they were unanswerable and that a consideration of them led inevitably to a conclusion of guilt. His manner of dealing with the entries in the account books of Bhagirath is very curious. He could hardly have supposed that Bhagirath would enter first Rs. 200 then Rs. 2,200, then Rs. 200 and finally Rs. 100 under the description of 'expenses incurred in bribing the Judge by the hand of Mangal Chand.' Bhagirath chose one of the customary methods employed in this country when bribes are given. Mr. Prem Narain can hardly fail to be aware that the bribe giver either makes no mention at all in his books of account of the alleged bribe, or he enters it in the name of non-existent person, or he incorporates it into the account of a man who is actually engaged in transactions with him, making later on a corresponding credit entry in favour of that person. Bhagirath in substance chose the latter method.

We may as well now discuss the entries in Bhagirath's books in relation to the whole transaction. On the morning of Wednesday, the 7th of September 1921, the cash balance with which his firm opened its business was Rs. 192-5-6. The firm does a very considerable business as is evidenced by the fact that they received from various named sources over Rs. 12,000 on that day, and paid out over Rs. 7,000. The actual money remaining over at the end of the day was Rs. 3,193 cash, Rs. 1,202-8 notes (being made up of 12 notes of Rs. 100 and a single note of Rs. 2-8) and 54 change. There were certain items which were included in what is called a 'suspense account,' and amongst those appears "Subju-patel 200." Bhagirath has explained that he took that 200 from the shop, entered it in the name of Sabju Patel with whom his firm had some dealings, and that was the first 200 paid to Mangal Chand. In the suspense account of the 8th of September there is an item of Rs. 2,201 in the actual name of Bhagirath. The 1 has a special significance, because according to Bhagirath he took 12 notes from the shop, of which we have already spoken, and bought Rs. 800 worth of notes with cash. There was manifestly plenty of cash in the shop to enable this to be done. The 1 which makes the figure Rs. 2,201 was the actual rupee paid by him at the rate of 2 annas per 100 for the notes, and witnesses have been called whose books have been produced, who have amply proved this transaction of the buying of these notes. On the 8th of September Bhagirath transferred from the name of Subju Patel in the suspense account the sum of 200 to himself, Bhagirath, adding to it the Rs. 2,000 plus 1, making thus in all Rs. 2,201. The sum of Rs. 2,200 was up to that date, the 8th of September, the mathematically exact amount which according to his story and that of Mangal Chand had been handed over. On the 9th the sum entered appears in this suspense account still in the name of Bhagirath *viz.*:—Rs. 2,201. Two hundred more was paid on the 10th to Mangal Chand and appropriated by him, as he says, to the reduction of a liability of Har Prasad Bhargava in respect of the shop of Onkar Das, and on the 10th of September the figure in the books against Bhagirath has been increased from Rs. 2,201 to Rs. 2,401 and at this date appears, not in the suspense account, but as a debit against Bhagirath in his personal ledger. On the 11th September an entry is made, debiting Sheoji Patel of Bargaon with Rs. 2,200 cash paid through Bhagirath on the 9th of September in Bargaon, and a further entry of 200 paid on the 10th September, presumably at Akola. Bhagirath's own ledger account is formally adjusted by a corresponding entry on the opposite side of the cash-book. Bhagirath has explained that this was an entry which cloaked up the real nature of the transaction, and that in fact the firm never advanced any of these monies to the man who is described as Subju Patel, Sheoji Patel, who when giving evidence described himself as Sabju Uddin. Sabju Uddin corroborated Bhagirath and said that he had borrowed none of this money. It was not suggested to Bhagirath that he went to Bargaon, some three stations away from Akola on the 9th of September, and it is evident from looking at the complete account which we have got here, that in cases where any expenses were incurred in making journeys those

expenses are entered. The story is, therefore, intelligible and in consonance with one's experience in these matters, and the entries in the account-book in respect of this item entirely corroborate the story of Bhagirath.

The next matter is as regards the Rs. 100 which was the final payment made on the 14th of September. The name of a man Phul Chand appears in the suspense account of the 12th of September in respect of a sum of Rs. 33; and on the 15th of September there is an item which shows that Rs. 100 cash was obtained from the firm of Sheo Lal Surajbhan. As far as that day's account goes, this sum of money simply appears amongst the cash in hand at the close of the day and Phul Chand's suspense account still stands at Rs. 33 only. On the 16th of September the same sum of Rs. 100 appears again as cash received from Sheo Lal Surajbhan but this entry is obviously made through an oversight, and is indeed so described in the books and is adjusted by a corresponding entry on the debit side. The payment of Rs. 100 being according to the evidence, the last instalment of the bribe remained to be adjusted and this was done by increasing Phul Chand's suspense account from Rs. 33 to Rs. 133.

In the Trial Court there was no clear elucidation of the precise circumstances under which these entries relating to this Rs. 100 came to be made. We could suggest more than one explanation but it is not incumbent on us to theorise in the absence of direct evidence. We think it sufficient to say that the "oversight" of the person or persons responsible for these entries of September 15th and September 16th before they got this item satisfactorily adjusted, seems to us just the sort of accident which was bound to occur sooner or later, when people were engaged in preparing a series of account-book entries which should record the payment of a bribe without anywhere disclosing it as such. Phul Chand, therefore, was shown as a debtor to the extent of Rs. 133. On the 28th of September that entry against him was wiped out and Bhagirath's name substituted.

Thus it appears that all these separate sums of money amounting to Rs. 2,500 do find a record in the business books of the firm of Bhagirath's in the amounts and under the dates on which Mangal Chand has asserted the acceptance of like amounts.

To say as Mr. Prem Narain does that the book entries contradict Bhagirath's evidence borders, in our opinion, on the perverse.

If in truth Bhagirath did lend to Sabju Uddin Rs. 2,400 as *prima facie* appears from his books, it is a singular circumstance that he should be willing to go into the witness-box and swear positively that he never lent that money and thus destroy all hopes of its ultimate recovery. Sabju Uddin says that he had previously told Bhagirath that he might want Rs. 2,000. It turned out later that he wanted Rs. 750 only. Having heard of the attachment order he decided not to go to Bhagirath to borrow money but went elsewhere. We believe Sabju Uddin and further are of opinion that as regards the books of Bhagirath they fully confirm his evidence.

It will be remembered that the last Rs. 300 payable to the Judge was not received direct by him but was, according to Margal Chand, paid over to the shop of Onkar Das at the Judge's request. Mangal Chand says that he paid these two sums over. Unquestionably, the fact is, that the receipt of the Rs. 200 and of the Rs. 100 are duly credited in the books of Onkar Das on proper dates and, therefore, Onkar Das admitted as against Har Prasad Bhargava the reduction of his indebtedness by Rs. 300. There is, however, a discrepancy in the manner in which the Rs. 100 was paid and the defence have relied on it as they are entitled to do so. It is stated in the *pakka rokar* "Credited in the name of Har Prasad Bhargava Sahib Sub-Judge, cash paid in person." Har Prasad Bhargava does not suggest anywhere that he paid Rs. 100 or any other sum to the shop of Onkar Das as asserted in that entry, but there is the fact, vouched for by Mangal Chand and other witnesses that Rs. 300 was brought by Mangal Chand to the shop of Onkar Das in instalments of Rs. 200 and Rs. 100 with the request that they should be credited to the account of the Subordinate Judge, in

the books of that firm and that this was done.

We now come to another matter in which the Judge, Mr. Prem Narain, has in our view over-estimated the effect of the evidence. It must strike any body as a regrettable circumstance that the original entry in ink which Bhagirath showed to Mr. Damle on the 26th of September in his note-book, should not have been available on the trial of this matter. The position of Bhagirath after the 26th of September was that he was taking time to make up his mind whether he should communicate to the Police the matters which he had disclosed to Mr. Damle. He had not made up his mind by the 4th of October, and on that day Ganesh Prasad, the head constable, sought him out. Bhagirath says, 'I at once felt that I must have been called in connection with the notes.' He then describes that the original page with the writing in ink was lose and because he thought that the Police might make trouble with him because of the looseness of the page, he took down himself the numbers on a slip (subsequently Exhibit P-III) and got Phul Chand to copy in the note-book the numbers " as I did not want to produce the loose sheet before the Police, because when I showed the book to Mr. Damle the sheet was not loose." This was, of course, an exceedingly foolish thing to do, because, as it happens there would have been nothing suspicious in the working loose of the sheet of the book. We have submitted the book which was produced as Exhibit P-V to a careful examination. It is a small book about 5 inches by 4, and originally about half an inch thick, covered in common flexible dark brown leather. It contains a large number of rough entries relating to Bhagirath's trade operations, and there are certainly not less than five places where a one-half sheet has been wholly torn out, with the result that the corresponding half sheets, whether written upon or unused, are actually loose or become loose very easily. Therefore if the loose sheet had been left in its place it would probably have appeared that the cause of its looseness was the tearing out at some time previously of the corresponding half sheet at the other side of the book;—that is to say, if the numbers were written on the right hand side of the book, there would have proved on examination to have been no corresponding half sheet on the left hand side of the book, the book being made up of sheets of paper folded in half and sitched together.

Bhagirath having handed over the slip with the 12 numbers upon it to the Police and Phul Chand having copied as he believed, the 12 numbers from the loose leaf, Bhagirath tore up the loose leaf. The book was handed to Police and Bhagirath and Phul Chand say positively that the book is the same, although the original page is not there. Mr. Damle's view that the book is not the same is guardedly expressed. He states that the note-book shown to him by the Police is not the note-book which he saw on the 26th September, and he then gives his reasons and as this has been considered by the defence to be an important matter, we set out exactly what he says:

"The note-book as far as my recollection goes had a brown coloured paper covering. The size was like the size of Exhibit P.-V but I cannot say if it was so thick. As I do not find the double row of entries in ink in the book and there are only 11 numbers in this book and the cover is different, I am inclined to say that the proper note-book has not been produced." The two main reasons which inclined Mr. Damle to believe that the book was not the same, were that he thought that the book shown to him had a paper cover and may not have been so thick as the one produced by the Police. We have come to the conclusion that the book shown to Mr. Damle and the book produced by Bhagirath is one and the same, and that Bhagirath and Phul Chand have told the truth about this matter. Except on credibility it is not of great importance in the case, because there is the outsanding fact which cannot be too often repeated that Bhagirath was on the 4th of October, the day on which the book was handed over to the Police, able to furnish to them a list of the numbers of 10 notes entirely correct and of two notes incorrect in the manner which we have described. Curiously enough

in the pencil entry in the book itself there are only 11 entries. It happened that there were a series of notes $\frac{P.\ D.}{37}$ 25092, 25093, 23094. In the book $\frac{P.\ D.}{37}$ 25094 appears, but not 25093, and it looks as if the figure 3 was written first and the figure 4 written over it. At all events the fact is that $\frac{P.\ D.}{37}$ 25093 does not find a place in the book but it was on the slip handed by Bhagirath to the Police Officer and was in fact found in Har Prasad Bhargava's box on the 26th of October. Khan Bahadar Jacob took pains to make clear his belief in the reliability of Bhagirath and Mangal Chand. We believe in the truth of their evidence also, and we accept without hesitation the account which Mr. Lachmi Narain, Mr. Neilson and Mr. James have given. No attack appears to have been made upon any of these latter witnesses nor could any attack conceivably be made. We have previously adverted to the conduct of Har Prasad Bhargava, and we propose now to consider how he shaped his case before Khan Bahadur Jacob, before the Sessions Judge and finally before us.

It will be remembered that on the 27th of September a letter was sent at the instance of the Acting Judicial Commissioner to Har Prasad Bhargava enquiring *inter alia*, "in what way and when each of the notes of Rs. 14,000 or Rs. 15,000 found in your bungalow on the night of the 19th come into your possession." He was told that if he wished to make answer he was given time until the 29th of September in which to do so. On the 30th of September Har Prasad Bhargava called on the Acting Judicial Commissioner and said he would submit his explanation in a sealed cover not to be opened unless and until a criminal case was instituted against him and not until the trial had actually commenced. The explanation was sent and the sealed envelope was opened in the course of the criminal trial. It contained the following paragraph:—

2. "The notes found with me on the 19th instant belong to me, Rs. 9,900 and odd worth were received by me from my Bombay broker in the last Mohurram holidays in settlement of accounts and include the sum of Rs. 7,000 on pledge of Hokam Chand Mill Shares and Rs. 4,000 worth notes were received by me from another Bombay broker of mine in the first week of August last on account of money due to me on an advance made last year. The rest of the money consisted of my savings. It is not possible for me to remember and account for each note separately."

This paragraph appearing as it does over the signature of a Judge, who as evidenced by an order in the Bhagirath case, was aware of the importance of particularity, impresses us unfavourably. As regards both these alleged transactions why in each case was not the full name and address of the alleged broker given instead of their identity being vaguely referred to as "my Bombay broker" and "another Bombay broker of mine" and why was not each transaction (if either had any existence) vouched for by documents such as accounts, letters, etc.? To these questions Mr. Dillon has been unable to give any answer. The fact is that in our belief, the statement is untrue. At the trial nothing would have been easier than these most vital allegations to be proved. The Government-Advocate's suggestion, when dealing with what we regard as the most unsatisfactory evidence of Mr. Ajudhia Prasad, was that the latter went to Bombay to secure the assistance of brokers and to fabricate a defence but that he was unsuccessful. A perusal of Mr. Ajudhia Prasad's evidence shows that he was very unwilling to answer any question as to his doings in Bombay. Having said that he went to Bombay to take legal opinion regarding the search of his brother's house he was asked "beyond obtaining legal opinion did you do any other business." He replied "the question is indefinite and so I cannot answer." He was then asked "did you do anything relating to money matters of your brother, or yours, or other brothers." To that he gave the following reply, "the question is indefinite and I have not understood it and I cannot answer it." The Court then took him in hand and extracted some kind of a reply. In cross-examination Mr. Ajudhia Prasad stated that Har Prasad

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Bhargava was arranging to provide him with Rs. 20,000 and was going to bring it to Seoni where he, Har Prasad Bhargava, was expected to arrive before the 20th of September. If that is a true statement Har Prasad Bhargava would not on the night of the 19th have denied that he had any money in the house but would have said at once that he had a very large sum which he had collected for the purpose of taking to his brother. He would also, in that event, have had no difficulty in demonstrating the sources from which it had been obtained. We have, however, no doubt that the story of the suggested loan by Har Prasad Bhargava to Mr. Ajudhia Prasad is false.

The prosecution put into the witness-box one Hazari Lal for the formal proof of a document. Under cross examination by the defence he disclosed a remarkable story which Khan Bahadur Jacob has described as "transparently false" and with which description we agree. Mr. Dillon showed good judgment in not referring to it in any way. Hazari Lal lives at Seoni—the same place at which Mr. Ajudhia Prasad resides. He says that at sometime before the 15th of September he had previously seen Har Prasad Bhargava and had been asked by him to bring some money from "Murari Lal of Bombay," that Har Prasad Bhargava had given him a letter authorizing him to collect it, that he had handed over the letter to "Murari Lal" and had received in return about Rs. 9,900. He says that about the 15th or 16th of September he handed to Har Prasad Bhargava at Akola the money so obtained. Amongst the notes were 70, each of the value of Rs. 100 and for some reason which he does not give he had written down the value and currency number of all the notes including these 70. Referring to the paper on which these numbers are alleged to have been written he said "I think that either I tore off the paper and left at Bhagdia's shop or left the paper under the *gaddi* of Onkar Das Bhagdia's shop. Mangal Chand sits on the same *gaddi*."

At this stage it need hardly be said that "Murari Lal," was not called to give evidence of his transactions with Har Prasad Bhargava, or to produce the letter or books of account, nor is there any reliable evidence which suggests that "Murari Lal" has any existence in fact. The underlying suggestion appears to be that Mangal Chand found the pieces of papers which contained amongst others the numbers of the 70 notes of Rs. 100 each, communicated some at least of these numbers to Bhagirath, told him they had been paid to Har Prasad Bhargava, and thus enabled Bhagirath to supply information to the Police, by means of Exhibit P-III. In cross examination no question of this kind was put to Mangal Chand, and as a proved friend of the Judge, Mangal Chand was hardly likely to engage in a conspiracy, to ruin him. If he had originally given the numbers innocently to Bhagirath nothing would have been easier for Mangal Chand to explain in Har Prasad Bhargava's interest, the remarkable manner in which Bhagirath came to know of the number of the notes subsequently found in Har Prasad Bhargava's possession.

Again we emphasise that if in truth Har Prasad Bhargava had received Rs. 9,900 only a day or two before the search, that fact must have been fresh in his mind on the evening of September 19th; and similarly the alleged facts in relation to the Rs. 4,000.

In his written statement he objected to the jurisdiction of the Court and denied the taking of any money from Mangal Chand on behalf of Bhagirath as a bribe. He attributes the "raid" of his house to a visit paid a few days before by Mr. Lachmi Narain to Sir Henry Drake-Brockman, the Judicial Commissioner, and says that Mr. Lachmi Narain was determined to make him a "scapegoat." He refers to the undertaking on the part of the Government not to prosecute witnesses as "a temptation, unknown to law"; and asserts that his answers contained in the sealed cover will give the source from which he obtained the money found in his possession on the night of the 19th of September. His explanation, which we have already set out in full, was, in our opinion, wholly untrue and designedly vague. He concluded his written statement by saying "under the circumstances

I do not propose to give any evidence." To that resolution he adhered and in view of the strength directness and precision of the prosecution case, emphatic denials and wholly unsupported charges of conspiracy appear to us to have been the only course open to Har Prasad Bhargava.

In the Courts of Khan Bahadur Jacob and Mr. Prem Narain and before us he raised certain points of law.

The Trying Magistrate, in his very careful and well-considered judgment has dealt at length with all the pleas taken by the accused. The procedure adopted by the Sessions Judge Mr. Prem Narain with regard to this matter seems to us most unsatisfactory. He reserves all questions of law until after he has elaborated his conclusion that the evidence on the record does not warrant the conviction of the accused on the charge as framed. He then sets forth a formidable list of the "points of law raised in the memorandum of appeal," in respect of which he remarks that "very lengthy arguments were addressed to me on them from both sides." He decides none of them holding that it is unnecessary to do so in view of the decision already pronounced upon the facts. Two of the pleas thus left undetermined are against the jurisdiction of the Trial Court; others impeach the admissibility of the most material evidence in the case, while others again raise questions of law as to the manner in which the testimony of Bhagirath and Mangal Chand should be regarded, in view of the admitted fact that they are in the position of accomplices in the commission of the offence charged. Now it is clearly illogical that a verdict of acquittal should be recorded as the ultimate result of a trial in respect of which it has not been finally determined that it was held before a Court of competent jurisdiction. It must also be exceedingly difficult for any Judge to arrive at a correct appreciation of the value of certain evidence, if he enters on the task while the back of his mind is still pre-occupied with a doubt whether that evidence ought to have been admitted into the record. We cannot help wondering whether a certain subconscious pre-occupation of the judicial mind with a set of legal conundrums, which the learned Sessions Judge was not anxious to solve, may not have contributed to the unsatisfactory manner in which he has handled the evidence and the erroneous conclusion he has drawn from it. The question of jurisdiction has not been and could not be seriously argued before us. The sanction of the Local Government of the Central Provinces, reproduced at page 5 of our printed books, was quite sufficient to remove the bar imposed by section 195 (1) (*a*) of the Code of Criminal Procedure to the cognisance of the alleged offence by any Court of otherwise competent jurisdiction. Under section 177 of the same Code the proper place for the trial was Akola, in the absence of any order expressly transferring the case for trial to some other Sessions Division. The Magistrate, Khan Bahadur E. Jacob, was duly invested with territorial jurisdiction at Akola and the case was properly instituted in his Court. The record before us does not explain why one complaint was filed before the said Magistrate at Nagpur on the 28th of October 1921, and a further complaint at Akola on 7th of November 1921, but this procedure could not have the effect of ousting his jurisdiction. Questions regarding the admissbility of evidence should ordinarily be raised at the time when such evidence is tendered. In the Trial Court the witness Bhagirath was examined on the 12th of November 1921 and cross-examined on the 2nd of December 1921. The witness Mangal Chand was examined on the 13th of November 1921, further examined on the 14th of November 1921, and cross-examined on the 2nd of December 1921. The accused was twice examined by the Court and put in a written statement in his defence on the 15th of December 1921. Even this statement contains no express plea against the admissibility of the evidence of these two witnesses. It is only from the judgment of Khan Bahadur Jacob that we gather that it was argued before him that "as Mangal Chand and Bhagirath had not been pardoned under section 337 of the Criminal Procedure Code, nor had the prosecution against them been withdrawn, they were not competent witnesses." In the memorandum of appeal to the

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Sessions Court there is a plea that "the evidence obtained" by means of "the undertaking on the part of the Local Government, otherwise described as amnesty not only has no value" but "is inadmissible"; there are also pleas against the admissibility of "the entries in the account-books of Bhagirath and Mangal Chand's master" as also of the memorandum Exhibit P-III handed by Bhagirath to the Investigating Police Officer and the entry containing the numbers of the currency notes in Bhagirath's note-book, Exhibit P-V. There is a general plea that the Trial Court admitted and recorded "irrelevant and inadmissible evidence both documentary and oral in spite of objections" and reserved its decision on the same. It has not been shown to us, and is not apparent from our examination of the record, that the question of the competence of Bhagirath and Mangal Chand to give any evidence at all was raised in the Trial Court at the proper time, that is when the witnesses were tendered for examination. The Magistrate purports to deal with it as an argument addressed to him when the defence finally summed up their case. It was no doubt open to him to consider, even at that stage, whether he had not made a mistake in examining Bhagirath and Mangal Chand at all; this he has done, and has held that the men were competent witnesses. The Sessions Judge has not decided the question at all. The argument addressed to us on the point when properly analysed seems to involve three distinct propositions:—

(I) That Bhagirath and Mangal Chand being on their own testimony accomplices in the commission of the offence to which they deposed, could not be examined as witnesses against the accused, because the case did not fall under the provisions of section 337 of the Code of Criminal Procedure, and there is no other section of that Code under which "the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, the offence under inquiry" can be examined at all.

(II) That Bhagirath and Mangal Chand were not merely accomplices, but were, by reason of the complaint filed in the Court of Khan Bahadur E. Jacob "accused persons" along with Har Prasad Bhargava, and under section 5 of the Indian Oaths Act X of 1873, it is not lawful to administer "an oath or affirmation to the accused person." In this connection it was suggested that the proper course for the Magistrate to have followed would have been to issue process against these men, along with Har Prasad Bhargava, and for the Local Government to "withdraw from the prosecution" of these two persons under section 494 of the Criminal Procedure Code.

(III) That the evidence of Bhagirath and Mangal Chand was obtained after the Government of the Central Provinces had issued, and caused to be published, a declaration that no prosecution would be instituted by the said Government against any person who came forward with evidence that he had paid or offered a bribe to Har Prasad Bhargava; that the issue of such a declaration was "illegal" and that no evidence obtained in consequence or tendered on the strength of such a declaration was legally admissible.

Now the first of these contentions rests upon an obvious fallacy. This fallacy is almost sufficiently exposed by the very terms of the second contention; but it re-appears, in substance, as the only arguable basis for the third contention. Section 337 of the Code of Criminal Procedure empowers certain Courts of Justice, *viz.*, Magistrates exercising certain powers or specially empowered *ad hoc* by an order of sanction, to pass a judicial order, the effect of which is that a "person supposed to have been directly or indirectly concerned in, or privy to, the offence under inquiry" who chooses to accept the pardon tendered by the said order, can give his evidence "as a witness in the case", with the knowledge and assurance that the order will operate as a bar to his own subsequent prosecution or trial for the offence in respect of which the pardon was tendered, or for any other offence of which he appears to have been guilty in connection with the same matter." Under certain circumstances set forth in section 339, the order tendering the pardon may cease to have this effect; but this will only be when it has been superseded by a judicial finding that the pardon has

been forfeited. The points to be noted are that section 337 is an empowering section that it is addressed to certain Courts of Justice, and has nothing to do with the powers or discretion of an executive authority, such as a Local Government, in the matter of instituting or refraining from instituting, any prosecution; and that the Legislature has seen fit to limit its operation to "the case of any offence triable exclusively by the Court of Session or High Court." We are dealing here with the case of an offence punishable under section 161 of the Indian Penal Code, which is triable by the "Court of Session, Presidency Magistrate or Magistrate of the First Class." Admittedly section 337 of the Criminal Procedure Code has no application to the case now before us. The result is that no Court of Justice had any authority to pass in favour of Bhagirath or Mangal Chand any order which either of them could plead as a bar to his own subsequent prosecution were such prosecution to be instituted. If they chose to come forward and give evidence without the protection of any such judicial order that was their own look out. There is no provision of Indian Statute Law, nor is there any principle of natural justice, which makes an accomplice, as such an incompetent witness at the trial of another person in respect of the offence in the commission of which he was an accomplice. The prosecution is not evading the provisions of section 337 of the Criminal Procedure Code, when it puts into the witness-box an accomplice in the commission of an offence to which that section does not apply. The practical difficulty in such a case is for the prosecution to feel any confidence that an accomplice will give true evidence. The Trial Court is undoubtedly entitled to inquire into any measures which those responsible for the conduct of the prosecution may have taken to overcome this difficulty. It will carefully consider the question what bearing the evidence as to the measures so taken in a particular case may have on the credibility of the accomplice witness concerned, on the value to be attached to his testimony. A refusal to admit his evidence on to the record, merely because he was an accomplice and because the case was one outside the purview of section 337 of the Criminal Procedure Code would be a clear error of law.

This is made all the more obvious by the second of the contentions addressed to us on behalf of the accused. We are not disposed to repel the contention that the Magistrate would have been within his jurisdiction if on the complaint laid before him he had caused process to issue against Bhagirath and Margal Chand as well as against Har Prasad Bhargava. These persons would then have come before the Magistrate as co-accused in the same case. The Magistrate could still, in his discretion, have proceeded to try the three accused either jointly or separately. The words "as the Court thinks fit" in section 239 of the Criminal Procedure Code are of the widest possible import. It is to be presumed that the Court will "think fit" to adopt, in each particular case, whichever course it regards as most conducive to the ends of justice. We are not concerned to decide a point which has not arisen but we must certainly not be understood to hold that if the Magistrate, after issuing process against Har Prasad Bhargava, Bhagirath and Mangal Chand, had thought fit to try Har Prasad Bhargava first, the other two would thereby have become incompetent witnesses at his trial whether for the prosecution or for the defence. If he had elected to enter upon a joint trial, the Public Prosecutor could, with the consent of the Court, have withdrawn from the prosecution of Bhagirath and Mangal Chand. Beyond question, these two could then have been put into the witness-box against Har Prasad Bhargava. No one would even have suggested that, after an order of discharge or acquittal had been passed in respect of them, either of them continued to occupy the position of "the accused person" within the meaning of section 5 of the Indian Oaths Act (X of 1873). From a legal point of view the only difference in the case now before us is that neither Bhagirath nor Mangal Chand was ever an "accused person" at the trial in which his evidence was tendered, within the meaning of the said section,

The real effect of the argument addressed to us on behalf of the accused on this point is that there is a method by which the prosecution, keeping strictly within the four corners of the Code of Criminal Procedure, might, with the consent of the Court, have put Bhagirath and Mangal Chand into the witness-box against Har Prasad Bhargava, each of them fortified by a judicial order of acquittal which would have barred their subsequent prosecution. They actually gave evidence without any such shield though relying upon an extra-judicial undertaking that the Local Government would not direct their prosecution. Whether their testimony is entitled to greater or less credit on this account is a question to be considered; but it has nothing to do with the admissibility of the testimony. There is abundant case-law in support of the propositions which we have laid down. In *Mohesh Chunder Kopali* v. *Mohesh Chunder Dass* (1) principles were laid down which would, beyond all question, make Bhagirath and Mangal Chand competent witnesses for the defence, if the present accused had sought to produce them as such at his trial. The same is the effect of the decision in *Queen-Empress* v. *Tirbeni Sahai* (2). In a very old case which has never, so far as we know, been dissented from, but was quoted with approval by a Bench of the Calcutta High Court in 1906 *vide Banu Singh* v. *Emperor* (3)—we refer to the case of *Queen* v. *Behary Lall Bose* (4)—it was contended that the evidence of a certain witness for the prosecution was inadmissible "because he had been at one time charged before the Magistrate as an accomplice and had neither been acquitted nor paid ned." The High Court repelled this contention and held that "there is no law or principle which prevents a person, who has been suspected or charged with an offence, but discharged by the Magistrate for want of evidence, being afterwards admitted as a witness for a prosecution." An even stronger case is that of *Queen-Empress* v. *Mona Puna* (5). The accused was on his trial on a charge of burglary, and the Police tendered in evidence against him a man whom they had previously arrested on suspicion of complicity in the same offence. The Court was of opinion that the Police had acted improperly in releasing this man, but nevertheless held him to be a competent witness for the prosecution. It was laid down that "the accused" in section 342 of the Criminal Procedure Code means "a person over whom the Magistrate or other Court is exercising jurisdiction" and reference was made to the provisions of section 118 of the Indian Evidence Act (I of 1872). The whole of the argument applies *a fortiori* to the facts of the present case and to the contention founded upon section 5 of the Indian Oaths Act (X of 1873). Two cases have been quoted on the other side. In *Empress of India* v. *Asghar Ali* (6) the facts were so different that we cannot treat any of the remarks, incidentally made by the learned Judges, as laying down principles applicable to the facts now before us. There had been in that case a breach of the clear provisions of section 337 of the Code of Criminal Procedure and it was difficult to see how the High Court could deal with the testimony of a witness tendered in contravention of those provisions otherwise than by rejecting it altogether. We were referred also to a case decided at Lahore which is to be found in the case of *Mahandu* v. *Emperor* (7). We think it sufficient to say that, in so far as the principles laid down in that case seem to us inconsistent with those in *Queen-Empress* v. *Mona Puna* (5) we are in agreement with the latter. In what has already been said, we have in substance anticipated the third contention on this point pressed upon us on behalf of the accused. In a case to which we have referred above, *Banu Singh* v. *Emperor* (3), the learned Judges held that "a Local Government

(1) 10 C. L. R. 553.
(2) 20 A. 426; A. W. N. (1898) 102; 9 Ind. Dec. (N. S.) 632.
(3) 33 C. 1353; 10 C. W. N. 962; 4 Cr. L. J. 145.
(4) 7 W. R. Cr. 64.
(5) 16 B. 661; 8 Ind. Dec. (N. S.) 919.
(6) 2 A. 260; 4 Ind. Jur. 250; 1 Ind. Dec. (N. S.) 727.
(7) 57 Ind Cas. 167; 1 L. 102; 2 L. L. J. 180; 22 Cr. L. J. 599; 89 P. L. R. 1920.

in India has no power to tender a conditional pardon to an accomplice for the purpose of his being examined as a competent witness against others accused with him." If this pronouncement only means that the Legislature in India has provided no method, outside the scope of section 337 or section 495 of the Criminal Procedure Code, by which a Local Government can provide an accomplice witness with a judicial order which he can subsequently plead in bar of his own prosecution, should such prosecution be instituted, it is undoubtedly correct. It seems to us obvious at the same time that a discretion to refrain from instituting a prosecution in any particular case is inherent in any authority to which the law has entrusted the power to institute a prosecution. Nor can any law prevent a person or body of persons exercising such authority from determining beforehand how that discretion shall be exercised upon the happening of a certain contingent event. If such determination is communicated beforehand to any person or body of persons, whom it may concern, we can find no provision in the Indian Statute Law which lays down that the competence of such person or persons to testify as witnesses in a Criminal Court about any matter referred to in such communication is thereby effected. As regards the point actually decided in *Banu Singh* v. *Emperor* (3) we are not concerned to say whether or not we should have passed the same order upon the facts than before the Calcutta High Court; they are sufficiently distinguishable from the facts of the present case. We are brought back to the conclusion which we have already indicated. The Government of the Central Provinces could undoubtedly have elected to follow a different procedure. They might have instituted a prosecution against Bhagirath and Mangal Chand and have withdrawn the same under section 494 of the Code of Criminal Procedure. If this had been done before framing a charge, the resulting judicial order would have been one of discharge; if it could conceivably have been done after a charge had been framed, an order of acquittal would have followed, pleadable under the provisions of section 403 of the Criminal Procedure Code in bar of any subsequent prosecution. The question whether the testimony of Bhagirath and Mangal Chand would have been entitled to more credit if they had given their evidence after such order of discharge or acquittal in their favour is one which, as we have already said, has nothing to do with that of their competence to testify. In appraising their evidence we bear in mind that it was given in reliance upon a promise made on behalf of the Local Government that no prosecution would be instituted against them in respect of the offence to the commission of which they testified.

The admissibility of certain documentary evidence produced by Bhagirath and Mangal Chand was challenged in the memorandum of appeal to the Sessions Court upon certain grounds independent of the general question of the competence of these witnesses to testify at all. Little was said in argument before us in support of these contentions, but it is well that we should deal with them. We are satisfied that the account-books of the firm of which Bhagirath is a member, and those of the firm of which Mangal Chand is a servant, which were produced in corroboration of their testimony are books properly kept in the regular course of business; the relevant entries in the same are admissible in evidence for the purpose for which they have used.

Two documents—Exhibits P-III and P.-V—were put in evidence in connection with Bhagirath's deposition in order to corroborate his assertion that he had used twelve currency notes of one hundred rupees each, bearing specified numbers, in order to make up the amount of the bribe paid by him. It was certainly open to the prosecution to lead evidence to prove that Bhagirath had made out a list of these twelve notes, specifying the said notes in detail, and had communicated that list to other persons at a time when he could not possibly know that those particular notes had been found in the possession of Har Prasad Bhargava on the night between the 19th and 20th September 1921. If Bhagirath is a competent witness at all, he was undoubtedly entitled to produce the memorandum in the book Exhibit P-V and to depose

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that it was in existence twenty-two days before the 26th of October 1921, on which date it was for the first time ascertained what were the numbers of the notes recovered from Mr. Har Prasad Bhargava on the night between 19th and 20th of September.

We cannot conclude this judgment, long as it already is, without expressing our high approval of the promptitude with which the Local Government acted and the course they took. Cases of the acceptance of bribes, whether by Judicial or Executive Officers, are invariably most difficult of detection and in proper cases an undertaking not to prosecute the offerer of a bribe is, in our opinion, a most salutary procedure.

On the other hand a Judge approached by an intending bribe giver is by no means unprotected. He can always take appropriate steps to secure evidence by which proceedings under the Criminal Law can be instituted against the offender. He can, for instance, stipulate that the money is to be paid direct to him at a certain time and certain place and he can without difficulty arrange for the whole transaction to be heard and in part witnessed by concealed third persons who will intervene at the proper moment. A "trap" of this kind is perfectly justifiable and is in Indian bungalows especially easy to arrange. The Acting Judicial Commissioner is to be congratulated upon the steps which he took; while Mr. Lachmi Narain's conduct is deserving of the highest commendation. He had to undertake a most painful task in respect of a man with whom he had been on friendly terms for some four or five years, and we have no doubt that, he and Mr. James and Mr. Neilson did, as it is said they did, their duty most sympathetically. We have already described Mr. Damle as a gentleman of unimpeachable honour and integrity, and in this case he showed a high standard of professional honour. Far from anybody in the case having put forward false, concocted or fabricated evidence or having engaged in any conspiracy against Har Prasad Bhargava, the whole record shows that the contrary is the case. The conviction of Har Prasad Bhargava by Khan Bahadur Jacob was right beyond any possibility of doubt and his judgment is a most admirable summary of the facts, while his arguments lead irresistibly to the conclusion of guilt. We set aside the order of acquittal and under section 423 (1) (*a*) of the Code of Criminal Procedure we find Har Prasad Bhargava guilty of the offence with which he was charged and pass upon him the same sentence which was passed by Khan Bahadur Jacob on the 4th of January 1922, namely, $2\frac{1}{2}$ years' rigorous imprisonment and a fine of fifteen thousand rupees. We also confirm the order regarding the disposal of the notes and the exhibits in the case. This order will be certified to the Court of Session at Akola, in order that Har Prasad Bhargava may be required to surrender to his bail and the sentence be carried out according to law.

Mr. Dillon has made an appeal to us to pass a lighter sentence and has pointed out that the sentence passed upon Har Prasad Bhargava is, as he describes, a crushing sentence. There is no doubt that we have power to lessen the period of imprisonment. We have power to reduce the fine or sweep it away. But in our opinion the sentence was a proper sentence, and Judicial Officers throughout India must understand that, if they are convicted of taking bribes from people, who are bound to bring their cases for decision before them, they must be punished in the most stern and exemplary manner. We are, therefore, unable to accede to the request of Mr. Dillon, because we are of opinion that the punishment in this case is the right and proper punishment.

Appeal dismissed.

K. S. D.

RAM GOPAL v. EMPEROR.

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 172 OF 1923.

April 30, 1923.

Present:—Mr. Justice Campbell.

RAM GOPAL—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 328—Poisoning—Circumstantial evidence—Prosecution, duty of.

In a case of poisoning, where the only evidence against the accused is circumstantial, it is the duty of the prosecution to eliminate all reasonable possibility that the poison was administered otherwise than by the appellant.

Appeal from an order of the First Class Magistrate, Rohtak, dated the 12th January 1923.

Mr. *ShamairChand*, for the Appellant.

Mr. *Mohammad Rafi*, for the Respondent.

JUDGMENT.—On the night of the 11th September 1922, at about 11-30 P. M. one Bhagwana was found by the Police on duty wandering about in a peculiar condition at the Jahazgarh fair in the Rohtak District. He was taken first to the fair dispensary, where he was examined cursorily by the Sub-Assistant Surgeon-in-charge, and thence to the *Thana* where he spent the night. At 6 A. M. he is recorded as having made a statement to the Police and then to have pointed out the place where he and his companions had been camped. At this place were found Chhajju and Chunna two persons who had accompanied Bhagwana from his village in the Bijnour District, and Ram Gopal the present appellant, who was said to have attached himself to the party at Delhi on the way to the fair. The Police were informed that, of two *neolis* or money bags placed beneath the bedding on which Bhagwana had been seen sitting when his companions went to sleep the night before, one containing Rs. 195 was missing.

The whole party was taken to the *Thana*. They were searched and Rs. 209 were found on Ram Gopal, appellant. Bhagwana was sent back to the dispensary and exhibited symptoms of *dahtura* poisoning. On the 13th September the Sub-Assistant Surgeon gave him a purgative and the resultant stools were sent to the chemical examiner who subseqently certified them to contain *dhatura*. Some *laddus* and *mathris* (sweetmeats and biscuits) which had been found on the person of the appellant were also sent and are reported to have shown no traces of *dhatura*. Chunna and Chhajju were examined by the Sub-Assistant Surgeon on 13th September and appeared to him to have nothing wrong with them.

The upshot was that Ram Gopal was sent up for trial and has been convicted of on offence under section 328, Indian Penal Code, and sentenced to five years' rigorous imprisonment. The Magistrate has held that he administered *dhathura* poison to Bhagwana with intent to commit theft, acting upon the following evidence by Bhagwana, Chunna and Chhajju which he has believed.

These three persons encountered the appellant at Delhi Railway Station and he asked to be allowed to travel with them to Jahazgarh fair, giving what have transpired to be his correct name and description.

The party arrived at Jhajjar the same night and there the appellant gave each of the others some *laddus* and *mathris* and later on presented them each with a betel leaf which he was seen by Chhajju to get from a shop in the Bazar. The contents tasted bitter and Bhagwana, Chunna and Chhajju did not finish them, but ate some. Then every one went to bed. Next morning Bhagwana, Chhajju and Chunna all felt intoxicated and performed the journey to the fair on foot with difficulty. When they got there Chhajju had an appetite and went to get a meal. Bhagwana and Chunna had none, and remained at the place where the party had decided to camp, but later they accepted from the appellant and ate five more *laddus* each. Chhajju and Chunna went to sleep leaving Bhagwana sitting on his bedding under which the two *neolis* had been placed. Bhagwana remembered so sitting down but afterwards his recollection was blank until he found himself with the Police.

The Magistrate has come to the conclusion that there is no doubt that *dhatura* was administered not only to Bhagwana but to Chhajju and Chunna, but there is no independent corroboration that the two latter were poisoned. In his first statement recorded by the Police Bhagwana

said that Ram Gopal had also experienced symptoms of poisoning, and he explains this away now by saying that he was not himself when he made the statement.

There is no direct evidence to connect the appellant with the poisoning of Bhagwana, and, although there is room for considerable suspicion, I do not think that the circumstantial evidence is sufficient to justify the conviction. The suggestion of the prosecution is that the poison must have been contained in the *laddus* and *mathris* or the betel given by the appellant to Bhagwana and the others at Jhajjar. Now in order to poison *laddus* and *mathris* it would probably be necessary to mix the stuff in the cooking. If Ram Gopal had started out with poisoned food in order to commit theft or other offence it was a little strange that he should give his right name when he joined his intended victims. As for the betel leaves it is conceded by the learned Counsel for the Crown that some preparations of "*pan*" are bitter, and Chhajju says that he and the appellant came back from the betel seller's shop together. It is not impossible that the appellant may have inserted *dhatura* without Chhajju seeing, but on the other hand no *dhatura* was discovered in the appellant's possession or detected in the *laddus* and *mathris* which were taken from him on search. If he did steal the missing *ncoli* it is difficult to see why he should remain with Chhajju and Chunna and not make his escape before the theft was discovered. The fact that money was found on him proves nothing, even if his own story, which has not been disproved, that he came to the fair to buy cattles be false. He certainly denied in the Trial Court that he had been a member of Bhagwana's party and represented himself as a casual stranger sleeping close by at the fair ground. This line of defence is now abandoned and it is admitted that he did travel with Bhagwana, etc. from Delhi. Still he cannot be convicted merely because o the inconsistency.

The difficulty which the prosecution had to get over was the elimination of all reasonable possiblity that the *dhatura* was administered otherwise than by the appellant.

Bhagwana and his two companions are said to have eaten nothing at Jhajjar except food which they brought with them and the things given to them by the appellant. The *dhatura* may have been in their own food. It was not incumbent on the appellant to show that it was not. This, no doubt, was unlikely but it was also unlikely that the appellant should have behaved as he did if he had gone to the trouble of poisoning Bhagwana, Chhajju and Chunna in order to steal their money. Bhagwana's statement to the Police that the appellant had felt the effects of poisoning cannot be ignored. It was not likely to have been deliberately false, nor was it likely that the appellant should have poisoned himself deliberately. He might have feigned the symptoms, as the Magistrate surmises, but so may Chhajju and Chunna.

I do not consider that this mysterious occurence has been so elucidated as to fasten responsiblity upon the appellant beyond resasonable doubt, and he has produced evidence that he is a shopkeeper of respectable antecedents, living at Nuranpur in the Muzaffarnagar District.

I aceept the appeal set aside the conviction and sentence and acquit the appellant who will be released.

Appeal allowed.

Z. K.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION NO. 304B OF 1922.

May 19, 1922.

Present:—Mr. Justice Macgregor.

EMPEROR—PROSECUTOR

versus

NGA THET SHE—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 215, 423, 439—Commitment made under s. 423, whether can be quashed—Revision.

Section 215 of the Criminal Procedure Code has no application to an order of commitment passed by a Sessions Judge under section 423

of the Code, in dealing with the appeal of an accused person.

Such an order of commitment can, however, be dealt with by the High Court in the exercise of its power of revision.

In the matter of Kalagiva Bapiah, 27 M. 54: 2 Weir 227, 578 and *Pirthi Chand Lal* v. *Sampatia*, 7 C. W. N. 327, relied on.

Reference made under section 438, Criminal Procedure Code, by the Sessions Judge, Hanthawaddy, to quash the commitment of Maung Thet She for trial before him on a charge under section 372, Indian Penal Code.

JUDGMENT.—This is a Reference made by the Sessions Judge of Hanthawaddy to quash the commitment of Maung That She for trial before him on a charge under section 372, Indian Penal Code. The commitment was made by the Special Powers Magistrate of Insein, on the direction of the Sessions Judge's predecessor in his order in Maung Thet She's Appeal (No. 46 of 1922) against his conviction under section 372 by the same Magistrate.

As the commitment was not made under any of the sections mentioned in section 215 of the Code of Criminal Procedure but was made by direction of the Sessions Judge acting, under section 423 of that Code, it appears to me that the question of quashing the commitment does not arise, but that the Sessions Judge's order for commitment can be dealt with by this Court in the exercise of its powers of revision: see *e.g.*, *In the matter of Kalagava Bapiah* (1) and *Pirthi Chand Lal* v. *Sampatia* (2).

NOTE.—The rest of the judgment is not material for the purposes of this Report.—[*Ed.*]

Z. K.

(1) 27 M. 54; 2 Weir 227, 578.
(2) 7 C. W. N. 327.

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 363 OF 1923.

May 15, 1923.

Present:—Mr. Justice Broadway and Mr. Justice Floyde.

MALLA—CONVICT—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 300, Excep. I—Death of wife caused by husband—Strangulation—Grave and sudden provocation—Benefit of doubt.

Accused who was living on very good terms with his wife killed her suddenly one night by twisting her own hair round her throat. There was no premeditation and no preparation:

Held, that in the absence of any evidence the accused was entitled to the benefit of the doubt as to whether some sudden and grave provocation did not arise which temporarily deprived him of self-control. [p. 984, col. 1.]

Criminal appeal from an order of the Sessions Judge, Sialkot, dated the 26th February 1923.

Mr. *Gullu Ram*, for the Appellant.

Mr. *C H. Carden Noad*, for the Crown.

JUDGMENT.—The appellant has been convicted by the Sessions Judge under section 302, Indian Penal Code, of the murder of his wife *Musammat* Amar Kaur on the night of the 10th/11th April 1918. The evidence is very fully set out in the judgment of the learned Sessions Judge and it is quite unnecessary to repeat those facts.

Having examined the entire evidence on the record we have no doubt at all that the appellant did murder his wife by strangulation. The only matter which remains for consideration is the question of sentence. The appellant and the deceased admittedly lived on the best of terms. It appears that shortly prior to the commission of the crime in question the appellant had been anxious that his wife should leave the place where they were living and return to their old home, but beyond this there is no evidence that they had any differences of opinion. It is suggested by the prosecution that the appellant suspected his wife of having an intrigue with one Ladha and although there is no actual evidence in support of this suggestion it is quite possible that the appellant's desire that he and his wife should leave the place arose from some suspicion that this intrigue in fact existed. It is clear that

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the crime was not a premeditated one as the accused did not bring any weapon for the purpose of killing the woman, and it is quite clear that he must have acted on sudden impulse as death took place by strangulation effected by twisting her hair round her throat. Some sudden provocation must have arisen to impel the appellant to do this deed, and in the absence of any evidence on this point we feel that the appellant is entitled to the benefit of the doubt as to whether sudden and grave provocation did not arise which temporarily deprived him of self-control.

Under the circumstances we feel that the death sentence should not be inflicted and we accordingly reduce the sentence to one of transportation for life. To this extent the appeal is accepted.

Appeal partly allowed.

Z. K.

LAHORE HIGH COURT.

CRIMINAL REVISION NO. 1442 OF 1922.

April 30, 1923.

Present:—Mr. Justice Lumsden.

DARYA SINGH AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 337, 494—Tender of pardon—Discharge, order of, absence of—Evidence, whether admissible—Evidence Act (I of 1872), s. 133—Approver, whether can corroborate approver—Penal Code (Act XLV of 1860), s. 401—Associating for habitually committing theft—Ingredients of offence.

A pardon was tendered to an accused person by the Local Government, who was examined as an approver but no formal order of discharge was passed in respect of him. On the other hand his name did not appear among those of the accused actually challaned, and it was expressly stated in the *challan* that no proceedings were being taken against him:

Held, that as the Magistrate was not exercising jurisdiction over him, he did not come within the definition of an accused person and was, therefore, a competent witness in the case. [p. 985, cols. 1 & 2.]

Queen-Empress v. *Mona Puna*, 16 B. 661; 8 Ind. Dec. (N. S.) 919, *Jhoja Singh* v. *Queen-Empress*, 23 C. 493; 12 Ind. Dec. (N. S.) 328, *Sardar Khan* v. *Emperor*, 21 P. R. 1904 Cr.; 135 P. L. R. 1904; 1 Cr. L. J. 1066, relied on.

Mahandu v. *Emperor*, 57 Ind. Cas. 167; 1 L. L. J. 182; 1 L. 102; 21 Cr. L. J. 599; 89 P. L. R. 1920, distinguished.

There is nothing in section 133 of the Evidence Act to suggest that the statement of one approver cannot be regarded as corroborating that made by another approver. If, however, it can be shown that the approvers had ample opportunity of consultation, the corroborative value of their evidence would be greatly diminished. [p. 985, col. 2.]

In order to establish a case under section 401 of the Penal Code, it is not necessary to prove that each individual member of the gang has habitually committed theft or any particular act of theft. Once it is proved that a gang was formed for the purpose of habitually committing theft, all persons who thereafter join the gang in committing one more theft come within the purview of section 401 of the Penal Code. [p. 986, col. 1.]

Beja v. *Emperor*, 26 Ind. Cas. 625; 13 P. R. 1914 Cr.; 16 Cr. L. J. 331; 223 P. L. R. 1915; 63 P. W. R. 1912 Cr., followed.

Bhabuti v. *Emperor*, 63 Ind. Cas 455; 19 A. L. J. 725; 20 Cr. L. J. 663; 3 U. P. L. R. (A.) 170, referred to.

Criminal revision against an order of the Sessions Judge, Ferozepore.

REPORT.—Out of 21 persons tried under section 401, Indian Penal Code, eleven have been convicted by the "section 30" Magistrate. The evidence showed that the gang, to which the convicts belonged, had committed numerous thefts and robberies in the Muktsar Tahsil and the surrounding country side, and had terrorised the neighbourhood for some time. The Police after an elaborate investigation, prosecuted the 21 persons, two other being absconders. The facts are given in greater detail in my appellate judgment of to-day's date on Criminal Appeals Nos. 302, 303, 304, 313, 327, 328, 329, 330 and 331 of 1922. The appellants were convicted on 18th August 1922. The fines have not been paid.

GROUNDS.—In view of the numerous crimes in which the gang took part and, the enormous amount of crime in the Ferozepore District, I consider that the sentences passed by the Magistrate are most inadequate. When the Magistrate was satisfied that the eleven persons mentioned were members of a gang of this kind, he should have passed the maximum sentence on each convict. The Special Public Prosecutor, who argued the case in the Appellate Court, referred to

Ghulam Mustafa v. *Emperor* (1). That was a case under section 400, Indian Penal Code, but the principle would apply to a case under section 401, Indian Penal Code. I recommend that the sentences should be enhanced to the maximum permitted by the Code.

Mr. *Des Raj Sawhney* (Public Prosecutor), for the Crown.

Messrs. *Saunders, Brij Lal, G. S. Salarhiya, Badri Das* and *Hukumat Rai*, for the Respondents.

ORDER.—This order disposes also of the connected applications Nos. 1631, 1706 and 1733 of 1922 and Nos. 92, 93, 94, 95 and 137 of 1923. These applications all arise in respect of a case under section 401, Indian Penal Code; of the 23 persons who were challaned in that case, two evaded arrest and of the remainder 11 were convicted by the Trial Court and sentenced to varying periods of imprisonment and also to fine. Appeals were preferred to the Sessions Judge but without success. the learned Judge indeed holding that on the evidence on the record, several of the accused who had been acquitted or discharged, had been fortunate. It was also considered that the sentences imposed on the persons convicted were overlenient and a reference was made to this Court with a recommendation that these sentences should be enhanced. *Per contra* 9 out of the 11 convicts have submitted applications for revision.

It will be convenient to dispose of the latter first. Several objections of a legal or *quasi*-legal character have been urged by the various Counsel representing the convicts. The principal witnesses for the prosecution are two approvers to whom a promise of pardon was made by the Local Government, the case not being one to which the provisions of section 337, Criminal Procedure Code, could be applied; not unnaturally the evidence of these approvers has formed the main point of attack. In the first place it is contended that as these approvers had not been formally discharged they still retained their status of accused persons and could not, therefore, be examined on oath under the provisions of section 342, Criminal Procedure Code. In this connection reliance is placed on a judgment of this Court published as *Mahandu* v. *Emperor* (2). In my opinion, however, that authority is easily distinguishable. It is true that no formal order of discharge was passed in respect of the two approvers but their names do not appear among those of the accused actually challaned. On the contrary it is expressly stated in the *challan* that no proceedings are being taken against them. In these circumstances they clearly do not come within the definition of accused persons seeing that the Magistrate was not exercising jurisdiction over them [*vide Queen-Empress* v. *Mona Puna* (3) and *Jhoja Singh* v. *Queen-Empress* (4)]. I hold, therefore, that the evidence of these witnesses is not inadmissible and in this finding I am supported by a ruling of this Court: *Sardar Khan* v. *Emperor* (5).

Another line of attack is that the statements of these witnesses cannot be taken as corroborative of each other and that consequently there is no sufficient independent evidence on which to base convictions. There is, however, nothing in section 133 of the Evidence Act to suggest that the statement of one approver cannot be regarded as corroborating that made by another approver. No doubt if it could be shown that the approvers had ample opportunity of consultation, this corroborative value would be greatly diminished, but in the present case the Sessions Judge has definitely found that there was nothing to suggest collaboration. There is consequently no reason why the two statements should not be given due weight for corroborative purposes. The statements are very detailed and correspond so accurately that it is not possible to believe that they are based on mere imagination however well drilled. And although much of the story told cannot be supported by direct testimony, there is on the record a vast volume of evidence which cannot be ignored and which clearly proves that many of the details given are

(1) 10 Ind. Cas. 833; 68 P. L. R. 1911; 45 P. W. R. 1911 Cr.; 12 Cr. L. J. 260.

(2) 57 Ind. Cas. 167; 1 L. L. J. 182; 1 L. 102; 21 Cr. L. J. 599; 89 P. L. R. 1920.

(3) 16 B. 661; 8 Ind. Dec. (N. S.) 919.

(4) 23 C. 493; 12 Ind. Dec. (N. S.) 328.

(5) 21 P. R. 1904 Cr.; 135 P. L. R. 1904; 1 Cr. L. J. 1066.

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correct. I am in entire agreement with the lower Courts that no sufficient reasons exist for rejecting or even suspecting the evidence of the two approvers.

The argument that it has not been proved that any gang existed is quite untenable. Both the lower Courts have believed the evidence on this point and there are no grounds for differing in the finding of fact. It is, however, urged that even if a gang did exist, there is no sufficient proof that the various applicants 'belonged' to it and in support of this contention reliance is placed on *Bhabuti* v. *Emperor* (6), and various passages in Gour's Penal Law of India.

The principles governing such cases are lucidly explained in *Beja* v. *Emperor* (7). It is not necesarry acording to that authority to prove that each individual member of the gang has habitually committed theft or any particular act of theft. Once it has been proved that a gang was formed for the purpose of habitually committing theft, all persons who thereafter join the gang in committing one or more thefts come within the purview of section 401, Indian Penal Code. It is clear in the present case that all the applicants were members of the gang and the plea of mere casual association cannot be entertained even in the case of Harbans Singh.

Various other arguments of less importance have been advanced by Counsel but none of them have any real force and I can see no reason to suppose that any of the applicants have been wrongly convicted. Both the lower Courts have gone fully into each individual case and I am not prepared to admit that in respect of any of the applicants is the conviction unjustified. It follows that all the applications preferred by the convicts are dismissed.

There remains the question of the recommendation by the learned Sessions Judge that the sentences should be enhanced. Reliance is placed on *Ghulam Mustafa* v. *Emperor* (1) and it is pointed out that the gang terrorised the inhabitants of the Muktsar Tahsil and was only brought to book through great exertions on the part of the Superintendent of Police. The catalogue of crimes is a lengthy one. There is no doubt that the convicts have been leniently treated and that in the case of the two leaders especially the sentences passed are inadequate. Darya Singh was the organiser of the gang and Partap Singh the leader of the expeditions. In such a case the maximum sentence should have been imposed, and accepting the application for enhancement in the case of these two convicts, I enhance their terms of imprisonment to seven years. Several of the other convicts might well have received severer sentences, but I do not consider it necessary to take any action in respect of them, and dismiss the application so far as they are concerned.

Z. K. *Sentence enhanced.*

(6) 63 Ind. Cas. 455; 19 A. L. J. 725; 20 Cr. L. J. 663; 3 U. P. L. R. (A.) 170.

(7) 26 Ind. Cas. 625; 13 P. R. 1914 Cr.; 16 Cr. L. J. 33; 223 P. L. R. 1915; 63 P. W. R. 1913 Cr.

CALCUTTA HIGH COURT.

CIVIL REFERENCE NO. 3 OF 1922.

June 1, 1922.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Chotzner.

EMPEROR—PROSECUTOR

versus

BIMALANANDA DAS GUPTA, A PLEADER.

Legal Practitioners Act (XVIII of 1879), s. 14—Legal practitioner taking employment without permission of High Court—Contempt of administration of justice—Misconduct.

A legal practitioner who accepts employment as a Professor in a College without the permission of the High Court, contravenes the rules framed by the High Court to regulate the conduct of legal practitioners and renders himself liable to the disciplinary jurisdiction of the Court.

It is misconduct on the part of a legal practitioner to publicly declare that he owes no allegiance to British Courts and has no faith in British Justice. That a legal practitioner should publicly seek to bring into contempt the administration of justice with which he is intimately connected, cannot be tolerated.

Emperor v. *Tarini Mohan Barari*, 69 Ind. Cas. 209; 35 C. L. J. 403; 26 C. W. N. 580; (1923) A. I.

MAHENDRA NATH v. MILKHI RAM.

R. (C.) 212, *Emperor* v. *Rajani Kanta*, 71 Ind. Cas. 81; 35 C. L. J. 356; 26 C. W N. 589; 49 C. 732; (1922) A. I. R. (C.) 515; 24 Cr. L. J. 33, referred to.

Civil reference made by the District Judge, Dacca.

Babus *Dwarka Nath Chuckerbutty* and *Surendra Nath Guha*, in support of the Reference.

JUDGMENT.—This is a Reference under section 14 of the Legal Practitioners Act in the matter of Babu Bimalananda Das Gupta, a Pleader at Dacca. The District Judge has formulated three charges against him. It is not necessary for our present purpose to refer to more than two of them.

The first charge is that he had engaged himself as a Professor of Economics in the Dacca National College without the permission of the High Court. The third charge is that when he was tried for an offence under section 188, Indian Penal Code, he stated to the Court that he had no faith in the justice administered by British Courts.

As regards the first charge, the Pleader sought to justify his conduct in the Court below by maintaining that his present occupation was in no way inferior, if not far superior, to the legal profession, and that he could not consequently be deemed to have violated the spirit of the law in the slightest degree. One of the rules framed by this Court to regulate the conduct of legal practitioners is in these terms: "Any person, who having been admitted as a Pleader, shall accept any appointment under Government or enter into any trade or other business shall give notice thereof to the High Court who may thereupon suspend such Pleader from practice or pass such orders as the said Court may think fit." It cannot be disputed that the Pleader has contravened the provisions of this rule and has rendered himself liable to disciplinary action.

As regards the third charge, it has been established that he proclaimed before the Criminal Court where he was tried that he owed no allegiance to British Courts and had no faith in British Justice. We agree with the District Judge that the Pleader has deliberately disregarded the obligations that rest upon him as a member of the legal profession and is wholly unfit to practice in any Court. It cannot be tolerated that a Pleader should thus publicly seek to bring into contempt the administration of justice with which he is presumably intimately connected. This view was emphasised by this Court in *Emperor* v. *Tarini Mohan Barari* (1) and *Emperor* v. *Rajani Kanta* (2). We are consequently of opinion that the Pleader has rendered himself liable to disciplinary action in respect of the third charge.

The result is that the Reference is made absolute and the certificate issued to the Pleader cancelled. If the faith of the Pleader in British Justice should ever be restored and if he should then apply for renewal of his certificate, the Court will deal with the matter on such materials as may be made available.

Reference made absolute.

Z. K.

(1) 69 Ind. Cas. 209; 35 C. L. J. 403; 26 C. W. N. 580; (1923) A. I. R. (C.) 212.

(2) 71 Ind. Cas. 81; 35 C. L. J. 356; 26 C. W N. 589; 49 C. 732; (1922) A. I. R. (C.) 515; 24 Cr. L. J. 33.

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LAHORE HIGH COURT.

CRIMINAL REVISION PETITION NO. 247 OF 1923.

April 21, 1923.

Present:—Mr. Justice Zafar Ali.

MAHENDAR NATH—ACCUSED—PETITIONER

versus

MILKHI RAM—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 259, 437—Absence of complainant—Discharge of accused—Further enquiry, order directing—Notice to accused, whether necessary.

Accused was discharged under section 259 of the Criminal Procedure Code owing to the absence of complainant. The District Magistrate set aside the order of discharge under section 437 of the Code without giving notice to the accused:

KASHI PRAMANIK *v.* DAMU PRAMANIK.

Held, that the accused should have been given an opportunity to show why the order should not be set aside.

Criminal revision against an order of the District Magistrate, Hoshiarpur, dated the 25th November 1922.

Mr. *M. L. Puri*, for the Petitioner.

Mr. *Abdul Aziz*, for the Respondent.

JUDGMENT.—This is a petition in revision seeking cancellation of an order made by the District Magistrate of Hoshiarpur under section 437 of the Criminal Procedure Code, whereby he set aside the order of a Magistrate subordinate to him discharging the petitioner (accused) and directed further enquiry. The proceedings against the petitioner had been instituted on a complaint under sections 498, 500, etc., As the offences were compoundable the Magistrate acting under section 259 of the Criminal Procedure Code discharged the accused because the complainant was absent. This order was perfectly legal but the District Magistrate was of opinion that as the case had been pending for a long time and the complainant had already produced his evidence, the Magistrate should not have really discharged the accused without waiting for the appearance of the complainant. The petitioner's grievance is that the District Magistrate passed the order without notice to him and so could not take into consideration, the fact that the absence of the complainant was due to having come to terms with him and to have compounded the offence on receiving Rs. 900 from him in the presence of a local Pleader. I am of opinion that the District Magistrate should take into consideration this plea of the accused before passing final orders. I, therefore, set aside the order already passed by him and direct him to give an opportunity to the accused to establish his allegation and then to dispose of the petition of the complainant.

Order set aside.

Z. K.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 850 OF 1921.

November 18, 1921.

Present:—Mr. Justice Walmsley and Mr. Justice Pearson.

KASHI PRAMANIK AND OTHERS—ACCUSED—PETITIONERS

versus

DAMU PRAMANIK—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 223, 342—Penal Code (Act XLV of 1860), s. 143—Examination of accused, absence of—Procedure—Unlawful assembly—Charge, contents of—Common object, whether must be stated.

Where it is found that the provisions of section 342 of the Criminal Procedure Code have not been complied with the proper course for the Appellate Court to follow is to set aside the conviction and to remit the case to the Trial Court in order that the provisions of section 342 may be followed and the matter disposed of according to law.

Fernandez v. *Emperor*, 59 Ind. Cas. 129; 45 B. 672; 22 Bom. L. R. 1040; 22 Cr. L. J. 17, *Mitrajit Singh* v. *Emperor*, 63 Ind. Cas. 825; 2 P. L. T. 520; (1922) Pat. 7; 6 P. L. J. 644; (1922) A. I. R. (Pat.) 158; 22 Cr. L. J. 697, relied on.

When a charge is framed under section 143 or the connected sections of the Penal Code the common object of the unlawful assembly must be stated in the charge.

Rule against an order of the Deputy Magistrate, Rajshahye, dated the 27th June 1921.

Mr. *K. N. Chaudhuri* (with him Babu *Probodh Chandra Chatterji*), for the Petitioners.

Babu *Jotindra Mohan Chaudhuri* (Junior), for the Opposite Party.

JUDGMENT.—This Rule was issued on two grounds. The first is that the Trying Magistrate did not comply with the provisions of section 342 of the Code of Criminal Procedure. This point is, I think, established, and following the ruling in *Emperor* v. *Fernandez* (1) and the case in the Patna High Court in *Mitrajit Singh* v. *Emperor* (2), the proper course for us to follow is to set aside the conviction and sentence of the petitioners and remit the case to the Trial Court in order that the provisions of section 342 of the Code may be followed and the matter disposed of in accordance with law.

(1) 59 Ind. Cas. 129; 45 B. 672; 22 Bom. L. R. 1040; 22 Cr. L. J. 17.

(2) 63 Ind. Cas. 825; 2 P. L. T. 520; (1922) Pat. 7; 6 P. L. J. 644; (1922) A. I. R. (Pat.) 158; 22 Cr. L. J. 697.

The second ground is that the charges framed against the accused are defectives. This is not a matter on which I should be disposed to interefere, f there were no other defects in the case. But as the case must be remitted on the first ground, I think, we should also direct that the charges be amended. The first charge under section 143, Indian Penal Code, omits to state the common object of the unlawful assembly. The common object should always be stated when a charge is framed under section 143, Indian Penal Code, or the connected sections. The second charge is under section 379, Indian Penal Code, and the property said to have been stolen is described simply as Damu's property. It is represented to us that the land on which the paddy said to have been cut by the accused was grown could have been described with much greater precision. That appears to be true and I think that as the first charge must be amended, the second charge should also be amended by a more accurate description being given of the land from which the complainant alleges the paddy was cut and removed by the accused. The amendment of the charges will involve the duty of giving the accused an opportunity of cross-examining the witnesses for the prosecution again. The case is, therefore, remitted to the first Court to be disposed of as directed above.

Z. K. *Case remitted.*

LAHORE HIGH COURT.

CRIMINAL REVISION NO. 1594 OF 1921.

March 16, 1922.

Present :—Mr. Justice Abdul Qadir.

BANARSI DAS AND ANOTHER—CONVICTS —PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 426, 447—Injury to complainant—Intention to annoy or hurt.

Complainant had a brick kiln for which he got water from the Railway Station close by, which water used to flow through the land of accused *K.* which he had taken on lease. On the termination of the lease *K.* also started a kiln in company with accused *B.* and took the supply of water from the Railway Authorities who did not extend the monopoly hitherto enjoyed by the complainant. Thereupon the present complaint was lodged under sections 426 and 447, Indian Penal Code, on the allegation that the accused had destroyed the water-course through which water used to flow to the complainant's kiln :

Held, that as the Railway were no longer supplying him with water, the stoppage or the removal of the water-course did not injure the complainant in any way and no criminal intention to annoy the complainant or to harm him having been shown it was not a fit case for prosecution on the criminal side. [p. 990, col. 1.]

Criminal revision from an order of the Sub-Divisional Magistrate, Ropar, District Ambala, dated the 15th October 1921.

Mr. *Shamair Chand*, for the Petitioners.

JUDGMENT.—Two persons named Kapur Singh and Banarsi Das were convicted of offences under sections 426 and 447, Indian Penal Code, and each of them was sentenced to one month's simple imprisonment and to a fine of Rs. 25. They appealed against that order and their imprisonment was reduced to 15 days (the period already undergone) but the fines were upheld.

They have now come up in revision to this Court and I have heard Mr. Shamair Chand on their behalf. He points out that the complainant in this case had a lease of certain land belonging to the petitioner Kapur Singh. The lease was for five years and it expired on the 4th June 1920. The complainant had a brick kiln for which he was using some water which he got from the Railway station close by and for the use of which he held a monopoly till June 1920. That water used to flow through the land of Kapur Singh to the kiln of the complainant. On the termination of his lease, however, Kapur Singh also started another kiln in which Banarsi Das joined him. The Railway people did not extend the monopoly enjoyed by Beni Parshad after June 1920 and began to supply water to Kapur Singh and Banarsi Das. The case of the complainant was that the petitioners had destroyed the water-course through which water used to flow through their land to his kiln and that thereby they had committed offences under

sections 447 and 426, Indian Penal Code.

The contentions on behalf of the petitioners are:—

1. That they did not commit any criminal trespass because the land belonged to Kapur Singh and the lease of the complainant on it had terminated at the time of this occurrence in 1921;

2. that they were within their rights in doing away with the temporary water-course that the complainant had made when he had the use of the land and to which he was no longer entitled; and

3. that even if the complainant had set up a right of easement on the land his case under sections 447 and 426, Indian Penal Code, for mischief could not succeed, because the said sections had no application where an incorporeal right was concerned.

This last point need hardly be discussed as no right of easement has, as a matter of fact, been alleged. The complainant had enjoyed the use of the water-course only as a lessee. Moreover, it is in evidence that the Railway was no longer supplying him with water and, therefore, the stoppage or the removal of the water-course did not injure him in any way. No criminal intention to annoy him or to harm him is shown by the evidence on the record and I think it is clear that this was not a fit case for the prosecution of the petitioners on the criminal side, whatever may have been the rights and duties of the parties on the civil side with regard to the water-course in question.

I think the petitioners, though they have suffered a part of the imprisonment inflicted, deserve to be acquitted, and I hereby acquit them. The fines, if realised, will be refunded.

Revision allowed.

K. S. D.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 944 OF 1922.

December 22, 1922.

Present:—Mr. Justice C. C. Ghose and Mr. Justice Chotzner.

ABDUL MATLAB—PETITIONER

versus

NANDA LAL KHATEL—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 407 (2), 438, 439—Appeal heard by Magistrate—Revision—Reference by Sessions Judge—Procedure.

Where an appeal from an order of a Second or Third Class Magistrate is heard by a First Class Magistrate, an application in revision against the order of the Appellate Court ought to be made to the Sessions Judge, asking him to make a reference to the High Court and should not be made direct to the High Court.

Criminal revision against the order of the Honorary Magistrates, Amta, Hooghly District, dated the 29th June 1922.

Messrs. *K. Ahmad* and *Debi Prosad Dutt*, for the Petitioner.

Babu *Birbhusan Dutt*, for the Opposite Party.

JUDGMENT.—This is a Rule calling upon the District Magistrate of Howrah and the complainant to show cause why the conviction and sentence passed on the petitioner should not be set aside on the ground that the petitioner, having purchased a certain share in the disputed *bheel* from the rightful owner thereof, acted *bona fide* in catching fish in the said *bheel*.

The facts, so far as are necessary for the disposal of this Rule, shortly, are these: one Ibrahim Mistry purchased a certain share in this disputed *bheel* from the widow of one Bechu Jemadar. The latter sold to Ibrahim for herself, and as guardian of her minor son and minor daughter. It appears that subsequently there was a sale of certain other shares in this *bheel* to the accused Matlab. The accused having purchased this last mentioned share caught fish in this *bheel*.

The question that arises is whether his act in catching fish in this *bheel*, by virtue of the conveyance last referred to was a *bona fide* act or not.

Now having regard to the facts found by the learned Magistrate, it is impossible

to come to the conclusion that the act of catching fish in this *bheel*, by virtue of the conveyance last referred to, on the part of the accused, Matlab, was not *bona file*; and in that view of the matter the conviction and sentence must be set aside and the fine, if paid, refunded.

A point has, however, been urged by Mr. Birbhusan Dutt, who appears to support the conviction, that the appeal in the lower Court having been disposed of by a First Class Magistrate, who was empowered to dispose of appeals from the decisions of Second and Third Class Magistrates under the provisions of section 407, sub-clause (2) of the Criminal Procedure Code, the application to this Court, without going to the Sessions Judge and asking him to make a reference to this Court, was not in order. In support of this contention our attention has been drawn to the cases of *Emperor* v. *Abdus Sobhan* (1) and *Rash Behari Saha* v. *Phani Bhusan Haldar* (2). We are in agreement with Mr. Dutt in the contention which he has put forward, namely, that ordinarily an applicant like the present petitioner ought to go to the Sessions Judge and move him for a reference to this Court. But so far as this Rule is concerned, we cannot discharge this Rule on that ground. The application having been heard and the Rule having been granted, we are bound to dispose of the Rule on the merits.

Rule granted.

Z. K.

(1) 2 Ind, Cas. 846; 36 C. 643; 13 C. W. N. 753; 10 Cr. L. J. 190.
(2) 63 Ind. Cas. 410; 48 C. 534; 22 Cr. L. J. 650.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 960 OF 1922.

January 4, 1923.

Present:—Mr. Justice Newbould and Mr. Justice Suhrawardy.

DEHRI SONAR—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 310, applicability of—Penal Code (Act XLV of 1860), s. 75—Previous conviction, evidence of, when to be given.

Section 310 of the Criminal Procedure Code lays down a special form of trial of the issue of liability to enhanced punishment in consequence of a previous conviction, but the section is expressly made applicable to trials before the Court of Session only, and does not apply to trials before Magistrates.

On 21st June accused was charged before a Magistrate with having committed offences punishable under sections 380 and 457 of the Penal Code. On 18th July witnesses were examined to prove a previous conviction of the accused, and a charge was framed that he was liable to enhanced punishment under section 75 of the Penal Code in consequence of the previous conviction:

Held, that there was no illegality or irregularity in the procedure adopted by the Magistrate.

Criminal revision against an order of the Additional Sub-Judge, Alipore, dated the 13th September 1922.

Messrs. *M. N. Mookerjee* and *K. N. Dutt*, for the Petitioner.

Mr. *Orr*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—This Rule was granted only on the 6th ground set out in the petition which is in the following terms, "that the trial has been vitiated by the admission of the evidence of previous conviction prior to this accused entering upon his defence."

It appears that on the 21st June the accused was charged with having committed offences punishable under sections 457 and 380 of the Penal Code, and that on the 18th July witnesses were examined to prove previous conviction of the accused, and a charge was framed that he was liable to enhanced punishment, under the provisions of section 75 of the Penal Code, in consequence of previous conviction. We are unable to see that there has been illegality

or irregularity in the Magistrate's procedure. Section 310 of the Criminal Procedure Code lays down a special form of trial of the issue of liability to enhanced punishment in consequence of previous conviction. But this section is expressly made applicable to trials before the Court of Session only, and does not apply to trials before Magistrates. In certain reported cases it has been held that the accused has been prejudiced by too early an admission of evidence as to previous conviction, but in the present case it has not been shown to us that there could have been any prejudice. We, therefore, hold that the ground on which this Rule was issued fails, and we accordingly discharge this Rule.

The petitioner must surrender to his bail, and undergo the unexpired portion of his sentence.

Rule discharged.

Z. K.

CALCUTTA HIGH COURT.

REFERENCE NO. 27 OF 1921.

April 4, 1921.

Present:—Mr. Justice Teunon and Mr. Justice Ghose.

CHANDRA MOHAN DAS MANDAL AND ANOTHER—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

***Criminal Procedure Code** (Act V of 1898), s. 260—Penal Code (Act XLV of 1860), s. 144, allegation of offence under—Summary trial, legality of.*

Where a complaint discloses or alleges the commission by the accused or by any of them of an offence under section 144 of the Criminal Procedure Code, the case cannot be tried summarily.

Reference made by the Sessions Judge, Rangpur, under section 438, Criminal Procedure Code.

Babu *Hemendra Chandra Sen*, for the Accused.

JUDGMENT.—This is a Reference made by the learned Sessions Judge of Rangpur under the provisions of section 438, Criminal Procedure Code. As is pointed out by the learned Judge, the complaint discloses or alleges the commission of an offence, in the case of at least one of the accused, punishable under section 144, Indian Penal Code. There is nothing, it is further pointed out by the learned Sessions Judge, to indicate that in so far as the number of persons was concerned the case was in any way exaggerated. It follows that the case now before us was not triable summarily.

We must, therefore, set aside the conviction and sentence against which this reference has been made and direct that the two accused before us be now retried under the regular procedure. The re-trial will take place in the Court of a Magistrate other than the Magistrate in whose Court the conviction now set aside was had, such Magistrate to be nominated by the District Magistrate.

The fine, if paid, will now be refunded.

Conviction set aside;
Re-trial ordered.

Z. K.

EMPEROR *v.* SADHU CHARAN DAS.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 49 OF 1921.

November 4, 1921.

Present:—Mr. Justice Newbould and Mr. Justice C. C. Ghose.

EMPEROR—PROSECUTOR

versus

SADHU CHARAN DAS—ACCUSED.

Evidence Act ***(I of*** **1872),** ***s.*** **32—*Verbal statement—Signs by dying person, admissibility of—Confession by person under influence of opium, value of.***

Where a dying person is unable to speak and can only make signs in answer to questions put to him, the questions and signs taken together might properly be regarded as a "verbal statement" made by a person as to the cause of his death within the meaning of section 32 of the Evidence Act, and are, therefore, admissible in evidence. [p. 994, col. 1.]

Queen-Empress **v.** ***Abdullah,*** **7 A. 385; A. W. N. (1885) 78; 4 Ind. Dec. (N S.) 692 (F. B.), followed.**

The confession of an accused should not be rejected *in toto* merely because the accused at the time of making it was under the influence of a dose of opium. [p. 994, col. 1.]

Criminal reference made by the Sessions Judge of Pabna and Bogra, dated July 20th, 1921.

Babu *Santosh Kumar Bose*, for the Accused.

Mr. *Orr*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—This is a reference by the learned Sessions Judge of Pabna and Bogra. The accused, Sadhu Charan Das, was put on his trial on the charge of having committed murder by causing the death of Dasi Sundari Dasya, his wife. He was also charged with having committed culpable homicide not amounting to murder, and also with having caused grievous hurt with a dangerous weapon to the said Dasi Sundari Dasya. The Jury by a majority of three to two found the accused not guilty on all the charges. The learned Sessions Judge being clearly of the opinion that it was necessary for the ends of justice to submit the case to the High Court has forwarded the record with a recommendation that the accused should be convicted under section 302 of the Indian Penal Code.

The main facts of the case are as follows:—On the night of the 13th of April last the accused Sadhu Charan and his wife, Dasi Sundari, slept together in the northern room of their house. At 6 A. M., in the following morning, their servant Kokan Chunder Das, a boy of 12 years old, came to open the *jhap* of the accused's sleeping room, but the accused did not allow him to do so. After this, Kokan said, that the accused Sadhu was vomiting, and Dasi Sundari asked Kokan to call Sadhu's brother and mother, and Kokan went to fetch them. A short time after Kokan had gone, two sellers of charcoal cakes who were passing by heard cries from the accused's room and saw Dasi Sundari coming out of the shop with a blood-stained *dao* in her hand and with her throat cut. She went towards the house of Babu Adhur Chunder Das, a Pleader. Adhur Chunder Das was coming from his house and met her and she fell on the ground. Adhur Babu secured a *dooli* and sent her off to the hospital. The medical examination discloses that she had one incised wound about four inches long and one inch and-a-half deep in front of the neck, the upper portion of the larynx and pharynx being divided. There were also two other slight incised wounds on the front of her left hand. Two constables who happened to be passing by Sadhu's shop saw a collection of people on the roadside. They entered the shop where Sadhu was seated and found blood stains on Sadhu's person and abrasions on his fingers. Sadhu was arrested and taken to the Police-Station. The Sub-Inspector found the accused slightly dosing and sent him to the hospital for treatment where he was admitted as a suspected case of opium poisoning. The doctor washed out the stomach and sent the washings to the Chemical Examiner who detected opium in the washings. At 2-45 P. M. that afternoon, Dasi Sundari made what is described as a dying declaration which was recorded by a Sub-Deputy Magistrate. She was unable to speak; but, in answer to the question put to her, she pointed out the accused as the person who had inflicted the wounds on her. At 3-15 that afternoon, the accused made a confession which was recorded by the same Sub-Deputy Magistrate. In that confession

the accused stated that he had cut the throat of his wife as she was of bad character. Dasi Sundari died at about 11 P. M. on the following day, the 15th of April.

The case against the accused rests mainly on the statement of his deceased wife and on his confession, and there is also certain circumstantial evidence. On the circumstantial evidence there can be no doubt that the deceased woman, Dasi Sundari, was cut in the room where she and her husband, the accused, had slept, and that she and the accused were the only persons present at the time. The only question, therefore, is whether, as is contended by the learned Pleader on behalf of the accused, the wounds were self inflicted or whether they were inflicted by the accused. As regards this point the main evidence, as already stated, consists of the woman's statement and the statement of the accused. Objections have been taken to the admissions of both the statements. As regards the statement of the deceased, it is contended that it cannot be regarded as a statement admissible under section 32 of the Indian Evidence Act, because it is not actually a statement, as the woman was unable to speak and could only make signs in answer to the question put to her. This point was considered by a Full Bench of the Allahabad High Court in the case of *Queen-Empress* v. *Abdullah* (1). The facts of that case, so far as this point is concerned, cannot be distinguished from the facts of the present case. We are in entire agreement with the majority of the Full Bench which held that the questions and the signs taken together might properly be regarded as a "verbal statement" made by a person as to the cause of her death within the meaning of section 32 of the Evidence Act, and were, therefore, admissible in evidence.

As regards the confession of the accused we see no reason why it should be rejected *in toto* because the accused at the time of making it was under the influence of a dose of opium. From the evidence of the Assistant Surgeon and of the Sub-Deputy Magistrate, we are satisfied that the condition of the accused was such that he could understand the questions put to him. Also the confession itself, though not very elaborate, shows that the accused was in full possession of his senses at the time he made it. There is one noticeable point as regards this and that is that, when the statement was read over to him, he made an important correction. In the answer, "I killed her hearing her character was bad" which was recorded by the Magistrate he corrected the word "hearing" into "seeing" making the answer mean that he cut her throat seeing that her character was bad. There seems to be no reason to suspect that there was any undue influence or inducement of any kind that led the accused to make this confession, and we can see no reason why he should have stated that he had cut his wife himself unless he had actually done so.

As regards the statement of the deceased, it is not quite clear what was the question put to her as there are slight variations in the different accounts. From the statement recorded at the time it would appear that three persons including the accused were made to stand in front of the woman, and she was asked to point out which of these persons had wounded her and she pointed to her husband. We think that it is to be regretted that the question was put in a form which suggested that the injury was homicidal. But nevertheless, the fact that the injured woman, shortly after she had received the injury, showed her husband as having caused it is a very important piece of evidence against him. There are other minor points in the case which support the theory that the wound was inflicted by the husband and not by the wife herself. The opinion of Medical Officer is that the wound was homicidal and not suicidal. He has given his reasons for his opinion, and, though it cannot be taken as a conclusive proof, we think his opinion is entitled to some respect. It is true that the wound was inflicted from left to right which would be consistent with a suicidal wound. But this is not the only point that has to be

(1) 7 A. 385; A. W. N. (1885) 78; 4 Ind. Dec. (N. S.) 692 (F. B.).

considered in determining the nature of the wound. There is evidence that the accused about a week before the occurrence purchased a *dao*. To this we attach no importance whatever. A *dao* is a common domestic implement and there is no reason for thinking that it was bought with the intention of being used in the manner in which it was actually used. The fact that the woman had a *dao* in her hand at the time she left her house is not inconsistent with the case for the prosecution that the injuries were not self inflicted. The marks found on the accused's fingers appeared to the Assistant Surgeon to be such as might have been caused by biting by teeth and the marks on the woman's hand would indicate that she tried to seize the weapon at the time she was attacked. If this was so, it is not improbable that she succeeded in wresting away the *dao* from her husband's hand and ran away with it in the manner described. On the evidence, the whole of which has been read by us, we are satisfied that the view, taken by the learned Sessions Judge is a correct view and that the injury was caused to the woman, by her husband, the accused. Having regard to the nature of the injury there can be no other conclusion than that the person who inflicted it intended to cause death, and that the offence committed is that of murder. The murder was undoubtedly committed, as the accused said, because he believed his wife to be of bad character. From the relations between the parties on the previous night, as described by their servant Kokan, it seems probable that the murder was committed suddenly on a quarrel arising between the husband and the wife after Kokan had left the house. Possibly, the accused suspected that his vomiting was caused by some poison administered by his wife, and that led him to attack her. But this is purely a conjecture. What actually happened, the husband can alone say. But we think, that, under the circumstances of the case, the lesser punishment provided for such an offence, will be sufficient. We, therefore, convict the accused, Sadhu Charan Das, under section 302 of the Indian Penal Code, of having committed murder by causing the death of his wife, and sentence him under that section to transportation for life.

Order accordingly.

B. N.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE NO. 39 OF 1921.

August 22, 1923.

Present:—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Coyajee.

EMPEROR—PROSECUTER

versus

DATTATRAYA SHANKAR PARANJPE AND ANOTHER—ACCUSED.

Bombay Prevention of Gambling Act (IV of 1887), s. 3—Common gaming house, what is—"Used for the profit or gain of the owner," meaning of.

In order to prove that a house is a common gaming house within the meaning of section 3 of the Bombay Prevention of Gambling Act it is sufficient to show that the house is one in which instruments of gaming are kept or used for the profit or gain of the person keeping or using such place, *i. e.*, where the person keeping or using the house knows that profit or gain will in all probability result from the use of the instruments of gaming. The profit or gain may not actually result from such use. But if profit or gain is the probable and expected result of the game itself and if that is the purpose of keeping or using the instruments, it would be sufficient to bring the case within the scope of the definition. But the prosecution must establish that the purpose is profit or gain. This may be done either by showing that the owner was charging for use of the instruments of gaming or for the use of the house, room or place, or in any other manner that may be possible under the circumstances of the case, having regard to the nature of the game carried on in that house. [p. 996, col. 2; p. 997, col. 1.]

Lachchi Ram v. *Emperor*, 65 Ind. Cas. 852; 23 Cr. L. J. 196; 20 A. L. J. 218; (1922) A. I. R. (A) 61, dissented from.

Criminal reference made by the Acting Third Presidency Magistrate, Bombay.

Mr. *G. N. Thakor*, (with him Mr. *B. B. Kampani*), for the Accused.

Mr. *Kanga*, Advocate-General (with him Mr. *A. Kirke-Smith*, Acting Public Prosecutor), for the Crown.

EMPEROR v. DATTATRAYA SHANKAR PARANJPE.

JUDGMENT.

Shah, Ag. C. J.—This is a reference made by the Acting Third Presidency Magistrate under section 432, Criminal Procedure Code. The question of law referred fo our decision is formulated in this manner:—

"Whether it must be established (1) that accused No 2 levied a fixed commission, irrespective of the result of the gaming or (2) that at the outside he manipulated the conditions in such a manner that he could not possibly lose."

The reference arises out of a case under the Bombay Prevention of Gambling Act IV of 1887, as amended by later Acts including the recent Act of 1922. The learned Magistrate has found that no presumption under section 7 of the Act can be made in this case. The prosecution has to prove the existence of a "common gaming-house" as a fact in this case. A "common gaming-house" is thus defined in the Act:—

"'Common gaming-house' means a house, room or place in which any instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, room or place, whether by a charge for use of the instruments of gaming or of the house-room or place, or otherwise howsoever."

It is essential for the prosecution under this definition to establish that instruments of gaming were kept or used in the house, room or place for the profit or gain of the person owning, occupying, using or keeping the house, room or place. It may be done by establishing that the person did so either by a charge for use of the instruments of gaming or of the house, room or place, or otherwise howsoever. The expression "otherwise howsoever" appears to be very comprehensive, and does not suggest any limitation, such as is contended for on behalf of the accused.

The question referred to us is based upon the decision in *Lachchi Ram* v. *Emperor* (1). That was a decision under the Public Gambling Act III of 1867, applicable to the United Provinces where that case arose. The definition of "common gaming-house" as given in that Act is for all essential purposes on the same lines as the definition in the Bombay Act which we have to interpret. According to the interpretation put by the learned Judges in that case upon the meaning of the expression "common gaming-house," "it must be established that the owner or occupier takes a fixed commission which is irrespective of the result of gaming, or at the outside, that he manipulates the conditions in such a manner that he cannot possibly lose"; in other words, the probability of making profit or gain from the gambling itself was not accepted as being sufficient to satisfy the requirements of the definition.

We have heard an interesting argument on the question as to how far the words justify the somewhat restricted meaning which has been put upon the definition by the learned Judges of the Allahabad High Court; and after a careful consideration of the arguments urged on either side, and with great respect to the learned Judges, I have come to the conclusion that the words of the definition which we have to construe here would not have their full meaning if we were to accept the narrow construction. I do not think that on a proper construction of the definition the prosecution can be restricted for the purpose of proving that a particular house, room or place is a common gaming house, to the two alternatives mentioned in the case of *Lachchi Ram* v. *Emperor* (1). It is sufficient if the house is one in which instruments of gaming are kept or used for the profit or gain of the person keeping or using such place, *i.e*, where the person keeping or using the house knows that profit or gain will in all probability result from the use of the instruments of gaming. The profit or gain may not actually result from such use. But if profit or gain is the probable and expected result of the game itself and if that is the purpose of keeping or using the instruments, it would be sufficient, in my opinion, to bring the case within the scope of the definition. At the same time it is clear that the prosecution must

(1) 65 Ind. Cas. 852; 23 Cr. L. J. 196; 20 A. L. J. 218; (1922) A. I. R. (A) 61.

establish that the purpose is profit or gain. This may be done either by showing that the owner was charging for use of the instruments of gaming or for the use of the house, room or place, or in any other manner that may be possible under the circumstances of the case, having regard to the nature of the game carried on in that house.

My answer, therefore, to the question is in the negative. With this answer, I would direct the papers to be returned to the learned Magistrate in order that he may dispose of the case according to his view of the evidence, having regard to our view on the question of law referred to us.

We make no order as to costs.

Coyajee, J.—I am entirely of the same opinion.

Answered in negative.

Z. K.

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 920 OF 1921.

January 24, 1922.

Present :—Mr. Justice Abdul Qadir.

KHIZAR OR KHIDRI AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 239—Penal Code (Act XL of 1860), ss. 147, 366, 376—Abduction and rape—Different accused—Joint trial—Prejudice—Force used in abduction—Separate sentences.

Where a girl is abducted by several persons and raped by one of them, the offence of rape constitutes a separate transaction from that of abduction and the person guilty of rape cannot be tried jointly with others who have taken no part in this offence. [p. 998, col. 2.]

Where, however, a joint trial is held, a retrial is not necessary when the accused has not been prejudiced and does not wish to be retried. [p. 998, col. 2.]

Separate sentences under sections 147 and 366 of the Penal Code are not justified, if the force used to take away the girl was a necessary ingredient for the completion of the offence under section 366 of the Code. [p. 999, col. 1.]

Bhagwan Singh v. *Empress of India* 4 P. R. 1901 Cr.; 52 P. L. R. 1901, referred to.

Appeal from an order of the Magistrate First Class, exercising enhanced powers under section 30 of the Criminal Procedure Code, Jhang, dated the 20th October 1921.

Mr. *C. Bevan Patman*, for the Appellants.

Mr. *Aziz Ahmed*, Additional Government Advocate, for the Respondent.

JUDGMENT.—In this case 26 men were placed on their trial for having committed offences under sections 366 and 147, Indian Penal Code. There was an extra charge under section 376, Indian Penal Code, against Khizar, appellant No. 1, and another extra charge under section 325, Indian Penal Code, against Wasawa appellant. Three out of the whole lot were discharged and seven were acquitted for want of sufficient evidence and the remaining 16 were found guilty and sentenced to various terms of imprisonment. They have appealed against their convictions and sentences through Mr. C. Bevan Petman, who has addressed lergthy arguments to me on their behalf and I have also heard Mr. Aziz Ahmed, Additional Government Advocate, for the Crown.

The cause of this occurrence was an orphan girl, named *Musammat* Fatima, who was living with her maternal grandmother, *Musammat* Fatteh, at Kot Mobla, in Jhang District. The parties are related to one another and are Bhattis by caste. The party of the appellants, it is said, wanted the hand of the girl, *Musammat* Fatima for Khizar, while *Musammat* Fatteh did not like this idea. She first gave *Musammat* Fatima in marriage to one Muhammad Khan. The party of the appellants thereupon brought a civil suit calling in question the validity of this marriage but this suit was compromised. The marriage had not, however, been consummated before Muhammad Khan died and it was then proposed to marry *Musammat* Fatima to Khan Muhammad, son of Wilayat, resident of Kot Sultan. A few days before the present occurrence the *nikah* between Khan Muhammad and *Musammat* Fatima was going to be performed, when two or three men of the party of the appellants, including Malak appellant, came and opposed the proposal and demanded the hand of *Musammat* Fatima and failing that asked for the

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hand of *Musammat* Khatun the younger sister of *Musammat* Fatima. It was agreed then to postpone the marriage of *Musammat* Fatima to enable the party of the appellants to settle things with *Musammat* Fatteh. It appears, however, that instead of negotiating with the old woman the party of the appellants decided to take the law into their own hands and to take away *Musammat* Fatima by force. They came to the house of the old woman in strong numbers, on the night between the 24th and the 25th April and caused injuries to *Musammat* Fatteh, her daughter, *Musammat* Bhagan, her son Dulchi, and Wilayat, who was in the house as a guest and took away *Musammat* Fatima on a mare. This man Wilayat, it may be mentioned, is the same person whose son was going to be married to *Musammat* Fatima who was staying in the house of his would be daughter-in-law. A report of this occurrence was made by *Musammat* Fatteh at Kadirpur Police Station, on the evening of the 25th April at 1-30 P.M., in which it was stated that 40 or 50 persons came to raid the house, of whom she recognised some seven Bhattis and several *kamins*, whom she named in that report. She also stated that the girl was placed behind Malak, appellant on his mare and that the raiders also took away jewellery of large value from the house. So far as the girl is concerned the story is that she was taken from place to place for about eight days, the persons who had taken her away dropping out one by one, till she and Khizar were left alone. The girl and Khizar were eventually taken to *thana* Massan by one Ghulam Muhammad Kureshi, P. W. No. 14, who had come to know that *Musammat* Fatima had been abducted. The girl made a statement at the *thana* giving the story of her abduction. It so happened that her relatives, who were in search of her, also arrived at the same Police Station, after she was taken there, and she was then sent to *thana* Kadirpur, where the Police were investigating into the case already. From there the case was *chalaned* on the investigation being completed.

Mr. Petman has raised several questions of law and fact in this appeal. One question of law raised by him is that the joint trial of Khizar and the other appellants was illegal, because Khizar was charged under section 376, Indian Penal Code, with having raped *Musammat* Fatima on several occasions, in the course of his wanderings when he was left alone with her, and this was an offence with which the other appellants had nothing to do and which was by no means a part of the original transaction. The learned Government-Advocate concedes that this contention is correct, for the offence of rape, if committed, would constitute a separate transaction, for which it would not be proper to try Khizar jointly with the other appellants. I think that the learned Magistrate made a mistake in adding this charge against Khizar in a case in which he was being tried jointly with a number of other men, who had taken no part in the alleged offence under section 376, Indian Penal Code. I would have ordered a re-trial of the whole case, on account of this misjoinder, but I think in the present case such an order is not called for. In the first place Mr. Petman says that he is instructed to say on behalf of his clients that they do not wish to be re-tried. In the second place it does not appear that the appellants have actually been prejudiced in any way by the addition of this charge, inasmuch as the learned Magistrate has disbelieved the story as to rape and has acquitted Khizar under that count.

Another point argued by Mr. Petman is one of mixed law and facts. He draws my attention to a portion of the statement of *Musammat* Fatteh, where she said that "*Musammat* Fatima was not demanded for Khizar," and to the statement of *Musammat* Bhagan, P. W. No. 2, in which she says that "the accused wanted the hand of *Musammat* Khatun," and urges that it should have been inferred by the lower Court from those statements that the common object of the party that took away *Musammat* Fatima was not to force her to marry against her will or to be seduced to sexual intercourse, but that they probably took her away in order to bring pressure to bear on *Musammat* Fatima's grandmother to give the younger girl, *Musammat* Khatun, in marriage to

Khizar. If this were so, he adds, then the ingredients necessary to constitute an offence under section 366 would be wanting. Mr. Aziz Ahmad replies to this part of the argument by laying stress on a portion of the statement of Wilayat, P. W. No. 4, who states that the party of the appellants wanted *Musammat* Fatima for Khizar but that they asked for *Musammat* Khatun's hand only in the alternative. He also points to a passage in the statement of *Musammat* Fatteh to the effect that Khizar's party was opposing every match that she proposed for *Musammat* Fatima. From this, he contends, it is quite clear that they really wanted *Musammat* Fatima, which is also apparent from what *Musammat* Fatteh stated in the first report, which she has duly proved. He also adds that the intention to force *Musammat* Fatima to marry against her will may be gathered from the conduct of Khizar's party in the past, as well as from what happened after the abduction, because according to the appellants' own showing, the girl was made to go through some form of *nikah* ceremony with Khizar. This last story about the performance of some kind of a *nikah* has not been believed by the Magistrate, and I do not think much stress can be laid on it. I have no doubt, however, that the intention of Khizar's party in carrying away *Musammat* Fatima was not merely to bring pressure to bear on her grandmother but was probably to force *Musammat* Fatima to marry Khizar. I hold, therefore, that section 366 is applicable to the proved facts of the case.

It is also contended by Mr. Petman that in this case, separate sentences under sections 366 and 147, Indian Penal Code, which have been passed by the learned Magistrate, are not justifiable, because the force that was used by those members of the party who took away *Musammat* Fatima, was used in the course of committing and in order to commit the offence under section 366. The learned Government Advocate contends that the causing of hurt to several inmates of the house, from which *Musammat* Fatima was abducted, was not a necessary part of the offence under section 366, and he relies on *Bhagwan Singh* v. *Empress of India* (1) as an authority to justify the separate sentences awarded. With the principle laid down in that ruling I entirely agree, but I think that in the case before me there is a good deal to be said in favour of the view that the force used was a necessary ingredient for the completion of the offence under section 366, Indian Penal Code, and separate sentences under section 147, Indian Penal Code, are not justified.

Coming now to the general arguments of the learned Counsel for the appellants, the more important of them may be briefly summarised as follows:—

(*a*) That the story of the prosecution is very much exaggerated and it is impossible that 40 or 50 persons should have come to the house of *Musammat* Fatteh to take away the girl.

(*b*) That there is no convincing evidence that the persons named in the first report or in Court were really identified by the witnesses and no proper identification parade was held during the investigation.

(*c*) That the report to the Police was made very late, seemingly after great deliberation, and is, therefore, not entitled to much value.

(*d*) That the story as given in Court is altered in material particulars from that embodied in the first report, and this throws considerable doubt on the good faith of the prosecution.

(*e*) That the learned Magistrate has not considered any of the points mentioned above in his judgment.

(*f*) That some men not mentioned even in the belated first report have been convicted.

(*g*) That some men have been convicted against whom there was not sufficient evidence even according to the standard adopted by the learned Magistrate.

I will take up these points one by one.

I think that it is not unlikely that in some respects the story of the prosecution may have been exaggerated, *e. g.*, it is possible to conceive that the number of the assailants was not actually so large as is represented, but there is no reason to doubt the truth of the main story that the appellats came in strong numbers and

(1) 4 P. R. 1901 Cr.; 52 P. L. R. 1901.

forcibly took away *Musammat* Fatima. The presence of injuries on the bodies of four persons of the prosecution party, including two women, is a very convincing circumstantial evidence in respect of the oral testimony of eye-witnesses on this point. The counter version put forward by the defence in this connection has been rightly rejected by the Magistrate. That version is that *Musammat* Fatteh had a friendship with Khizar and not being pleased with the prospect of a marriage with Wilayat's son, she sent a message to Khizar to take her away. The version goes on to say that Khizar came alone, waited outside the house and got a woman to go and bring out *Musammat* Fatima and that then the two went about together, the girl being all the time a consenting party to all that happened. It is added by the defence, in order to explain the marks of injuries on some of the appellants that four men of their party, *viz.*, Sahiba, son of Murad, Wasawa, Yara and Kandu, passed in front of the house of the complainants after the girl had been taken away by Khizar and there an altercation between the complainants and the four men took place, which resulted in a fight, in the course of which the complainants received their injuries and Yara, Sahiba son of Murad, Wasawa and Kanda of the appellants got injured. This version appears to be quite an unnatural one and is merely an attempt to explain that part of the case which cannot be denied.

Coming to the question of identification, I think Mr. Petman is right in complaining that no identification parades were held. The case was one in which such parades should have been held and if they had been held, they would have no doubt, furnished better and more satisfactory evidence. But it seems to me that they were probably not held for the reason that so far as the Bhatti appellants were concerned, there could be no question as to the capacity of the eye-witnesses to identify them, as they were related to one another, and as regards the *kamins* who accompanied the Bhattis, the majority of the latter also would be known to the party of the complainants. The night on which this abduction occurred was a moonlight night, which would facilitate recognition of persons previously known to the witnesses. I hold, therefore, that the witnesses who profess to have clearly identified the offenders, whom they name, are entitled to be believed, in spite of the criticism referred to above as to the want of regular identification parades.

The objection that the report was made late and after deliberation has some force in it. There is no satisfactory explanation of the delay but the delay is not such as to be fatal to the case.

Some of the appellants can, however, get some benefit from this report. The case against three of the appellants, whose names are not to be found in this report, made after considerable deliberation and after the witnesses had had time to compare notes among themselves, must be held to be open to doubt. *Musammat* Fatteh alleges that she based the report on her own personal observation of the culprits and did not cousult any of the other witnesses. But this is probably incorrect and the report must be taken to be the result of the comparison of notes by all the four eye-witnesses. In view of this the appeal of Muhammad, son of Hakim Machhi, of Kadu son of Raja, and of Shera son of Sajawala, will be accepted, as their names do not find a place in the first report. The only exception to the test applied to the case of these three men will be as regards Kanda son of Jinda, who is one of the four persons who admit that they came into conflict with the complainants and who is himself a marked man, having been injured in the conflict.

The criticism that the story as given in the first report has been altered in several particulars in Court is also not without foundation. For instance, it is stated in the report that jewellery was taken away, but the story in Court is that it was found afterwards that jewellery had not been actually taken away, as *Musammat* Fatima, when she returned to her house told her relatives that she had put the jewellery in a place different to that in which it was previously kept. This explanation may or may not be true, but there is nothing inherently improbable in it and, if the facts are as now disclosed, this would show the good faith of the witnesses for prosecution, because it would not have been difficult

for them to persist in the story that jewellery was missing, if the story were false. I do not think that this particular discrepancy between the first report and the story in Court can affect the merits of the main case. Certain other discrepancies are pointed out as to the way in which *Musammat* Fatima took shelter in a *kotha* and as to who accompanied her; but those discrepancies I do not regard as material. There is just one discrepancy between the first report and the story as given in Court which creates a doubt in favour of Malak, appellant, and of which I think the benefit must be given to him. As has been said above, according to the first report the girl is alleged to have sat behind Malak, appellant, on his mare. The story now is that she was made to sit behind Kadu on the mare. It is argued on behalf of Malak that he was not on the scene and that he was named because in the earlier deputations from the appellants' party he had taken a somewhat prominent part. I think it is quite possible that on account of his previous prominence a particularly prominent part was attributed to Malak on the occasion in question but that subsequently it was found necessary to change the story in view of the statement made by *Musammat* Fatima that he was not the person behind whom she had sat on the mare, and, therefore, they had to substitute Kadu for him. But Kadu is one of the men who were not named in the first report. Therefore, it seems to me that there is something unsatisfactory about the evidence so far as it affects Malak, appellant, and he will, therefore, be acquitted.

I am not very much pressed by the objection that the Magistrate did not consider the points discussed above. The learned Magistrate has written a very elaborate and careful judgment in this case and the fact that points like those urged by Mr. Petman were not discussed in it might be due to the fact that they were not argued before him. I have already disposed of the point (*f*) in my remarks about point (*c*).

As regards point (*g*) my attention has been drawn to the case of Salihon, and it is urged that as the Magistrate has convicted only those persons whom at least three eye-witnesses named in Court, Salihon's conviction should not be upheld as *Musammat* Fatteh on being asked to identify him in Court failed to do so, though she was one of the three witnesses who had named him. I think this contention must prevail. *Musammat* Fatteh's evidence against Salihon should not count when she was unable to identify him correctly in Court and, therefore, by the standard adopted by the learned Magistrate the case against him is not supported by sufficient evidence. He is, therefore, given the benefit of doubt and acquitted.

The result is that five of the appellants, *viz.*, Muhammad son of Hakim, Kadu, Shera, Malak and Salihon are acquitted. The convictions of all the other appellants under section 366 are upheld and the sentences awarded to them under that section are maintained. The sentence of one year's imprisonment each, however, that was passed against them, under section 147, Indian Penal Code, is not mainatained and to this extent only their appeals are accepted. The separate sentence against Wasawa under section 325 for causing grievious hurt to Wilayat, prosecution witness, is maintained.

N. K. *Appeal partly accepted.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE NO. 196 OF 1922.

April 26, 1922.

Present :—Mr. Justice Gokul Prasad.

MUKUND RAM—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 273, offence under—Noxious food—Knowledge—Presumption.

Knowledge that an article of food offered for sale is unfit for consumption cannot be presumed; this, like other ingredients of the offence under section 273 of the Penal Code, must also be proved.

Emperor v. *Sheo Lal*, 26 A. 387; 1 A. L. J. 64; A. W. N. (1904) 56; 1 Cr. L. J. 210, referred to.

Criminal Reference.

JUDGMENT.—In this case the Deputy Magistrate has not appreciated the effect

of the words "knowing or having reason to believe that the same is noxious as food or drink" in section 273 of the Indian Penal Code. There is nothing on this record to show that Mukund Ram knew that the *baisan* was of such a nature as would be unfit for consumption. The learned Deputy Magistrate seems to think that such knowledge is always to be presumed. There is no warrant in law for such a presumption; just like other ingredients of the offence, this also has to be proved, see the case of *Emperor* v. *Sheo Lal* (1). The conviction was, therefore, illegal.

I accept the reference, set aside the conviction and the sentence and direct that the fine, if realised, be refunded.

Reference accepted.

W. C. A.

(1) 26 A. 387; 1 A. L. J. 64; A. W. N. (1904) 56; 1 Cr. L. J. 210.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL NO. 107 OF 1922.

April 20, 1922.

Present :—Mr. Ashworth, A. J. C.

LILA AND ANOTHER—ACCUSED —APPELLANTS

versus

EMPEROR—COMPLAINANT—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 147, 149, applicability of—Easement, right of—Forceable protection—Injury caused by several persons—Unlawful assembly not proved, effect of.

No person has a right to prevent by force another person dealing with his own land merely because he has some right of easement or customary right over a portion of that land, of which right he is not at the time in actual enjoyment. [p. 1003, col. 2.]

Once a charge of unlawful assembly fails a person cannot be convicted in respect of an injury which is not proved to have been caused by him. [p. 1003, cols. 1 & 2.]

Criminal appeal from an order of the Additional Sessions Judge, Sitapur, dated 30th January 1922.

Mr. *J. P. C. Bhattacharji*, for the Appellants.

The Government Pleader, for the Crown.

JUDGMENT.—The appellants Lila Teli and Tula Ram Brahman appeal from their conviction by the Additional Sessions Judge of Sitapur under sections 147, 304 read with 149 and 325 read with 149, Indian Penal Code.

It is common ground in this case that one Kamta Prasad had a field which was irrigated from a certain tank by a *char* which ran through the field of one Jamna Din. Jamna Din sent seven labourers, of whom one was the appellant Lila, in charge of the appellant Tula Ram, to remove this *char*. Kamta Prasad's men objected and there was a fight in which one Chhote Lal was killed. One report was made at the *thana* by Jamna Din and another report by one Raj Kishore purporting to act on behalf of Kamta Prasad. The Additional Sessions Judge has found that this latter report did not emanate from Kamta Prasad; Kamta Prasad in this case put in a written version of what he said that he had told Raj Kishore to report but the Court came to the conclusion that this version was concocted at a late stage of the investigation.

The learned Additional Sessions Judge has summed up his findings in this case as follows:—

"My findings are that a riot took place in which there were more than five men on each side. I disbelieve the prosecution story as put before me about how the riot started. I hold that men of Jamna Din's party went there to demolish the *char* forcibly. I find that the men of Kamta Prasad's party went there to prevent the demolition of the *char*. During the course of the fight several persons were injured and as a result of the injuries inflicted upon Chhote Lal he died. As regards the persons who joined the riot on Jamna Din's side I find that it is proved that Tula Ram and Lila Teli took part in the fight. As regards the presence of the other accused I am not prepared to believe the evidence of the prosecution and I give them the benefit of doubt. I hold that the party of Jamna Din was an unlawful assembly

whose common object was to demolish the *char* and to use force if resisted. I hold that the *char* has been used by Kamta Prasad for at least over 20 years and that he had a right to see that it remained in tact unless removed by legal process."

It will be seen from these findings that the propriety of the conviction of the two appellants depends on the right of Kamta Prasad's party to interfere to protect the integrity of the *char*. The learned Additional Sessions Judge has not stated any principle of law or enactment which would give Kamta Prasad a right to stop the demolition of the *char* merely because he may have had some easement or customary right to use it. There is no evidence that Kamta Prasad had any right of occupation of the land covered by the *char*. He was not (within the meaning of section 141, Fourth, of the Indian Penal Code) being deprived of the actual use of water, or other incorporeal right of which he was in possession or enjoyment. The Patwari, who is prosecution witness No. 6, has attempted to make out that the land covered by this *char* is uncultivated land but in his cross examination he has made it quite clear that when the *kharif* crop was sown the *char* was demolished and reconstructed for the purposes of *rabi* irrigation. The alleged riot took place on the 6th September 1921 and so Kamta Prasad could have had no right in respect of the *char* at the time. It appears, therefore, that Kamta Prasad's men were the aggressors. This being so, it is impossible to convict Jamna Din's party of riot since they were there at the beginning of the affair with no illegal purpose. Either they were unlawfully interfered with by Kamta Prasad's party in which case they had a right to stand their ground and resist interference or else the fight arose out of a mere dispute. In the latter case there could be no riot. There is some evidence that Lila Teli struck the deceased man but the Additional Sessions Judge has not believed it. On his findings the two appellants are merely guilty of constructive assaults. Once a charge of unlawful assembly fails against them they cannot be made liable for the injury caused to the deceased. Indeed the last sentence of the findings, set forth above, of the learned Additional Sessions Judge shows that the conviction is untenable. No person can have a right to prevent by force another person dealing with his own land merely because he may have some right of easement or customary right over a portion of that land of which right he was not at the time in actual enjoyment.

I allow the appeal, set aside the convictions and direct that the two accused be set at liberty.

Appeal allowed.

Z. K.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION NO. 63 OF 1923.

April 9, 1923.

Present:—Mr. Justice Moti Sagar.

KARM DIN—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Arms Act (IX of 1878), s. 4—Bolts and bars of rifles, whether arms—Arms, whether must be in serviceable condition.

The word "arms", as defined in section 4 of the Arms Act, includes parts of arms as well, and bolts and bars of rifles are, therefore, "arms" within the meaning of this section. [p. 1004, col. 2.]

Nurdin v. *Empress*, 38 P. R. 1889 Cr., followed.

It is not necessary that an arm or a part of an arm should be in a serviceable condition before it can fall within the definition contained in section 4 of the Arms Act. [p. 1005, col. 1.]

Queen-Empress v. *Jayarami Reddi*, 21 M. 360; 1 Weir 659; 7 Ind. Dec. (N. S.) 611, relied on.

Petition under section 439, Criminal Procedure Code, for revision of an order of the Sessions Judge, Ferozepore, dated the 19th December 1922, affirming that of the Magistrate, First Class, Ferozepore, dated the 29th November 1922.

Mr. *Abdul Aziz*, for the Petitioner.

Mr. *J. N. Mackay*, for the Respondent.

KARM DIN v. EMPEROR.

JUDGMENT.—This is an application for revision of an appellate order of the Sessions Judge of Ferozepore upholding the convictions and the sentences passed upon the present petitioner under section 411 of the Indian Penal Code, and section 19 (*d*) of the Indian Arms Act. The petitioner was arrested on the 11th of June 1922 at the Kapurthala Railway Station, and was found in unlawful possession of a large number of component parts of rifles said to be the property of Government and which, it was alleged, he had received from one Ali Muhammad, at Ferozepore on the same day. The accused, after having been arrested, was tried before Mr. E. J. Stephens, Magistrate of the First Class at Ferozepore, on two counts: (1) under section 411 of the Indian Penal Code for having been found in possession of stolen property knowing it to be stolen property; and (2) under section 19 (*d*) of the Indian Arms Act for being in unlawful possession of arms without a license in contravention of the provisions of the Indian Arms Act. He was sentenced to one year's rigorous imprisonment on the first count under section 411, Indian Penal Code, and to six months' rigorous imprisonment on the other under section 19 (*d*) of the Indian Arms Act.

The main evidence on which these convictions are founded is that of the informer Abdulla (P. W. No. 5). Abdulla lodged the First Information report and stated therein that the accused had stopped with one Ali Muhammad at Ferozepore and that, while there, he had obtained possession of these articles with the help of the latter. He was also examined as a witness in the case but there he stated that these things had been put into a bundle, which the accused was carrying over his head, by the wife of Ali Muhammad. The accused admitted that he had been found in possession of these things at the Kapurthala Railway Station, but denied that these things were put into his bundle with his knowledge. He also admitted having stopped at Ali Muhammad's place at Ferozepore but stated further that he had absolutely no knowledge as to how these things came to be put into the bundle which he was carrying over his head. None of the Courts below have accepted this explanation of the accused, and I think that they were right in doing so. It is impossible to believe that the things which were found in his bundle could have been placed there without the consent or knowledge of the accused. Obviously the things found were very heavy; and if, as the accused says, they were put into his bundle without his knowledge, their weight, if nothing else, would have put him on inquiry, and led him to find out what the bundle contained.

In this Court it is contended by Mr. Abdul Aziz that Abdulla, the informer, and Ali Muhammad at whose place the accused stopped were not on good terms with each other and that the things were placed by Abdulla himself in the bundle in order to bring Ali Muhammad into trouble believing that the bundle belonged to the latter. It is sufficient to say that there is absolutely no evidence on the record in support of this theory, and I have not the slightest hesitation in rejecting it as highly improbable.

Next it is contended that the bolts and the bars of rifles found in possession of the accused are not arms within the meaning of section 4 of the Indian Arms Act and that, therefore, the conviction of the accused under section 19 (*d*) is illegal. I am unable to agree with this contention. The word "arms" as defined in section 4 include parts of arms as well, and there can be no manner of doubt that a bolt, which is obviously a most important part of a rifle, is a part of an arm within the meaning of this section. In *Nur Din* v. *Empress* (1) certain accused were convicted for having in their possession sword-hilts bought from time to time at sales of old stores. It was contended on their behalf that sword-hilts were not arms within the meaning of the Act. It was, however, held that the expression "arms" included "parts of arms" and that, the hilts being part of a sword was an arm. The principle of this authority fully applies to the present case and I must, therefore, hold that the bolts and the bars found in possession of the accused were arms within the meaning of section 4 of the

(1) 38 P. R. 1889 Cr.

Act. The contention that an arm or a part of an arm must be in serviceable condition before it can be said to come within the meaning of section 4 is wholly disposed of by the Full Bench authority; *Queen-Empress* v. *Jayarami Reddi* (2) where a revolver with a broken trigger was held to be an arm within the meaning of this section, in spite of the fact that it was not serviceable at the time when it was found in possession of the accused.

Lastly it is contended that the conviction under section 411, Indian Penal Code, is bad inasmuch as there is no evidence to show that the things found in possession of the accused were stolen property, Mr. Mackay for the Crown concedes that there is no evidence on the record in support of this charge, and does not, therefore, press for a conviction on this count.

I accordingly accept the petition and set aside the conviction under section 411 of the Indian Penal Code. The conviction under section 19 (*d*) of the Indian Arms Act, however, will stand.

Petition partly accepted.

Z. K.

(2) 21 M. 360; 1 Weir 659; 7 Ind. Dec. (N. S.) 611.

PATNA HIGH COURT.

CRIMINAL REVISION NO. 298 OF 1920.

July 14, 1920.

Present:—Mr. Justice Jwala Prasad.

RAGHUNANDAN PANDEY—PETITIONER

versus

KISHIN MOHAN SINGH AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145, proceeding under—Notice—Finality of proceeding—Magistrate, duty of.

A proceeding under section 145 of the Criminal Procedure Code is binding on the whole world. Under clause (3) of the section the order initiating the proceeding is to be published by a copy of it being affixed to some conspicuous place at or near the subject-matter of the dispute. This provision is intended to give notice to all persons interested in the subject-matter of the dispute to come forward and be made parties to the proceeding. Therefore, when the proceeding is over, the question of possession is, so far as the Magistrate is concerned, set at rest once for all, and thereafter he should maintain the order by taking action under sections 107 and 144 of the Code, as the case may be, against persons interfering with the possession of the party declared to be in possession, whether or not they were parties to the proceeding under section 145 of the Code. [p. 1006, cols. 1 & 2.]

Criminal Revision.

Mr. *G. C. Pal*, for the Petitioner.

Mr. *Khurshed Hussan*, for the Opposite Party.

JUDGMENT.—This application is directed against an order of the Magistrate, dated the 9th June 1920, declaring the possession of the second party under section 145 of the Code of Criminal Procedure.

Raghunandan Pandey, first party, is the applicant before us. The second party consists of Kishun Mohan Singh, Dharam Lal Singh and Sheo Tahal Rai.

The subject-matter in dispute is plot No. 1705 of the Cadastral Survey. The litigation is a long standing one and has become a matter of ancient history which has been given in detail in the judgment of this Court, dated the 7th November 1918, in a previous proceeding under section 145 of the Code.

Raghunandan Pandey, first party, was also first party in that case. Sheo Tahal of the second party in this case was along with Ramrekha Rai and others, second party in that case.

The first party purchased on the 16th January 1917 at an auction sale held in execution of a decree against Ramrekha Rai and his sons, the property of the judgment-debtor and obtained writ Exhibits A and A-1 referred to in the judgment of this Court.

On the 23rd April two members of the second party in that case Prayag and Ram Kishore instituted proceedings under rules 100 and 101 of O. XXI of the Code of Civil Procedure disputing the right of the decree-holders to take possession of the properties on the ground that they were not parties to the Civil Court sale and the *dakhaldahani*. Their objections were disallowed and the possession given

by the Court was confirmed on the 16th August 1917. A few months after that, the possession of the first party auction-purchaser was interfered with on the spot. The Police reported on the 17th January that the first party was in possession of the properties and that the judgment-debtors and others at their instigation were trying to disturb his possession. A proceeding under section 145 was accordingly instituted. The proceeding is dated the 23rd January 1918 and is Exhibit 3 in this case. It was proclaimed and served on the spot, per report of the Sheriff of the Court, dated the 30th January 1918. Plot No. 1705 is mentioned in the proceeding as being the subject-matter of dispute.

The Magistrate was, therefore, under misapprehension in saying that it is not clear that the former case under section 145 "affected Survey Plot No. 1705" which is the subject matter of the present case. This in itself vitiates his order under section 145. If he had looked to Exhibit 3, the proceeding in the former case and the Sheriff's report he would not have made this remark and the fact that the present plot was also the subject-matter of the previous proceeding under section 145 was a very material fact for the determination of the present proceeding before the Magistrate. The delivery of possession by the Civil Court to the first party and the proceedings adopted by some of the persons at the instigation of the judgment-debtors under sections 100 and 101 of the Code of Civil Procedure, were fully dealt with in the judgment of this Court in that case and it was held that the first party was in possession of the property, and the only remedy of persons affected by it was to go (*sic*) Tahal Rai, one of the second party in the present case concerned, for he was also a party in the previous proceeding. Clause (3) of section 145 of the Code of Criminal Procedure requires that a copy of the order of the Magistrate under clause (1) of the section, namely, the proceeding under section 145, shall be published by being affixed to some conspicuous place at or near the subject-matter of dispute. This is a new clause and is intended to give notice to the persons interested in the subject-matter of the dispute to come forward and be made parties to the proceeding. As far as the Magistrate is concerned, the question of possession is thus set at rest once for all and thereafter he should maintain the order by taking action under sections 107 and 144 as the case may be against persons interfering with the possession of the party declared by the Magistrate to be in possession. Therefore, the proceeding in the previous case is binding upon the whole world. In the other case the order of the Magistrate declaring the second party to be in possession was set aside and it was held that the first party was in possession of the property under the recent writ of *dakhaldahani* of the Civil Court. In that view the Magistrate was directed to see that the possession of the first party was not interfered with in any way. This virtually was a declaration under section 145 in favour of the party and the Magistrate should have acted upon the directions given by this Court and protected the first party from being interfered with in its possession.

The Magistrate has disregarded the order of this Court and has embarked upon an investigation into the question of possession on the ground stated by him that Kishun Mohan Singh of the second party was not a party in the previous section 145 case. As shown above, this position is untenable.

Another reason for re-opening the proceeding is stated by the Magistrate to be that he was not a party also in the Civil Court decree and the *dakhaldahani*, but, as shown in the previous judgment of this Court, the possession was effectively delivered by the Civil Court to the first party, and the only course open to persons other than the judgment debtors was to apply under section 100 of the Code and thereafter to institute a regular suit. As a matter of fact two other persons, who subsequently became parties in the former proceedings under section 145, Criminal Procedure Code, made such applications, which after investigation by the Civil Court were dismissed. It was in the circumstances held that the order became final and conclusive under section 103 and that order was binding upon the Criminal

Court under section 145 so far as the question of possession is concerned.

Thus the grounds upon which the Magistrate has re-opened the question of possession are untenable.

Again the Magistrate in his order has not specified as to whether the three persons, members of the second party, were jointly or severally in possession of the property. If they were jointly liable the former proceeding under section 145 operating against Sheo Tahal Rai, one of the members, is also conclusive against the other members also. If, on the other hand, they were separately in possession the Magistrate ought to have said so and to have specified as to which of them was in exclusive possession. The matter is concluded by the subsequent decree of the Civil Court (Exhibit 4 dated the 13th September 1919 filed before the Magistrate).

Sheo Tahal Rai very rightly under the directions of this Court in the previous proceeding under section 145 along with others lodged a civil suit for a declaration of his title and recovery of possession of the property with respect to which an adverse order was passed against him. In that case a number of persons have been arrayed as plaintiffs and defendants. Sheo Tahal Rai knew full well who were the persons interested in the subject-matter and it is conspicuous that although in the present proceeding he claims to be in possession of the property along with two other persons and the order of the Magistrate has been made jointly in favour of all of them, yet he did not make them parties in the civil suit. It clearly shows that Kishun Mohan Singh and Dharam Lal, two members of the second party in the present proceeding, had no interest in the property. That case was decided against the plaintiff, Sheo Tahal Rai, and the right, title and possession of the first party was confirmed and the previous delivery of possession of the Civil Court was also upheld. The second party, Sheo Tahal Rai, has no *locus standi* in the present proceeding and for the matter of that, the other party Kishun Mohan Singh and Dharam Lal Singh. The Magistrate has disregarded the decree of the Civil Court which was Exhibit 4 produced before him and which under section 145 was conclusive as to the rights of the parties to possession of the property in suit. The fact that the plot was not mentioned in the Original Civil Court writ of delivery of possession, does not affect the question, for at that time the survey plots were not known. The property was identified in the former proceeding which clearly mentions Plot No. 1705 as the subject-matter of the dispute. It has also been specified in the Civil Court decree. (Exhibit 4 dated the 13th September 1919).

The order of the Magistrate is, therefore, without jurisdiction and is set aside.

It is strange that the Magistrate in this particular case is bent upon disregarding the repeated orders and decrees of the Civil Courts at the instance of one person or the other. If the man declared by the Civil Court to be rightful owner of the property and entitled to possession of the same, be driven to litigation in this way, perhaps there will be no end to it, for everybody in the village one after the other will come forward to dispute his right. It was clearly held in the previous proceeding by this Court and also by the Police in that proceeding that the judgment debtors were instigating the persons not parties to the decree to set up claims adverse to the purchaser simply with a view to harass him. There must be finality somewhere and if the Magistrate had realised his duty and done it properly in following the Civil Court precept and maintained the possession of the property, so far as he was concerned, the matter would have come to an end.

I, therefore, have no hesitation in setting aside the order of the Magistrate and I enjoin the Magistrate will maintain the possession of the first party and prevent aggressions by others and will not take notice of the fact that they were not parties either to the Civil Court decree or to the previous 145 proceeding. If anybody is aggrieved by the possession given by the Civil Court let him go to the proper Tribunal for the adjudication of his rights and recovery of the property. The Magistrate has ample power under sections 107 and 145 to maintain the possession of the first party.

N. M. *Order set aside.*

BIKRAM SINGH *v.* NIHAL CHAND.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION NO. 845 OF 1923.

June 25, 1923.

Present:—Mr. Justice Moti Sagar.

BIKRAM SINGH—ACCUSED—PETITIONER

versus

NIHAL CHAND—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute, whether should be granted to debtor against creditor.

It is not expedient that a sanction to prosecute should be granted to a debtor to use against his creditor.

Nazir Hasan v. *Dost Muhammad*, 26 A. 1; A.W. N. (1903) 171; 1 Cr. L. J. 120, *Jadu Lal* v. *Lowis*, 11 C. W. N. 712; 34 C. 848; 5 Cr. L. J. 480; 6 C. L. J. 531, *Brojobashi Panda* v. *Emperor*, 4 Ind. Cas. 485; 13 C. W. N. 398; 11 Cr. L. J. 4, *Donald Graham & Co.* v. *Kewalram Ghanshamdas*, 15 Ind. Cas. 805; 13 Cr. L. J. 533; 5 S. L. R. 237, relied on.

Petition, under section 439, Criminal Procedure Code, for revision of an order of the District Judge, Gujranwala, dated the 10th February 1923, reversing that of the Senior Subordinate Judge, Gujrat, dated the 8th June 1922.

Mr. *Gobind Ram*, for the Petitioner.

JUDGMENT.—One Bawa Bikram Singh applied for the execution of his decree which he had obtained against Kesar Mal and his son Nihal Chand. On the 15th of January 1919 Nihal Chand made an application to the Senior Subordinate Judge of Gujrat to the effect that he had paid to the decree-holder Rs. 1,200 in full satisfaction of the decree, and prayed that the decree-holder should be summoned to certify the payment. Along with this application he filed a receipt for Rs. 1,200 which purported to bear the signature and thumb mark of the decree-holder, Bawa Bikram Singh. Bawa Bikram Singh appeared in Court and denied the genuineness of the receipt. On the 29th of August 1919 the Senior Subordinate Judge declared the receipt to be genuine and further ordered that notice should be issued to the decree-holder to show cause why he should not be prosecuted for perjury. Sanction was granted against Ram Lobhaya and Mahbub Alam witnesses who had deposed that the receipt was not genuine, but sanction was refused against Bawa Bikram Singh on the ground that there was no application by the judgment-debtor to prosecute the decree-holder. Nihal Chand then made a regular application for sanction to prosecute Bikram Singh, but this was rejected by the Senior Subordinate Judge on the 8th of June 1922. Against this order of dismissal an appeal was preferred to the District Judge of Gujranwala, who by his order dated the 10th of February 1923 set aside the order of the Senior Subordinate Judge and granted sanction to prosecute Bawa Bikram Singh under sections 193/210 of the Indian Penal Code.

Bawa Bikram Singh has come up to this Court on the revision side and it has been contended on his behalf that under the peculiar circumstances of this case sanction ought not to have been granted. In my opinion there is force in this contention and it must prevail. There is ample authority for holding that it is not expedient that sanction to prosecute should be given to a debtor to use against his creditor, *vide* *Nazir Hasan* v. *Dost Muhammad* (1), *Jadu Lal* v. *Lowis* (2), *Brojobashi Panda* v. *Emperor* (3) and *Donald Graham & Co.* v. *Kewalram Ghanshamdas* (4). In the present case there can be no manner of doubt that the object with which the judgment-debtor has applied for sanction to prosecute the decree-holder is not to further the ends of justice but to put pressure upon the decree-holder to give up his claim under the decree. I do not think that it will be in the interests of public justice to maintain the order of sanction given by learned Sessions Judge and I accordingly revoke the sanction.

Sanction revoked.

Z. K.

(1) 26 A. 1; A. W. N. (1903) 171; 1 Cr. L. J. 120.

(2) 11 C. W. N. 712; 34 C. 848; 5 Cr. L. J. 480; 6 C. L. J. 531.

(3) 4 Ind. Cas. 485; 13 C. W. N. 398; 11 Cr. L. J. 4.

(4) 15 Ind. Cas. 805; 13 Cr. L. J. 533; 5 S. L. R. 237.

MUHAMMAD HAMID v. MAHMUD.

PRIVY COUNCIL.

APPEAL FROM THE PUNJAB CHIEF COURT.

November 2, 1922.

Present:—Viscount Cave, Lord Phillimore, Lord Justice Clerk, Sir John Edge and Mr. Justice Duff.

Khawaja MUHAMMAD HAMID—PLAINTIFF—APPELLANT

versus

Mian MAHMUD AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Wakf—*Dedication when may be inferred*—Khankah, *nature of*—Sajjadanashin, *succession to*—*Surplus offerings*—*Members of family, whether entitled.*

A *khankah* is a monastery or religious institution where *dervishes* and other seekers after truth congregate for religious instruction and devotional exercises. [p. 1009, col. 2.]

Piran v. *Abdool Karim*, 19 C. 203; 9 Ind. Dec. (N S.) 581, *Mohiuddin* v. *Sayiduddin*, 20 C. 810; 10 Ind. Dec. (N. S.) 545, *Vidya Varuthi Thirtha* v. *Balusami Ayyar*, 65 Ind. Cas. 161; (1921) M W. N. 449; 41 M. L. J. 346; 44 M. 831; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 48 I. A. 302 at p. 823; 26 C. W. N. 537; 24 Bom. L. R. 629; 20 A. L. J. 497; (1922) A. I. R. (P. C.) 123 (P. C.), referred to.

Origin of *khankahs* described.

On the death of a *sajjadanashin* his eldest son is not entitled as of right to succeed him but the eldest son, if qualified, is the natural successor of his father. [p. 1013, col. 2.]

Dedication may be inferred although the word *wakf* is not shown to have been used. [p. 1013, col. 2.]

Jewun Doss Sahoo v. *Shah Kubeer ood-deen*, 2 M. I. A. 390; 6 W. R. 3 (P. C.); 1 Suth. P. C. J. 100; 1 Sar. P. C. J. 206; 18 E. R. 348, referred to.

At certain shrines the members of the founder's family other than the *sajjadanashin* are treated as entitled to share in the surplus offerings which remain after payment of expenses. [p. 1014, col. 2.]

Appeal from a judgment and decree of the Punjab Chief Court, reversing a judgment of the District Judge, Multan.

Messrs. *DeGruyther, K. C.*, *Bevan Petman* and *Dube*, for the Appellants.

Sir *George Lowndes*, *K. C.*, Messrs. *Raikes* and *Abdul Rashid*, for the Respondents.

JUDGMENT.

Viscount Cave.—This appeal raises questions as to the existence of a *khankah* (a Muhammadan religious institution) at Taunsa in the District of Dera Ghazi Khan in the Punjab, and as to the rights of the *sajjadanashin* (or superior) of such an institution. The nature and origin of *khankahs* were described in the judgments of the High Court of Bengal in *Piran* v. *Abdool Karim* (1) and *Mohiuddin* v. *Sayid-ud-din* (2) and in the judgment of this Board in *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (3) and need not be further elaborated. It is enough to say that a *khankah* is a monastery or religious institution where *dervishes* and other seekers after truth congregate for religious instruction and devotional exercises. It has generally been founded by a *dervish* or a *Sufi* professing esoteric beliefs, whose teachings and personal sanctity have attracted disciples whom he initiates into his doctrines. After his death he is often revered as a saint, and his humble *takia* (or abode) grows into a *khankah* and his *durgah* (or tomb) into a *rauzah* (or shrine). The *khankah* is usually under the governance of a *sajjadanashin* (the one seated on the prayer mat) who not only acts as *mutwalli* (or manager) of the institution, and of the adjoining mosque, but also is the spiritual preceptor of the adherents. The founder is generally the first *sajjadanashin*, and after his death the spiritual line (*silsilla*) is extended by a succession of *sajjadanashins*, generally members of his family chosen by him or according to directions given by him in his lifetime, or selected by the *fakirs* and *murids*, and formally installed; and the income of the institution is usually received and expended by them.

In the present case events followed closely the course above described. Khawaja Muhammad Suleman, who was a disciple of Nur Muhammad Muharvi of Mahar in the State of Bahawalpur (a member of the well-known Chishti family of *sufis*), came to dwell at Taunsa, a place situated in a sandy desert under the Suleman range and then uninhabited. It is recorded in a book called Manakab-ul-mahbubin (the history of the beloved of God), which was written in or about the year 1860 by one of his disciples and

(1) 19 C. 203; 9 Ind. Dec. (N. S.) 581.
(2) 20 C. 810; 10 Ind. Dec. (N. S.) 545.
(3) 65 Ind. Cas. 161; 48 I. A. 302 at p. 323; (1921) M. W. N. 449; 41 M. L. J. 346; 44 M. 831; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 26 C. W. N. 537; 24 Bom. L. R. 629; 20 A. L. J. 497; (1922) A. I. R. (P. C.) 123 (P. C.).

was referred to by both parties in the suit, that Suleman built a house and a *dalan* (or gallery) for his lodging, a *hujra* (or room) for his worship, and a *dalan* for the society of *fakirs*, and further that he erected a *katcha* mosque where he said prayers in congregation, and to the east of the mosque a wooden canopy shaded by reeds, under which he held Court. Mention is also made of other *hujras* and a *langer* (or kitchen) for the use of his adherents, and a well; and it is said that an auditor of accounts and a legal adviser and a Counsellor were appointed. Suleman was much revered as a religious teacher and made many disciples, including the Nawab of Bahawalpur, who demolished the *katcha* mosque of earth and built a *pacca* mosque in its place.

Suleman died in or about the year 1849; and, his sons having predeceased him, he was succeeded by his grandson (the elder son of his elder son) Khawaja Allah Bakhsh, who on the third day after the death of Suleman was "made to sit on the *musalla* of Hazrat Suleman" with the usual ceremonies, including the tying of the turban, and with the assistance of holy men who had come from Ajmere. Khawaja Suleman was buried in his house at Taunsa, and his tomb became a sacred place of pilgrimage, particularly on the occasion of the *urs* or celebrations held on the anniversary of his death; and Taunsa became known as Taunsa *sharif*, or or holy Taunsa. In memory of Suleman, the Nawab of Bahawalpur erected a marble shrine over his place of burial and re-built the mosque in marble.

Khawaja Allah Bakhsh carried on his grandfatner's work with zeal and success, and with the assistance of a number of *pirs* and *khalifas* who had been ordained by him, and made many disciples; and many thousands of pilgrims were attracted to the shrine. Allah Bakhsh obtained grants of more land from the tribes in the district, and with the help of his followers put up huts and bungalows for the *fakirs* and *dervishes*, and *serais* and *langars* for the accommodation of the pilgrims, so that at the time of his death the mosque and shrine, with the buildings used in connection with them, occupied some acres of ground. Remission of revenue was granted to Allah Bakhsh as *sajjadanashin* of the *khankah* at Taunsa, and he was exempted under that designation from appearing personally in a Civil Court.

On September 13, 1901, Khawaja Allah Bakhsh died, and his eldest son Hafiz Muhammad Musa was duly installed as *sajjadanashin* in his place. Shortly afterwards differences arose between Muhammad Musa and his half-brother Mian Mahmud (the first respondent in this appeal) as to the posititon and authority of Muhammad Musa as *sajjadanashin* and the rights and interests of the two brothers in the property left by their father Khawaja Allah Bakhsh; and at the instance of the Deputy Commissioner, these differences were referred under the Frontier Crimes Regulation to the *Tumandars* (or headmen of the district) with a view to a settlement. The *tumandars*, after hearing the parties, made an award, dated September 30, 1903, whereby they determined (in effect) first, that Muhammad Musa was *sajjadanashin* of the *khankah* with the right to manage the mosque and shrine; secondly, that the income of the shrine, consisting of the offerings of the pilgrims, should belong as to one-fifth to Muhammad Musa as *sajjadanashin*, as to the balance to the two brothers equally; and, thirdly, that while the mosque was *wakf* property and the shrine, with its inner and outer *astanas* (or courtyards) and certain other properties were joint and impartible, the remaining properties including the *serais*, bungalows and *langars*, were divisible between the brothers equally. The following clauses in the award which relate to the properties above-mentioned, have a bearing on what follows:—

"4.—The building of the *astana kalan* (which includes the *astana* of the *khankah* shrine), and as well as the houses of the *muhavil* people situate on the northern side of the mosque, shall be considered joint. However, the compound of the *astana* of the *rauza mubarik*, which is situate on the west of the mosque and is attached to the *rauza*, shall not be considered as liable to partition, because it is an *ibadat-khana*. The *dervishes* who formerly lived there shall, in future, also stay there in accordance with the previous practice.

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"5.—The mosque is *wakf* property. The appointment of its *Imam* and *Muazan* shall be in the hands of the *sajjadanashin*. Saying of prayers and call to prayers shall be, in accordance with the practice of the previous *sajjadanashins*, in the hands of the *sajjadanashin* for the time being. The prayers should be said during that portion of the time in which they were formerly said, according to the practice of the *sajjadanashins*. The same practice shall be acted upon in future.

* * * * *

"8.—The residential buildings, consisting of *Hiram Sara*, dwelling houses, guest-houses and *langar khanas* (charitable kitchens) shall be the property of both the parties in equal shares. But the *langar khani* and Makan-i-Itikaf, which are in front of the shrine, and where the Kuran and *wazifas* are recited, are specifically declared, with the consent of Mian Mahmud, to be the exclusive property of the *sajjadanashin*. Mian Mahmud shall have no concern with these buildings. There are also two *kharas* (mills for grinding corn) in the *langar khanas* (charitable kitchens). They shall also belong to the *sajjadanashin*. The boundaries of the *langar khana* (charitable kitchen) are as follows:—

"On all three sides, namely west, south and east, there is a public thoroughfare. The said building is confined within a wall with the exception of shops.

"9.—*Hiram Sara* buildings, outer residential houses and guest houses have all been held to be the property of the parties in equal shares. They shall be divided accordingly in a gentlemanly manner.

"10.—Dah Dardah well and Thalawala well shall be joint property. None of the parties shall be entitled to interfere with the supply of water for the timebeing.

* * * * *

"16.—The place "*musallah*" in front of the shrine where the late Hazrat sat and recited his prayers should be considered as specially meant for the *sajjadanashin*, and in his absence the person whom he authorises can sit there."

These decisions were apparently accepted by Muhammad Musa and to some extent by Mian Mahmud, and they proceeded to partition between them by arrangement the properties declared to be divisible. But further differences arose, and the whole matter was again referred to the arbitration of a *Maulvi* named Najam-ud-din, who, after hearing the parties, made his award, dated June 17, 1904. This award went into much detail, and it is unnecessary to state its conclusions at length but the short effect of it was to confirm the decisions of the *Tumandars* except as to the income from the shrine, which the arbitrator directed to be divided equally, and to confirm with certain modifications the partition arranged between the parties. This award was accepted by Muhammad Musa, who applied to have it filed in Court, but the application was opposed by Mian Mahmud, who was still not content, and was rejected on the ground that the award was incomplete.

Meanwhile, the two brothers, being still in difference, joined in a request to Nawab Ahmad Yar Khan to endeavour to bring about a settlement and the latter prepared a deed of compromise under which both parties were to accept the award of Najam-ud-din, subject to some small modifications of detail. Muhammad Musa by a letter to Ahmad Yar Khan assented to this proposal, and Mian Mahmud was apparently willing to agree to it but before formal effect could be given to the compromise. Muhammad Musa died on February 9, 1906.

Upon the death of Muhammad Musa a further quarrel broke out between his eldest son Khawaja Muhammad Hamid (the appellant in this appeal) and the respondent Mian Mahmud as to the right of the former to succeed his father as *sajjadanashin*, and as to the rights and interests of the disputants in the property of Khawaja Allah Bakhsh, but on the intervention of Mr. Casson, the Deputy Commissioner, terms were arranged, and few days after Muhammad Musa's death the following agreement was signed:—

"I, Mian Hamid, very willingly consent to Mian Mahmud sitting in front of me and shall have no objection thereto, but he should not sit on my *mussallah*. On every occasion I shall consider him, who is my uncle, as deserving respects from

me. I shall be going to my uncle once a day. I shall act upon and abide by the settlement made by Ahmad Yar Khan with my deceased father.

(Sd.) FAKIR HAMID,
Sajjadanashin of Taunsa.

"I would very willingly take part in the *dastarbandi* and installation on *gaddi* of Mian Hamid and shall perform the ceremony with my own hands. I shall ever be loving my dear nephew Mian Hamid.

(Sd.) FAKIR MAHMUD."

The effect of this agreement was that the appellant was to be installed as *sajjadanashin* in succession to his father, and that the settlement proposed by Ahmad Yar Khan was to be accepted and carried into effect.

In pursuance of the last-mentioned agreement the appellant was duly installed as *sajjadanashin* by the ceremony of *dastarbandi* (the tying of the turban), the respondent Mian Mahmud and a number of *pirs* assisting in the ceremony; but a few days later the respondent Mahmud, apparently repenting of his bargain, procured himself to be invested by other *pirs* with the like rank, and thenceforth began to usurp some of the functions of the *sajjadanashin* and in other ways to interfere with the rights secured to the appellant by the agreement. This new quarrel continued for some years, and ultimately on July 22, 1911, the appellant commenced this suit against the respondent Mian Mahmud and the two younger brothers of the appellant (who also claimed an interest in the succession of Hafiz Musa), alleging in effect that the shrine and all the property used in connection with it, including a great part of the properties which had been partitioned, were dedicated to the religious purposes of the *gaddi*, and that the respondent Mian Mahmud was interfering with such property and with the appellant's rights as *sajjadanashin*, and claiming an injunction and possession of the property. The defendants filed written statements in answer and a number of issues were framed, of which the most important were the following:—

"(1) Is there a religious institution (*gaddi*) at Taunsa, and is plaintiff its manager (*muntazim*)?

(2) Does property 1-31 of the plaint belong to this institution, and (*or*) is this property *wakf* and is plaintiff its *mutwalli*?

(3) Is plaintiff *sajjadanashin* of this institution, and what are his rights as such?

(4) Is the partition invalid?"

The suit was heard by the District Judge of Multan (Mr. F. H. Forbes) who decided the first and third issues and the greater part of the second and fourth in favour of the plaintiff-appellant, holding that there was a religious institution at Taunsa of which the plaintiff alone was the manager, and that the shrine with its inner and outer *astanas* and the schools, bungalows, *serais* and *langars* used in connection with it, were religious buildings and *wakf* property under the plaintiff's sole control. He accordingly on February 4, 1913, made a decree containing a declaration that the properties above-mentioned were under the management of the plaintiff as *sajjadanashin* and that the defendants had no proprietary rights in them, an injunction restraining the defendant Mian Mahmud from interfering with the plaintiff's management of the above property and an order for possession and for the costs of the suit.

The defendants having appealed to the Chief Court of the Punjab, the learned Judges of that Court (Sir Donald Johnston C. J. and Leslie Jones, J.) differed from the District Judge on all the above points, and held that (apart from the mosque), there was no such religious institution as alleged, that the plaintiff was no *sajjadanashin*, and that none of the property in suit was *wakf*, but that all of it was ordinary property of Allah Bakhsh divisible among his heirs. They accordingly reversed the decree of the District Judge with costs and dismissed the appellant's suit except that (the defendant Mahmud not objecting) an injunction was granted restraining the defendant Mahmud from attempting to lead prayers in the presence of the plaintiff when the latter was there with the intention of leading prayers.

The plaintiff thereupon appealed to His Majesty in Council.

The appeal was strenuously argued on behalf of the appellant and of the respondents. Difficulty is caused by the contradictory evidence given by the witnesses, including the *maulvis* who were called as experts in Muhammadan Law, and by the difference of opinion in the Indian Courts; but their Lordships, after considering all the arguments brought before them, have come to clear conclusions upon the several points raised which may be stated in the following order:—

1. Is there at Taunsa a religious institution (a *khankah* or *mazhabi gaddi*) for devotional exercises, and the instruction of pupils in the Muhammedan faith?

In their Lordships' opinion there is such an institution. The history of the foundation by Suleman and Allah Bakhsh agrees closely with the history of other institutions always recognised as *khankahs* and is consistent only with the existence of such a foundation. The life and teaching of Suleman, his recognition as a saint, the thronging of pilgrims to his shrine, the swarm of *fakirs* and *dervishes* who have been there engaged in teaching and devotional exercies, the large number of disciples constantly present, and the recognition of Allah Bakhsh, Muhammad Musa and the appellant successively as *sajjadanashins* of the institution—these and other facts which are beyond dispute show that a religious institution such as described by the plaintiff has existed and flourished at Taunsa for many years past. The foundation is expressly referred to in some of the documents, such as the award of the *Tumandars*, as a *khankah*, and has been described by the respondent himself as a *gaddi*; and the evidence shows that it is acknowledged by Muhammadans throughout India as a legitimate off-shoot of the *khankah* at Mahar and of the great shrine at Ajmere, and as the mother of a number of other shrines which are frequented by the faithful. Upon the whole, their Lordships consider that the existence of this foundation must be taken as established.

2. Is the appellant *sajjadanashin* and manager of the *khankah*? With deference to the opinion of the learned Judges of the Chief Court, their Lordships feel no doubt that he is. Notwithstanding the practice hitherto followed at Taunsa, they would hesitate to say that on the death of a *sajjadanashin* his eldest son is entitled as of right to succeed him; but the eldest son, if qualified, is the natural successor of his father. And, however that may be, the evidence is clear that the appellant was formally recognised and installed by the *pirs* with the express consent and assistance of Mian Mahmud; and this being so, it is not now open to Mahmud to question the appellant's position as *sajjadanashin* or his right to manage the mosque and the property attached to the *khankah*.

3. What property is attached to the *khankah*? or, in other words, what properties were made *wakf* by Khawaja Suleman or Khawaja Allah Bakhsh and dedicated to the religious purposes of the institution?

This is a question of considerable difficulty, as it is not proved by direct evidence that either Suleman or Allah Bakhsh used the word *wakf* or made formal dedication of any property to religious uses. But, as pointed out in *Jewun Doss Sahoo* v. *Shah Kuleer-ood-deen* (4) dedication may be inferred although the word *wakf* is not shown to have been used and there are facts proved in this case from which the dedication of some property to religious purposes may be inferred.

First, as to the shrine of the saint, with its *astana*, the place of worship for the *sajjada*, and the surrounding *hujras* and gates—being the property shown in the plan P. 1—their Lordships are of opinion that this is *wakf*. Not only is the shrine the burial-place of the founder, but the tomb with its adjuncts have been used and recognised for upwards of half a century as a place of pilgrimage and as the home and centre of the religious and educational community founded by the saint and continued by his grandson. The marble shrine erected by the Nawab was obviously intended to be used, not as

(4) 2 M. I. A. 390; 6 W. R. 3 (P. C.); 1 Suth. P. C. J. 100; 1 Sar. P. C. J. 206; 18 E. R. 348.

private property, but as a place of pilgrimage and a focus of religious teaching. The place of worship in the courtyard has been reserved for the *sajjadanashin*, and the *hujras* for the use of the *fakirs*. Some of the buildings contain inscriptions pointing to a religious use. The *Tumandars*, who had local knowledge, held these buildings to be impartible; and their view was confirmed by Najam-ud-din and Ahmed Yar Khan and accepted by all persons concerned, including the respondent Mahmud. In view of all these facts it is difficult to believe that this property is now to be treated as the absolute property of the heirs of Allah Bakhsh, so that it would be in the power of any of them to claim his share and practically to destroy the religious foundation; and it seems reasonable to infer a dedication to the purposes of the *khankah*.

Secondly, as to the mosque, with its inner and outer courtyards, well, tanks, *hujras* and schools, and the Maharvi bungalow—being the property shown in the plan P-2—like considerations apply. The mosque is admittedly *wakf* property. The *asatnos* are used by the *fakirs* and pilgrims, and are holy ground; for Allah Bakhsh directed that shoes should be taken off there. The huts are for the use of the *servishes*, and the schools are religious schools connected with the *khankah*. The Maharvi bungalow was given by an adherent for the use of the superior of Mahar, the parent shrine, on his visits to Taunsa. This property, therefore, must also be held to be *wakf*.

As to the remaining properties in dispute such as the *serais* and *langars*, these stand in a different position. They have, no doubt, been used for the accommodation of the pilgrims, but they were never appropriated to the religious purposes of the *khankah*. There is no evidence showing that they were erected out of the offerings at the shrine. The *Tumandars* and the arbitrators, all of them skilled in Muhamadan Law, treated these houses as private property and partible, and the parties to the dispute accepted this view and agreed to a partition. As to these items, therefore, that is to say, all the properties except Nos. 1 and 2, the appellant's claim fails.

4. To whom do the offerings at the shrine belong?

It was stated in the judgment of this Board in *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (3) that "ordinarily speaking, the *sajjadanashin* has a larger right in the surplus income than a *mutwalli*, for so long as he does not spend it in wicked living or in objects wholly alien to his office, he, like the *Mahant* of a Hindu *math*, has full power of disposition over it." But this does not mean that in every case the whole income from a *khankah* is at the disposal of the *sajjadanashin*; and it is plain from the authorities, as well as from the evidence in this suit, that at certain shrines the members of the founder's family other than the *sajjadanashin* are treated as entitled to share in the surplus offerings which remain after payment of expenses. Thus, it is stated in the Fatwa Azizi (page 90) that "the offerings daily made at the *durgah* should be spent in connection with the expenses of the descendants of the saint and the service of the *durgah* according to their needs. An honest person should be appointed as *mutawalli* in order to collect the offerings and distribute them properly," and it appears from the evidence that at Mahar—the parent shrine of Taunsa—and at some of the shrines which have sprung from Taunsa, the right of the descendants of the founder to share in the offerings is recognised. In the case of Taunsa itself it is difficult to draw from the evidence any clear rule. Allah Bakhsh disposed of the whole income as he pleased; but Musa's right to do so was challenged, and the claim of Mian Mahmud to a share in the offerings was admitted by the *Tumandars* and the arbitrators. Further, the appellant was installed as *sajjadanashin* upon an express undertaking by him to carry out the award of Ahmad Yar Khan; and under that award, which confirmed in this respect the award of Najam-ud-din, the surplus offerings were to be shared equally with Mahmud. Upon the whole, their Lordships think that the appellant must be held to this undertaking, and accordingly that he must share the surplus offerings, after deducting all outgoings (including a reasonable remuneration to

the *sajjadanashin*) with the respondent Mian Mahmud during their joint lives.

In the case of these offerings, as in the case of the immoveable property, their Lordships have dealt only with the rights of the appellant and the first respondent *inter se*, and have not considered the rights of the other respondents.

For the above reasons their Lordships are of opinion that this appeal should be allowed, and that the decree of the Chief Court should be set aside, except so far as it grants an injunction against the first defendant enjoining him in future not to enter the mosque with his congregation and lead prayers in the presence of the plaintiff when the latter is there with the intention of leading prayers with his congregation, and that in lieu thereof it should be declared that the properties numbered 1 and 2 in the list attached to the decree of the District Judge are under the management of the plaintiff as *sajjadanashin*, and there should be a decree for the delivery of possession of those properties to the plaintiff, and for an injunction restraining the first defendant from interfering with the management of those properties by the plaintiff, or with the exercise by him of his rights and duties as *sajjadanashin*. There should also be a declaration that the defendant Mian Mahmud is entitled during the joint lives of himself and the plaintiff to one half of the surplus offerings at the shrine after deducting all outgoings (including a reasonable remuneration to the *sajjadanashin*), with liberty to him to apply for an account and payment of what may be found due. Their Lordships will humbly advise His Majesty accordingly.

As both parties have throughout the proceedings put forward claims which cannot be supported, there will be no orders as to the costs of the proceedings in the Courts below or of this appeal.

Appeal allowed.

K. S. D.

Solicitors for the Appellant:—Messrs. *Lewis & Yglesias.*

Solicitors for the Respondents:—Messrs. *Ranken, Ford & Chester.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1917 OF 1920.

August 30, 1923.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Chotzner.

BHAIRAB CHANDRA DAS AND OTHERS—DEFENDANTS—APPELLANTS

versus

THE MIDNAPUR ZEMINDARI CO. LTD. AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 105—Landlord and tenant—Mokarari patta—*Fixity of rent—Presumption—Enhancement of rent, whether permissible.*

The use of the term *mokarari* implies fixity of rent, and where a *mokarari patta* provides that the lessee is to hold down to his sons, grandsons etc., the tenure becomes *mourusi mokarari*. [p. 1018, col. 1.]

Ram Narain Singh v. *Chota Nagpur Banking Association*, 36 Ind. Cas. 321; 43 C. 332, *Mahanurd Sahay* v. *Saidunnessa Bibi*, 8 C. L. J. 525, 12 C. W. N. 154, *Gayatulla Sardar* v. *Girish Chandra*, 12 C. W. N. 175, *Reshee Case Law* v. *Satish Chandra Paul*, 64 Ind. Cas. 774; 35 C. L. J. 90; (1922) A. I. R. (C.) 123, followed.

Mere forbearance on the part of a landlord to enforce enhancement of rent does not justify the inference that the tenure is not enhanceable. But no question of presumption arises where the terms of the contract have been reduced to writing. [p. 1019, col. 1.]

Jugalandhu Sola v. *Mogremoyi Dassi*, 56 Ind. Cas. 884, 24 C. L. J. 363; 44 C. 555; 22 C. W. N. 89, *Guru Charan Naraj* v. *Sarab Ali*, 52 Ind. Cas. 79; 30 C. L. J. 9; 23 C. W. N. 1041, followed.

A *mokarari patta* contained the following clause: "Becoming entitled to make sale and gift etc., you down to your sons, grandsons etc. in succession shall continue to peacefully enjoy and possess on payment of the rent according to the demands prevalent in the Pergunah without any enhancement or abatement of the rate of rent according to the different classes of lands. If you hold possession of any land in excess to what is mentioned in this *patta* and if any land be found upon measurement to be in excess, then you shall separately pay the rent thereof according to the rates of different classes of land; and if the area of the land be found to be less, you shall get abatement of rent under a settlement at the aforesaid rates. The rates of rent according to classes will, in fact, never be enhanced or abated"

Held, that the landlord had by the grant of the *patta* precluded himself from exercising the right vested in a *Zemindar*, holding under the Permanent Settlement, to raise, from time to time, the rents, according to the *Paraganah* or current rates, of all the rent-paying lands within his *Zemindari*. [p. 1019, col. 1.]

Amar Nath Bhattacharjee v. *Raja Hrishikesh Laha*, 64 Ind. Cas. 829; 35 C. L. J. 138, *Robert*

Watson & Co. v. *Radha Nath Singh*, 1 C. L. J. 572, *Port Canning and Land Improvement Co.* v. *Katyani Debi*, 53 Ind. Cas. 522; 46 I. A. 279; 47 C. 280; 37 M. L. J. 578; 17 A. L. J. 1061; 1 U. P. L. R. (P. C.) 91; (1920) M. W. N. 160; 24 C. W. N. 369; 11 L. W. 296; 22 Bom. L. R. 437; 32 C. L. J. 1; 27 M. L. T. 195 (P. C.), *Katyayani Debi* v. *Port Canning and Land Improvement Company Limited*, 25 Ind. Cas. 274; 19 C. W. N. 56, *Bamasoondery Dassyah* v. *Radhika Chowdhrain*, 13 M. I. A. 248; 13 W. R. P. C. 11; 4 B. L. R. P. C. 8; 2 Suth. P. C. J. 293; 2 Sar. P. C. J. 524; 20 E. R. 544, referred to.

Ram Kumar Singh v. *Messrs. Robert, Watson & Co.*, 9 C. W. N. 334, *Surja Prosad Sukul* v. *Midnapore Zemindari Company Limited*, 77 Ind. Cas. 954; 38 C. L. J. 369, distinguished.

Appeal against a decree of the Additional Special Judge, Midnapur, dated the 30th January 1920, reversing that of the Assistant Settlement Officer, Midnapur, dated the 23rd May 1917.

Babu *Bijay Kumar Bhattacharyya*, for the Appellants.

Mr. *U. N. Sen Gupta*, Babus *Probodh Kumar Das* and *Apurba Charan Mukherjee*, for the Respondents.

JUDGMENT.—This is an appeal by the tenant-defendants in a proceeding under section 105 of the Bengal Tenancy Act instituted by the plaintiffs-respondents for settlement of fair and equitable rent of a tenure. The tenancy is recorded as *kayemi mokarai* in the Record of Rights. The tenants consequenly contended that though rent could be assessed in respect of excess lands, the rate of rent could not be enhanced. This contention was overruled by the Assistant Settlement Officer who assessed fair and equitable rent on the basis of the assets. On appeal by the landlords and cross-appeal by the tenants, the Special Judge remanded the case for further enquiry under O. XLI, r. 25, Civil Procedure Code. Ultimately, the Special Judge varied the order of the primary Court in favour of the landlords. On the present appeal, the tenants have urged that the tenure was held at a fixed rate of rent and consequently fair and equitable rent could not be assessed. When the appeal was heard on the 7th July 1922, it transpired that the terms of the tenancy were set out in a lease dated the 24th June 1864 which was not mentioned in the judgments of the Courts below. Thereupon the following questions were remitted to the Special Judge for investigation on such evidence as might be adduced by the parties.

(1) Whether the *patta* of the 12th Asar 1271, corresponding to the 24th June 1864, is or is not genuine;

(2) Whether it relates to the lands of the tenure now under consideration;

(3) Whether it fixes the rates of rent (to be assessed on the different classes of land) in perpetuity;

(4) Whether the rights of the parties were affected by the compromise of the 25th January 1887 which was arrived at in the course of the suit instituted on the 27th July 1886.

The Sepecial Judge has now returned the record together with the following findings supported by full statement of reasons:

(1) The *patta* is a genuine document;

(2) The *patta* relates to the tenure now under consideration;

(3) The *patta* fixes the rates of rent in perpetuity, though the aggregate rent may be re-adjusted from time to time on variation of the area;

(4) The *mokarari* nature of the tenancy was not called in question in the compromise and was not affected thereby; but the provision in the *patta* that enhancement of rent for increase in area should be based on the existing classification of the land into thirteen classes was abandoned and a new classification of the land into fifteen classes was introduced.

The entire appeal has now been re-argued before us, and two substantial points have emerged for consideration, namely, first, does the *patta* fix in perpetuity the rates of rent to be assessed on the different classes of land; and, secondly, to what extent have the rights of the parties under the *patta* been affected by the compromise of the 25th January 1887.

The determination of the first question depends upon the true construction of the *patta* which was in the following terms:

"*Mokarari Patta granted to Lal Mohon Tanti and others, dated the 24th June* 1864.

No. 441.

(Seal)

Issued from Sherista
Amin Daptar.

Signature
(Illegible.)

BHAIRAB CHANDRA DAS *v.* MIDNAPUR ZEMINDARI CO. LTD.

This *mokarari patta* is granted by Messrs. Robert Watson & Co. the *Patni Zemindars* of Perganah Bogri to Lal Mohon Tanti, Jitu Tanti, Bhairab Tanti, Kali Tanti, Krishna Tanti and Ramdhan Tanti of Bhatmoda, Perganah Bogri the tenants of Mouzah Bhatmoda, Tarai Paschim, dated the 24th June 1864 corresponding to the 12th Asar 1271 B. S.

.....Quantity of land.....Rate.....Amount of *jama*

As per map prepared in connection with the enquiry made in 1271 B. S. bounded on the east by the limits of Mouzahs Kanapara and Ashapur, on the south by the River Silabati, on the west by the Beota Khal and on the north by the patit land on the limit of Mouza Pechamura. Within these boundaries total quantity of 478 *bighas* and 7 *cottas*, 8 *chittaks* of land. Out of this land the *garlaik* (non-culturable) in the *khas* possession of the Sarkar is as follows:—

	Bigha.	Cotta (torn)	Chittaks.
Included in khal	1	10	12
Occupied by road	5	19	8
Banjar (jungle) patit	7	15	0
Culturable patit	103	11	0
Pather Chatan	8	19	0
Indigo plantation	80	5	8
	208	0	12
	270	6	12

Out of this the area covered by the settlement taken by Anantaram Hadi in respect of 8 annas share is :—

	135	3	6
Remaining land	135	3	6

DETAILS.

	B.	C.	Ch.	R.	as.	gds.	Rs.	as.	gds.
Water, sand	67	3	8	0	8	0	33	9	$7\frac{1}{2}$
Danga sand	1	17	0	0	7	0	0	13	0
Sandy danga	0	6	0	0	7	0	0	2	$2\frac{1}{2}$
Dhanda	7	6	0	0	4	0	1	13	$7\frac{1}{2}$
Jhanja Danga (torn)	0	18	8	0	5	0	3	6	10
Becently cultivated	1	2	2	0	5	0	0	5	10
Serawa Danga	6	19	0	0	4	0	1	11	15
Biri Danga	,,	18	8	0	4	0	0	3	$12\frac{1}{2}$
Garden	,,	9	8	0	6	0	0	2	$17\frac{1}{2}$
Homestead	4	3	12	0	6	0	1	8	10
Tanks	3	2	0	0	4	0	0	12	10
Oush danga	5	15	8	0	8	0	2	14	5
Culturable patit	25	1	0	0	5	0	7	13	5
	135	3	6				55	4	$11\frac{1}{2}$
B. S.	135	3	$1\frac{1}{2}$				Rs. 55	4	$11\frac{1}{2}$

BHAIRAB CHANDRA DAS v. MIDNAPUR ZEMINDARI CO. LTD.

"Admitting the sum of rupees fifty-five annas four and *ga das* eleven and half as the annual rent of the total quantity of one hundred and thirty five *bigkas* three *cottas* and one and a half *poas* of land you have submitted a *kabuliyat*. This *mokarari patta* is accordingly granted to you. Becoming *maliks*, that is, becoming entitled to make sale and gift etc. you down to your sons, grandsons etc. in succession shall continue to peacefully enjoy and possess on payment of the rent according to the demands prevalent in the Perganah without any enhancement or abatement of the rate of rent according to the different classes of lands. If you hold possession of any land in excess to what is mentioned in this *patta* and if any land be found upon measurement to be in excess, then you shall separately pay the rent thereof according to the rates of different classes of land; and if the area of the land be found to be less, you shall get abatement of rent under a settlement at the aforesaid rates. The rates of rent according to classes will, in fact, never be enhanced or abated. Keeping intact the limits and boundaries of the aforesaid Mouza and holding the land as *jote* and letting out the same as *jote* you shall continue to peacefully enjoy and possess down to your sons and grandsons in succession as the *maliks*. You shall not harbour any wicked persons and bad characters within the aforesaid Mouza. If you do so you shall be answerable for the disturbance created by them. Finis. The 12th Asar 1271 corresponding to the 24th June 1864."

The *patta*, we observe, is described as *mokarari*. This unquestionably implies fixity of rent. Reference may be made to the decision in *Ram Narain Singh* v. *Chota Nagpur Banking Association* (1), where in an appendix will be found definitions of the term *mokarari* collected from various authorities. These show that the term *mokarari* implies fixty of rent, as was ruled in the cases of *Mohanund Sahay* v. *Saldunnessa Bibi* (2), *Gayratulla Sardar* v. *Girish Chandra* (3), *Reshee Case Law* v. *Satish Chanara Paul* (4).

We further notice that the *patta* provides that the lessee is to hold "down to your sons, grandsons etc." which makes the tenure *mourusi mokarari*. This clearly does not tend to assist the contention of the landlords.

We note finally that the lease provides that excess lands found upon measurement would be assessed not at the customary rate, but according to the rates for different classes as fixed in the lease. The parties undoubtedly contemplated the possibility of accretion, as the tenure was bounded on the south by a river and on the west by a *khal*. Such accretion might take place any length of time after the grant of the lease and it is inexplicable how the provision that the new land, whenever it might appear would be assessable at the rates prescribed in the lease, can be reconciled with the theory that the rates were intended to be liable to enhancement at the instance of the landlord. Nor can such a theory be reconciled with the provision that "the rates of rent according to classes will in fact never be enhanced or abated." The decision of this Court in *Amarnath Bhattacharjee* v. *Raja Harishikesh Lola* (5) furnishes a parallel to the present case. In that case, the rent was fixed at the rate of two annas per *bigha* in 1866; on the discovery of additional lands in the possession of tenants, the excess area was assessed at two annas per *bigha* in 1881, and finally it was agreed that if thereafter at any period further excess lands should be discovered in the possession of the tenants the excess area would be liable to be assessed at the rate of two annas per *bigha*. It was ruled that the rate of rent was fixed in perpetuity at two annas per *bigha*. Reference was made to the judgement of this Court in *Messrs. Robert, Watson & Co.* v. *Radha Nath Singh* (6) where the earlier decisions of the Judicial Committee on the subject were reviewed. Reference

(1) 36 Ind. Cas. 321; 43 C. 332.
(2) 8 C. L. J. 525; 12 C. W. N. 154.
(3) 12 C. W. N. 175.
(4) 64 Ind. Cas. 774; 35 C. L. J. 90; (1922) A. I. R. (C.) 123.
(5) 64 Ind. Cas. 829; 35 C. L. J. 138.
(6) 1 C. L. J. 572.

was also made to the decision of the Judicial Committee in *Port Canning and Land Improvement Co.* v. *Katyani Debi* (7) which affirmed the decision of the Court in *Katyayani Debi* v. *Port Canning and Land Improvement Co.* (8). We are consequently of opinion that the tenants have established, as required by the decision of the Judicial Committee in *Bamasoondery Dassyah* v. *Radhika Chowdhrain* (9) that their landlords have, by the grant of the *patta*, precluded themselves from exercising the right vested in a *Zemindar*, holding under the Permanent Settlement, to raise 'from time to time, the rents, according to the pergunah or current rates, of all the rent-paying lands within his *zemindari*.' It need not be disputed that mere forbearance on the part of a landlord does not justify the inferenee that the tenure is not enhanceable; *Jogabandhu Saha* v. *Magnamoyi Dassi* (10), *Guru Charan Nandi* v. *Sarab Ali* (11); but no question of presumption arises where, as here, the terms of the contract have been reduced to writing. We may add that we have been pressed with the decisions in *Ram Kumar Singh* v. *Messrs. Robert, Watson & Co.* (12), *Surja Prosad Sukul* v. *Midnapur Zemindari Co., Ltd.* (13). These decisions do not purport to formulate any general priciples which can control the construction of the contract of tenancy now in suit. We may state, however, that on examination of the records, we have satisfied ourselves that there are substantial differences between the *patta* in this case and the corresponding documents which were placed before the Court in those litigations. Those tenancies were not described as *mokarari*, nor was there any clause for fixity of rent. The only feature common to the present case and the two relied upon by the respondents is that the rent for excess land is made assessable at the same rate as the original land. This, by itself, does not justify the inference that because those tenancies were held enhanceable, the same character must be attributed to the present tenancy. We feel no doubt that the Special Judge has correctly held on remand that the *patta* in this case fixes in prepetuity the rates of rent to be assessed on the differentt classes of land.

The determination of the second question depends upon the true construction of the compromise of the 25th January 1887. We are of opinion that the Special Judge has correctly stated its effect. The *mokarari* nature of the tenarcy was not at all called in question in the compromise which was arrived at in the course of the suit instituted on the 27th July 1886. The nature of the tenancy consequently remained unaffected. The classification of the lands was, however, altered. In the *patta*, there are two classes on eight annas, two classes on seven annas, two classes on six annas, three classes on five annas and four classes on four annas. In the compromise petition there are three classes on eight annas, one class on seven annas, five classes on six annas, one class on five annas and five classes on four annas. To this extent and no further the parties modified the original contract. The contention of the landlords that the original contract of tenancy dated the 24th June 1864 has been completely superseded by the compromise of the 25th January 1887, is manifestly untenable.

The result is that this appeal is allowed and the decree of the Special Judge set aside. The case will be remitted to the Court of first instance in order that rent may be assessed on the disputed tenure on the following basis: the rates of rent to be assessed on the different classess of land will be deemed to have been fixed in perpetuity by the *patta* of the 24th June 1864, but the lands will be

(7) 53 Ind. Cas. 522; 46 I. A. 279; 47 C. 280; 27 M. L. J. 578; 17 A. L. J. 1061; 1 U. P. L. R. (P. C.) 91; (1920) M. W. N. 100; 24 C. W. N. 369; 11 L. W. 296; 22 Bom. L. R. 437; 32 C. L. J. 1; 27 M. L. T. 195 (P. C.).

(8) 25 Ind. Cas. 274; 19 C. W. N. 56.

(9) 13 M. I. A. 248; 13 W. R. P. C. 11; 4 B. L. R. P. C. 8; 2 Suth. P. C. J. 293; 2 Sar. P. C. J. 524; 20 E. R. 544.

(10) 36 Ind. Cas. 884; 24 C. L. J. 363; 44 C. 555; 22 C. W. N. 89.

(11) 52 Ind. Cas. 79; 30 C. L. J. 9; 23 C. W. N. 1041.

(12) 9 C. W. N. 334.

(13) 77 Ind. Cas. 954; 38 C. L. J 369.

classified on the lines of the compromise of the 25th January 1887.

The appellants are entitled to their costs in all the Courts including the costs of the enquiry by the Special Judge on remand. The respondents will, however, retain the costs of the day's hearing assessed at one gold *mohur* as directed in our order of remand dated the 7th July 1922, we assess the hearing fee in this Court at five gold *mohurs*.

Z. K. *Appeal allowed;*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL, NO. 1638 OF 1921.

November 7, 1922.

Present:—Mr. Justice Stuart and Mr. Justice Gokul Prasad.

RAM KISHUN RAM—PLAINTIFF—APPELLANT

versus

NORTH-WESTERN RAILWAY AND ANOTHER—DEFENDANTS—RESPONDENTS.

Railways Act (IX of 1890), ss. 72, 76—Risk-Note, construction of—Railway liable for loss of goods—Deterioration of goods—Damages, whether can be recovered.

Certain goods were consigned to the defendant Railway Company for carriage under a Risk-Note under which the Company was liable only in the event of the loss of the consignment or one or more complete packages forming part of the consignment, due to the wilful neglect of the Railway Administration, or to theft by or to the wilful neglect of its servants, transport agents or carriers. The goods arrived at their destination in a very deteriorated condition owing to the wilful neglect of the Railway Company. The consignee refused to take delivery of the goods and sued the Railway Company for the value of the goods:

Held, that under the terms of the Risk-Note the Company was not liable for deterioration of the goods.

Second appeal from a decree of the District Judge, Ghazipur.

Mr. *M. L. Agarwala*, for the Appellant.

Dr. *Surendro Nath Sen* and Mr. *Lalli Mohan Banerji*, for the Respondents.

JUDGMENT.—The facts of the suit out of which the present appeal arises are these:—The plaintiff-appellant, Ram Kishun Ram, gave an order to a firm of brokers at Ballia, called Chunni Lal Ganpat Rai, to obtain for him 184 bags of flour from Amballa. The brokers placed the order with a firm at Amballa who complied with it by loading 184 bags at the Amballa Railway Station of the North-Western Railway and consigning them, at reduced rate to Ballia. It is admitted by the North-Western Railway and the Bengal and North-Western Railway Companies, who were co-defendants in the suit, that the consignment, instead of being despatched to Ballia was despatched to Bally. Ballia is the head-quarters of a District in the United Provinces some 88 miles from Benares Cantonment, by the narrow gauge system of the Bengal and North-Western Railway. Bally is a small town six miles from Calcutta, and about 424 miles from Benares by the broad gauge system of the Oudh and Rohilkhand Railway and the East Indian Railway. The mistake in sending the consignment to Bally instead of Ballia was about as aggravated a mistake as sending a consignment to Cawnpore instead of to Calcutta. As a result, the consignment was completely lost sight of for sometime. When it was traced, the grain had deteriorated and the plaintiff-appellant refused to take delivery. It is admitted that the grain had deteriorated considerably and that the consignment, which was of a value of nearly Rs. 3,000, was sold, by auction, for under Rs. 1,500. The present suit has been instituted by the plaintiff-appellant to recover something under Rs. 3,000. The Subordinate Judge of Ghazipur decreed him Rs. 2,781-13-9. The North-Western Railway appealed and the District Judge of Ghazipur reduced the decretal amount to Rs. 1,422. The plaintiff-appellant prefers this appeal here.

There has been considerable argument at the Bar as to whether the consignment was despatched under a Risk-Note. We agree with the learned District Judge that the consignment was despatched under a Risk-Note. Under the terms of that Risk-Note the North-Western Railway Company would only be responsible, in the event of the loss of the consignment or one or more complete packages forming

part of the consignment, due to the wilful neglect of the Railway Administration, or to theft by or to the wilful neglect of its servants, transport agents or carriers. Now, there clearly was no loss. The claim is a claim for deterioration, and, even although the deterioration may have been due to the wilful neglect of the North-Western Railway or some other Railway Company working in connection therewith, in fact it is difficult to understand how such a mistake could have been made except by the grossest disregard of all reasonable precaution, unfortunately for the plaintiff-appellant, deterioration, due to such neglect, would afford no cause of action to him as the consigument was sent under a Risk-Note. It certainly does not seem desirable that a Railway Company should be able to contract itself out of liability for such a gross and flagrant error as the one disclosed. It seems difficult to believe that any responsible person could have made the mistake which occurred here, but, be that as it may, the Company's answer is complete. The case is covered by the Risk-Note and this appeal must be dismissed. It is dismissed accordingly with costs.

Z. K. *Appeal dismissed.*

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS No. 96 OF 1923.

May 22, 1923.

Present:—Mr. Justice Rutledge.

TAKIR RAM KALWAR—
PLAINTIFF
versus
M. N. SWAMY NAIDU—
DEFENDANT.

Rangoon Small Cause Court Act (VII Bur. of 1920), s. 14 (s)—Suit for declaration and damages for wrongful concealment of property, nature of—Jurisdiction of Small Cause Court.

Merely asking for a declaration in a suit does not necessarily make it a suit for a declaratory decree within the meaning of section 14 (*s*) of the Rangoon Small Cause Court Act.

A suit for a declaration and damages based on the allegation that the defendant had wrongfully removed and concealed certain property which the plaintiff was entitled to attach in execution of a decree does not fall within section 14 (*s*) of the Rangoon Small Cause Court Act and is not excluded from the cognisance of the Small Cause Court.

Mr. N. N. Sen, for the Plaintiff.

JUDGMENT.—In this case the plaintiff tendered a plaint of the value, as regards Court-fees, of Rs. 134, and, as the Deputy Registrar considered that the Small Cause Court, Rangoon, had jurisdiction, the plaintiff's Advocate has brought the matter to this Court, and has argued that, as in his plaint he seeks for a declaration, his case is accordingly a suit for a declaratory decree, and that, as such, the jurisdiction of the Small Cause Court is barred by section 14 (*s*) of that Act. I am of opinion that, merely asking for a declaration in a suit, does not necessarily make it a suit for declaratory decree within the meaning of section 14 (*s*) of the Rangoon Small Cause Court Act, 1920. This, in my opinion, applies to suits where only a declaration is asked for.

The plaintiff's real cause of action in the present case is one of tort as set out in paragraph 4 of the plaint, in that after he had got an order from the Court restoring his attachment of certain property, which had been removed owing to the plaintiff's default in not paying the fees for advertisement, the defendant wrongfully removed and concealed the property, so that the plaintiff was unable to re-attach it; and that, by reason of the defendant's so doing, the plaintiff suffered damage to the extent of Rs. 114.

This is an action for damages for tort, and there is nothing in section 14 of the Small Cause Court Act to deprive that Court of jurisdiction to enquire into his claim.

For the plaintiff, it is alleged that, in enquiring into this claim, the Court is bound to ascertain and to enquire to whom the property belonged, as the defendant had put in an application asking for removal of attachment on the ground

that the property belonged to him. I know of no provision of law which prevents the Small Cause Court from enquiring into who actually owned these few articles of property; and it would be in the highest degree inconvenient that the time of this Court should be taken up in investigating paltry claims to the value of Rs. 114, merely because the Advocate for the plaintiff thinks that he is constrained to ask the Court for a declaration, or that the Court should be constrained to deny the Small Cause Court jurisdiction in case such a claim is inserted in the plaint.

Let the plaint be returned to the plaintiff for presentation to the Court of Small Causes.

Plaint returned.

Z. K.

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION
SUIT NO. 2016 OF 1920.
January 29, 1923.
Present:—Mr. Justice Page.

JADAB CHANDRA MITTER AND OTHERS
—PLAINTIFFS
versus
ROMESH CHANDRA BOSE—
DEFENDANT.

Solicitor and client—Fees disallowed by Taxing Officer—Solicitor, right of, to retain client's money.

A Solicitor is entitled to retain such moneys of his client as, in accordance with the rules of the Court, he is entitled to claim against him. He has no right at all in law to retain any sums after the Taxing Officer has disallowed them, without having made a successful application to the Court either on review, or on a reference or otherwise, to increase the sums allotted. [p. 1024, cols. 1 & 2.]

Mr. *Zorab* (with him Mr. *S. N. Banerjea*), for the Plaintiffs.

Mr. *Langford James* (with him Mr. *B. K. Ghosh*), for the Defendant.

JUDGMENT.—This is a suit for the recovery of moneys paid to a Solicitor for and on behalf of the plaintiffs under an order of the Court. It arises in this way. The plaintiffs employed the defendant to act for them as their Solicitor in certain proceedings, the plaintiffs succeeded in the proceedings in the first instance, and as a condition for stay of execution a sum of Rs. 4,000 was ordered to be paid by the unsuccessful party to the defendant on his undertaking not to part with it until the hearing of the appeal was completed. The plaintiffs succeeded on the appeal, and this sum is still in the hands of the Solicitor, the present defendant.

The only issue which I have to consider in this case relates to certain fees amounting to Rs. 1,700 which were fees paid to Counsel, or alleged to have been paid to Counsel, by the defendant. Those fees, I find as a fact, were discussed between the defendant and the plaintiffs before Counsel were briefed or the fees paid. I am quite satisfied, having heard the defendant in the box, and also one of the plaintiffs, that the defendant did tell the plaintiffs whom he was going to brief, that the plaintiffs were very anxious to employ certain eminent Counsel who practised before these Courts, and that he informed them that, if they chose to retain these eminent Counsel, he would have to pay a fee which would probably not be allowed on taxation. Nevertheless, they were very anxious, as is obvious from the correspondence, to have the case thoroughly considered, and they were prepared to employ these expensive Counsel. I think that they knew what they were going to do, and that they were advised by the defendant that if they did employ those Counsel, the whole of the fees which were to be paid to them would not be recovered on taxation. However, no written authority was signed by the plaintiffs to enable the defendant to brief those Counsel. The defendant said that he did not obtain the usual written authority because they were relations and friends and he trusted them to

pay what was right and proper in the matter.

Now, when taxation took place before the master, the whole of the items in dispute (*i. e.*, about Rs. 1,700) were included in the defendant's bill, and the whole of the sums in dispute were disallowed by the Taxing Master in the course of his taxation; no application has been made to Court to review the decision of the Master, no reference has been made by the Master under rule 9 to the Court, and no application has been made by the defendant in respect of these costs independently of a review under r. 72 or a reference under r. 9. The allocatur was passed by the Master as regards one set of costs on the 26th May 1917 and as regards another set of costs on the 22nd January 1919, several years ago. The defendant says in this case: "It is perfectly true that I did not obtain an order of the Master for payment of those costs; I could not have done so because the Master only had jurisdiction up to a certain amount, and these costs were in excess of the amount over which he had jurisdiction; but I could at any time, if I had chosen, have applied to the Court to grant me an order or at any rate to send back to the Master authority for the Master to grant such costs for Counsel as in the circumstances the Master thought right, even although they were above the amounts which the Master had jurisdiction under rule 32 to grant; but I did not take such steps; I just sat on the money, but now that I have been asked to return the money and an action is brought to recover the money from me, I can, if I choose, ask the Court to hold that this money is a disbursement on behalf of the plaintiffs; and that these moneys ought not to be re-paid by me to the plaintiffs." A case was cited to me, which is *Sailendra Mohan Dutt* v. *Dharani Mohan Roy* (1), and it appears from that authority that the Court on an application made to it, is not bound to find that a written document, or a written agreement, has been signed by the client authorising the Solicitor to brief Counsel at a fee which is in excess of the amount allotted by the Master. The Court, as I understand the judgment, held that, although the rules as to a written document being necessary were applicable to the jurisdiction of the Master, they did not in any way bind or restrict the Judge in the exercise of the unfettered jurisdiction, which the Court held that he possessed, to order such fees for Counsel to be allotted as he thought right. Therefore, the defendant was justified in saying that in the event of an application having been made by him, he was not bound to prove before the Judge that he had received in respect of those costs an authority in writing signed by the client in that behalf. But in that case although the Court held that the Court has an unfettered discretion to grant such a sum or special fees for Counsel as it thinks fit, it did not go the length of saying that in every case or at any time the Court will grant an application made by a Solicitor similar to the one which this Solicitor says he is entitled to make in this case, because if you find, as in the case which we are considering now, that a Solicitor includes in the items of costs which he carries in these sums for Counsel, he has submitted to the jurisdiction of the Taxing Master for the purpose of deciding what is a proper sum for the Taxing Master to allot in respect of these accounts, and having done so he comes under r. 72, Chapter XXXVI. Rule 72 says that any party who is dissatisfied with the decision of the Taxing Officer as to any item or part of any item which may have been objected to, may not later than seven days from the date of the decision or within such further time as the Taxing Officer or Judge may allow, apply to a Judge in Chambers for an order to review the taxation as to the same items, and the Judge may thereupon make such order as to him may seem just, but the Taxing Master's decision shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid. Now, in this case all the items in question were carried on before the Taxing Master. The Taxing Master considered them, and

(1) 69 Ind. Cas. 823; 49 C. 618; 26 C. W. N. 870; (1922) A. I. R. (C.) 402.

In so far as the amount in question is concerned disallowed them. I do not find in the judgment which I have referred to that I am precluded in any way from holding that, where a Solicitor has elected to submit these items to the judgment of the Taxing Master, and that Taxing Master has given a decision as to them, that he cannot several years afterwards apply to the Court, to increase the sums allotted, because, were he at liberty to do so, it would altogether destroy the effect of rule 72. If he could do so, then the last words of rule 72 would not mean what they say. The words of rule 72 provide that, apart from an application to the Court within seven days, or such further time as may be allowed by the Court, the order of the Taxing Officer shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid. In this case, the Master having struck out those items, there has been no appeal, no application to the Court under rule 72 or under rule 9 or in any other way, with the result that under rule 72 the order of the Master has become final and conclusive as to those items.

Now, how does that affect this action which I am now considering? The defendant claims that he is entitled to retain these moneys as being moneys which he has disbursed on behalf of the plaintiffs, and he says: "I may do so apart altogether from the rules of taxation because as an agent I have disbursed moneys for my principals at their request, and I am entitled to recoup myself from moneys in hand which otherwise I should have been obliged to return to the plaintiffs." I do not think that that contention is a sound one, because, in my opinion, the effect of it would be that, provided that moneys were actually disbursed, it would not matter whether such moneys were to be allowed on taxation or not. In any case, on the general principle of agency, if they were disbursed by an agent on behalf of principal, the agent would be able to retain moneys of his principal sufficient to cover such disbursements. That is not, in my opinion, a course open to a Solicitor. A Solicitor is entitled to retain such moneys of his clients as, in accordance with the rule of Court, he, being an officer of the Court, is entitled to claim against them and, therefore, the defendant can only retain such sums against his clients in this action as under the rules of Court he could be justified in claiming. I have already held that he has no right at all in law to retain any of these sums after the Taxing Master has disallowed them without having made a successful application to the Court either to review, or on a reference or otherwise, to increase those sums. No such application has been made and, in my opinion, he is not entitled to claim any of those sums which he is seeking to retain. He admits that, if he is not entitled in law to claim these sums that he has no right whatever to keep them as against the plaintiffs, and the result will be that I hold that, as he has no right in law, having regard to the order of the Taxing Master, which is final and conclusive, to claim these sums as a Solicitor against his clients, he has no right to retain them as against the plaintiffs. Therefore, he will have to reimburse the plaintiffs the amount of these fees.

Under the circumstances there will be judgment for that sum, which is Rs. 1,700 and a further sum of Rs. 1,724 which the defendant has paid into Court, making altogether Rs. 3,424. But I do not propose to make a judgment with costs because it is clear that in this case the defendant, on the evidence before me, has in fact disbursed these moneys on behalf of the plaintiffs.

There will be judgment without costs

W. C. A. *Order accordingly*

CALCUTTA HIGH COURT.

CIVIL RULE NO. 196 OF 1922.

June 15, 1922.

Present :—Justice Sir Thomas Richardson, Kt., and Mr. Justice B. B. Ghose.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL,—PETITIONER

versus

RAJ KUMAR MUKHERJEE AND OTHERS —OPPOSITE PARTIES.

Provident Funds Act (IX of 1897), ss. 2 (4), 4 (1)—State Railway Open Line Code, Vol. II, Appendix I, r. 30—Compulsory deposit, whether liable to attachment after retirement of depositor—'Discharged' meaning of.

The word "discharged" in rule 30 of the Rules contained in the State Railway Open Line Code, Volume II, Appendix I, does not necessarily mean dismissed, and is wide enough to include the case of a servant who has been permitted to retire or take his discharge. [p. 1025, col. 2.]

A deposit which is received as a compulsory deposit continues to retain that character so long as it remains in the fund and does not cease to be a compulsory deposit merely on account of the discharge of the depositor from service within the meaning of rule 30 of the Rules contained in the State Railway Open Line Code, Volume II, Appendix I, and, as such deposit, is not liable to attachment under the provisions of section 4 (1) of the Provident Funds Act. [p. 1026, col. 1.]

Rule against an order of the Judge of the Court of Small Causes at Sealdah.

Mr. *Gibbons*, Advocate-General, Babus *Dwarkanath Chuckerbutty* and *Surendra Nath Ghose*, for the Petitioner.

Babus *Mohendra Nath Roy* and *Rupendra Kumar Mitter*, for the Opposite Party.

JUDGMENT.

Richardson, J.—By our order dated 26th January 1922, Rule No. 515 of 1921, was made absolute on the footing that the amounts standing to the credit of W. J. Godfrey in the State Railway Provident Institution was attachable at the instance of the then petitioner Raj Kumar Mukherjee, in execution of a decree for money which he had obtained against Godfrey in the Sealdah Court of Small Causes. Inasmuch, however, as the Rule was unopposed, there being no appearance for Godfrey and the Administrator of the Fund, to whom no notice of the Rule had been given, not being represented, liberty was expressly reserved to the latter to come in and move to have the order discharged. In pursuance of the liberty so reserved, the present Rule was obtained on behalf of the Secretary of State for India. At the hearing the learned Advocate-General appeared for the present petitioner, the Secretary of State, and the learned Vakil, Mr. Mohendra Nath Roy, for the creditor.

There is no dispute that the amount standing in the fund to Godfrey's credit was not attachable so long as he was employed as a servant of a State Railway. The question is whether the amount became attachable on his retirement from such service.

It now appears that the Rules regulating the General Provident Fund to which we were referred on the former occasion, do not apply to the State Railway Provident Institution, which is governed by the Rules contained in the State Railway Open Line Code, Volume II, Appendix I. Rule 10 of the General Fund Rules is, therefore, out of the way. The corresponding rule 30 of the relevant rules is otherwise framed and in the view we take gives rise to no difficulty. It is in these terms:—

"Neither compulsory deposits, nor bonuses, *i.e.*, money added by Government to compulsory deposits, nor the interest thereon standing at the credit of a depositor, whether in actual service, discharged, or deceased, can be attached by a Court of Law, but voluntary deposits and the interest thereon standing at the credit of a depositor on any given date are free to attachment on that date."

It is conceded that the amount at Godfrey's credit consists entirely of deposits which, when they were made, were "compulsory deposits" within the meaning of this Rule and of the Provident Funds Act. There is no question of any voluntary deposits.

As to the word "discharged" it does not necessarily mean "dismissed." It is wide enough to include the case of a servant who has been permitted to retire or take his discharge.

The question is whether rule 30 is in accordance with the law on the subject.

The Civil Procedure Code, section 60 (1) (*k*), exempts from liability to attach-

ment "all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, 1897, for the time being applies in so far as they are declared by the said Act not to be liable to attachment".

That leaves the matter to be controlled by the Provident Funds Act and rule 30 seems merely to express the draftsman's view of the result of sub-section (1) of the section 4 of that Act (IX of 1897 as amended by Act IV of 1903). The question turns on that sub-section, the meaning of which, apart from any difficulty as to the term "compulsory deposits," is clear enough. "Compulsory deposits," it says, "in any Government or Railway Provident Fund shall not be liable to any attachment under any decree or order of a Court of Justice in respect of any debt or liability incurred by a subscriber to, or depositor in, any such fund, and neither the Official Assignee nor a Receiver appointed under Chapter XX of the Code of Civil Procedure shall be entitled to, or have any claim on any such compulsory deposit." The words are quite plain and general. No "compulsory deposits" are attachable.

But then it is argued that these deposits with which we are concerned, though they were compulsory deposits when they were made and so long as Godfrey continued in the Railway service, ceased to be compulsory deposits when he retired. The argument is based on the definition in section 2 (4) of the Act and on rule 22 of the Rules.

As defined in the Act "compulsory deposit" means "a subscription or deposit which is not re-payable on the demand, or at the option of the subscriber or depositor, and includes any contribution which may have been credited in respect of, and any interest or increment which may have accrued on, such subscription or deposit under the Rules of the Fund."

Rule 22, so far as it is material, is as follows:—

"Saving with the particular sanction of the Government of India, no compulsory deposit or bonus shall be withdrawn excepting—

(i) on the decease of the depositor;

(ii) on his leaving the public service."

The contention is that if the Act and rule 22 be read together, Godfrey's deposits became re-payable on his demand when he left the public service and thereupon were automatically removed from the category of compulsory deposits.

In my opinion that is a mistaken construction of the statutory definition. The definition speaks with reference to some fund in which the deposit is made, and, as it seems to me, it crystallizes the nature of the deposit at the time at which it is made. A compulsory deposit is a deposit which goes into the fund as a compulsory deposit and is at that date received and classified as such. It is conceivable that the Rules of a Fund might subject the general right of withdrawal conferred by such a rule as rule 22 to restriction or condition so that the whole amount at a depositor's credit might never become freely payable or re-payable on his demand. But quite apart from that, a depositor presumably continues to make compulsory deposits till he dies in service or retires, and I can see no ground for a different classification of such deposits, or a different description being applied to them after his death or retirement. In other words, as long as the deposits subsists in the fund, so long, at any rate, both as matter of legal construction and in the common and ordinary way of speaking, they are properly and correctly described as compulsory deposits. If that be so, under section 4 of the Act, they are not liable to attachment.

Though there is no decision binding on us, the question is not free from authority and the view I have expressed is supported by the judgment of Sir Lawrence Jenkins, C. J., in *Veerchand* v. *B. B. & C. I. Railway* (1) the facts of which are on all fours with the facts of the present case. The case of *Miller* v. *B. B. & C. I. Railway* (2) on which reliance has been placed for the creditor, was there cited but was not followed. I am content to adopt the brief statement of the learned Chief Justice. The "deposit", he said "when it was made, was not re-payable on demand,

(1) 29 B. 259; 6 Bom. L. R. 921.
(2) 5 Bom. L. R. 454 at p. 458.

and, therefore, at that time was a 'compulsory deposit' and having once acquired that character with the attendant consequences, it continued (in my opinion) to retain it."

I have dealt with the case on the footing that no distinction exists between the deposits made by the depositor himself on the one hand and the contributions in respect of those deposits and the interest or increment accrued on them on the other. I have assumed that there is a sense in which these accretions to the original deposits can be said to be "re-payable" or "not repayable" on the demand of the depositor. I do not forget, however, that Sir Lawrence Jenkins, C. J., found an argument on the frame of the statutory definition. If a word be interpreted as meaning one thing and including another and a different thing, the meaning of the word as first defined would seem to be enlarged so as to include the second thing. It is as if the Legislature had said the word shall mean and include (1) the first thing and (2) the second thing. In the view suggested for the creditor, therefore, on the depositor's death or retirement, a distinction might have to be drawn between the deposits made by the depositor himself, then re-payable on his demand, and the additions to those deposits, to which the limitation of not being re-payable on his demand was never applicable or essential and which must, therefore, be understood as coming otherwise within the meanig of the term "compulsory deposit." The learned Chief Justice concluded:—"I do not suppose it was ever intended that the fund should as to part be, and as to part not be, a 'compulsory deposit.'"

As to the cases in this Court, in *Seth Manna Lal* v. *Gainsford* (3) the main question decided was that the fund there in question, which had been established by the Corporation of Calcutta, was subject to the Provident Funds Act. It is not clear whether the subscriber whose deposits it was sought to attach, was or was not at the time in the employ of the Corporation.

(3) 35 C. 641; 12 C. W. N. 633.

In *Hindley* v. *Joynarain Marwari* (4) the Provident Fund was that of the East Indian Railway. The depositor had died and a decree for money had been obtained against his father as his legal representative. An attempt made in the course of executing the decree to attach the amount standing to the credit of the deceased in the fund, was frustrated by Rankin, J. "Whether," said the learned Judge "the employee is in the service or out of the service, whether he be alive or dead, his share is unattachable in the hands of the institution." That decision is in point and the general observations which the learned Judge makes on the nature of these funds may also be usefully referred to. For if there be any doubt as to the meaning of the Act it is permissible to have regard to the state of things to which the Act was intended to apply, the conditions in which it would operate, and the class of persons which it was intended to benefit.

In the result this Rule must, in my opinion, be made absolute. Our order dated 26th January 1922 in Civil Rule No. 515 of 1921 should be discharged, and if the amount standing to the credit of W. J. Godfrey in the Railway Provident Institution has been attached or re-attached by the Sealdah Court of Small Causes, the attachment should be withdrawn.

Ghose, J.—I am of the same opinion. The Provident Funds Act seems to be an instance of fragmentary legislation as it does not provide for all the circumstances under which the sums standing to the credit of depositors are payable and complications have arisen in the decision of the case on account of the rules framed from time to time for the administration of the fund and the resolution of the 29th of July 1919 to which our attention was drawn. Rule 10, with reference to which we had decided the case at the previous hearing, has now been shown to have been excluded in its operation as regards subscribers to the State Railways Provident Fund. Rule 30, which is appli-

(4) 54 Ind. Cas. 439; 46 C. 962; 24 C. W. N. 288.

cable to servants employed on State Railways has been relied on by the learned Advocate-General. Undr this rule the money in deposit is not liable to attachment. It is contended on behalf of the creditor by Babu Mohendra Nath Roy that this rule is *ultra vires* of the Act. His main contention is that the money was not a compulsory deposit when it was sought to be attached and reference was made to rule 22 which provides, amongst other things, that no compulsory deposit or bonus shall be withdrawn except on the depositor leaving the public service. It is urged that when the money is payable on the employee leaving the service, it is payable on his demand, and it, therefore, ceases to be a compulsory depesit within the definition in section 2 (4) of the Act and is consequently liable to attachment. The observations of Russel, J., in *Miller* v. *B. B. & C. I. Railway* (2) are relied on in suport of this argument and it is contended that the case of *Veerchand* v. *B. B. & C. I. Railway* (1) which is a decision on the question in controversy was wrongly decided and ought not to be followed. It may be observed in passing that there was an appeal from the decision of Russel, J., but the Court of Appeal apparently rafrained from expressing any opinion on this question [See *Veerchand* v. *B. B. & C. I. Railway* (1).]

It seem to me that the money in deposit is included within the definition of "compulsory deposit" in the Act. The deposit was not re-payable on the demand or option of the subscriber, but was payable only under certain circumstances. In my opinion it cannot be said that the deposit was payable on demand by reason of the fact that it became payable under the rules on one of the events happening afterwards, and that the character of the deposit that it was not repayable on demaud remains unaltered. Hence it is not excluded from the definition of compulsory deposit. The money, therefore, is not liable to attachment under the provisions of section 4 (1) of the Provident Funds Act. In this view I should follow the decision of Jenkins, C. J., in *Veerchand* v. *B. B. & C. I. Railway* (1) and I need not refer further to the rules or to the policy of the Act on which arguments were addressed to us.

I agree in the order proposed by my learned brother.

Z. K. *Rule made absolute.*

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 15 OF 1922.

January 20, 1922.

Present:—Mr. Kanhaiya Lal, J. C.

HAUSLA BAKHSH SINGH—APPELLANT

versus

RAJ BAKHSH SINGH AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11 Expl. VI, O. VII, r. 4—Representative suit—Community of interest—Frame of suit—Plaint—Hinda Law—Joint family—Property acquired by collateral succession, whether joint family property—Manager, whether can sue or be sued.

In order to make Explanation VI to section 11 of the Civil Procedure Code applicable to a case there ought to be a community of interest claimed on the strength of a common title and the claim must have been made in good faith for the enforcement or defence of that common right on behalf of all persons having such common interest. The common interest may rest on the existence of a joint family, in which that interest is vested, or may rest on a joint title otherwise obtained. [p. 1029, col. 2.]

Where a person who claims joint property sues in a representative capacity in assertion of a common title he has to state under O. VII, r. 4 of the Civil Procedure Code that he has taken the necessary steps to enable him to sue in that capacity. Where he sues to enforce his personal right against persons only some of whom he impleads, knowing, that others are interested in denying his title or are in possession, without stating the capacity in which the persons who are actually impleaded, are sued, those who are not made parties are not bound by it unless the persons impleaded act in a representative capacity and profess to defend a common title in good faith on behalf of themselves and their co-owners. [p. 1030, col. 1.]

Property inherited by right of collateral succession cannot be treated as joint family property in respect of which the manager as such can sue or be sued so as to bind the rest of the family. [p. 1030, col. 2.]

Hardwar v. *Ram Milan*, 42 Ind. Cas. 812; 4 O. L. J. 563; 20 O. C. 271, followed.

Miscellaneous appeal against a decree of the Additional Subordinate Judge, Fyzabad, dated the 3rd of August 1921.

Mr. *Niamat Ullah*, for the Appellant.

Mr. *Ram Prasad Varma*, for the Respondents.

JUDGMENT.—The dispute in this case relates to the property of Bodh Singh who died in January 1916. On his death, mutation of names was effected in respect of his property in favour of Raj Bakhsh Singh and Sarabjit Singh, his cousins and Mathura Singh and Rampal Singh, the sons of a deceased brother of Raj Bakhsh Singh and Sarabjit Singh. The defendant, Bachan Singh claims to be the legitimate son of Bodh Singh. He objected to the entry of the names of Raj Bakhsh Singh, Sarabjit Singh, Mathura Singh and Rampal Singh; but his objection was disallowed.

Subsequently, he filed a suit against Sarabjit Singh, Mathura Singh and Rampal Singh, for the recovery of the disputed property. The suit was referred to arbitration and an award was made by virtue of which Bachan Singh was recognised to be the son and legal heir of Bodh Singh and the property of Bodh Singh was awarded to him.

Before the institution of that suit, Raj Bakhsh Singh, the present plaintiff, had joined the Army Labour Corps and he was serving under War conditions when Bachan Singh got the above decree against Sarabjit Singh, Mathura Singh and Rampal Singh, and in execution thereof, obtained possession over the disputed property.

The present suit has been filed by the plaintiff to contest the right of Bachan Singh to succeed to the property of Bodh Singh. He denies that Bachan Singh is the son of Bodh Singh. The Court of first instance did not go into that question and dismissed his suit on the ground that the decision in the previous suit was binding on him though he was not a party. The lower Appellate Court held otherwise and remanded the suit for a trial on the merits.

It is not disputed that, except during the period when the plaintiff was out on field service, he has been living jointly with his brother, Sarabjit Singh and his nephews Mathura Singh and Rampal Singh and that they all formed a joint family of which Sarabjit Singh was the manager. The property which the plaintiff claims to have inherited from Bodh Singh by right of collateral succession was not, however, joint family property and the contention of the lower Appellate Court is that, in respect of that property, the head of the joint family as such possessed no right of management and any proceedings taken against him in regard thereto cannot bind persons who were not parties to those proceedings under section 11, Explanation VI of the Code of Civil Procedure. Explanation VI provides that, where persons litigate *bona fide* in respect of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of that section, be deemed to claim under the persons so litigating.

In order to make that Explanation applicable, there ought to be a community of interest claimed on the strength of a common title and the claim must have been made in good faith for the enforcement or defence of that common right on behalf of all the persons, having such common interest. The common interest may rest on the existence of a joint family, in which that interest is vested, or may rest on a joint title otherwise derived.

There is nothing, however, to show that Sarabjit Singh, Mathura Singh and Rampal Singh were sued in a representative capacity or that they had filed a defence in assertion of a common right on behalf of themselves and the present plaintiff. On the other hand, they pleaded that the present plaintiff was a necessary party to that suit, that he was in military employ and that the suit should not be maintained without his being made a party or heard in his absence (Exhibit II). The reference made to arbitration did not, therefore, bind persons who were no parties to that suit (Exhibit A). The award did not determine whether the present plaintiff was a necessary party to the suit and whether the suit could have been heard in his absence (Exhibit A_2). Had the present plaintiff been made a party, it is obvious that the hearing of the suit would have been adjourned under

section 6 of the Indian Soldiers Litigation Act (IX of 1918) for the period prescribed after the plaintiff had ceased to serve under War conditions or until represented in the suit by a duly authorised agent. The defendant-respondent cannot be allowed to defeat the provisions of that law by having deliberately omitted to implead him, although he knew that his name was also entered in the revenue papers (Exhibit 9) and to seek to bind him indirectly by relying on the provisions of Explanation VI of section 11 of the Code of Civil Procedure. His conduct in excluding the present plaintiff from the suit cannot be deemed to be a *bona fide* attempt to enforce a title against persons interested in defending it. Order I, r. 3 of the Code of Civil Procedure, requires that all persons should be joined as defendants against whom any right to relief in respect of or arising out of the same Act is alleged to exist, whether jointly or severally, where if separate suits were brought against such persons, any common question of law or fact would arise. Order I, r. 9, provides that no suit shall be defeated by reason of the non-joinder of parties and the Court may, in every suit, deal with the matter in controversey as regards the rights and interests of the parties actually before it. The position of a person against whom the possession of certain property is claimed is by no means similar in every respect to that of a person who claims joint property on behalf of himself and his co-sharers or in a representative capacity in assertion of a common title. Where he sues in a representative capacity, he has to state under O. VII, r. 4, that he has taken the necessary steps to enable him to sue in that capacity.

Where he sues to enforce his personal right against persons only some of whom he impleads, knowing, that others are interested in denying his title or are in possession, without stating the capacity in which the persons who are actually impleaded, are sued, those who are not made parties are not bound by it unless the persons impleaded act in a representative capacity and profess to defend a common title in good faith on behalf of themselves and their co-owners.

The property now in dispute was not joint family property held by the manager on behalf the joint family. It was property claimed to have been inherited by the present plaintiff and certain other persons by right of collateral succession and, as poined out in *Hardwar* v. *Ram Milan* (1), it cannot be treated as joint family property in respect of which the manager as such could sue or be sued so as to bind the rest of the family.

The appeal, therefore, fails and is dismissed with costs.

Z. K.

Appeal dismissed.

(1) 42 Ind. Cas. 812; 4 O. L. J. 565; 20 O. C. 271.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 1500 OF 1920.

January 8, 1923.

Present:—Mr. Justice Walmsley and Mr. Justice B. B Ghose.

DARAPALI SADAGAR—PLAINTIFF—APPELLANT

versus

NAJIR AHMED—DEFENDANT—RESPONDENT.

Construction of deed—Lease—Boundary, description of—Reference to map—Inaccuracy—False description.

As soon as there is an adequate and sufficient definition, with convenient certainty, of what is intended to pass by a deed, any subsequent erroneous addition will not vitiate it. [p. 1031, col. 2.]

Llewellyn v. *Earl of Jersy*, (1843) 11 M & W, 183; 12 L. J. Ex. 343; 63 R. R. 569; 152 E. R. 767, *Lyle* v. *Richards*, (1866) 1 H. L. 222; 35 L. J. Q. B. 214; 12 Jur. (N. S.) 947; 15 L. T. 1, *Mellor* v. *Walmsley*, (1905) 2 Ch. 164; 74 L. J. Ch. 475; 93 L. T. 574; 53 W. R. 581; 21 T. L R. 591, referred to.

Leases of contiguous portions of a *mahal* were granted to the plaintiff and defendant and in each lease the boundary line was described as shown in the settlement map. In the map a *gopath* was depicted where the boundary line was shown. On the spot the *gopath* was further away towards the plaintiff's portion from the boundary line:

DARAPALI SADAGAR *v.* NÁJIR AHMED.

Held, that the mistake in the map with regard to the position of the *gopath* was merely a false description and the parties were bound by the boundary line as shown in the map. [p. 1031, col. 2.]

Appeal against a decree of the District Judge, Chittagong, dated the 27th February 1920.

Messrs. *J. C. Roy* and *N. K. Bose*, for the Appellant.

Messrs. *M. N. Roy* and *P. C. Sen*, for the Respondent.

JUDGMENT.

Ghose, J.—This appeal arises out of a dispute between grantees of two conterminous plots of land within the *khas mahal* of Government. Plaintiff was given lands in the south and defendant lands in the north, the grant to both parties being from the year 1312 B. S. The dispute is regarding the boundary line between the parcels. The Courts below have decided against the plaintiff. Hence this appeal by him. The question depends upon the construction of the leases with regard to the boundary line. In the lease of the plaintiff the land is thus described—"land lying within the boundaries as shown in the map which is in the settlement papers and appertaining to the *Sudar khas mahal*, etc." and again in the schedule as "4 drones 14 *kanis* of land in *dag* No. 1742/3796 of the present survey, etc." The defendants' land is similarly described in his lease, "land lying within the boundaries as shown in the map which is in the settlement papers, etc." and in the schedule as "1 drone 5 *gandas* of land in all covered by *dag* No. 1742/13797 of the present survey, etc." It is admitted that the reference to the map in the leases has this effect, that it should be treated as incorporated in the leases and forming part of the documents. If things stood alone, there would have been no question that each party would be entitled to the *dag* as shown in the map as forming his parcel and the boundary line would have been the line drawn in the map. In the map, however, at the place where the boundary line has been drawn a *gopath* has been depicted but as a matter of fact there is no *gopath* in the locality. There is, however, actually a *gopath* in existence further to the south of the boundary line as drawn in the map. Plaintiff's case is, that notwithstanding the fact that a *gopath* has been shown near the boundary line which does not exist there, he is entitled to all the lands up to the line as drawn in the map, without reference to the actual site of the *gopath*. He further urges that the *gopath* not having been described as the boundary, the mistake in the map as to the true position of the *gopath* is immaterial and no enquiry should have been directed as to its exact situation. The contention of the defendant on the other hand is that the *gopath* having been depicted in the map, where the boundary line was drawn it was the clear intention of the parties that the boundary line should be at the place where the *gopath* actually is, and that the boundary ought not to be the line as drawn in the map. The question is not free from difficulty, but in my opinion having regard to the authorities the plaintiff's contention should prevail. The manner, most beneficient to the defendant, in which the lease of the plaintiff may be read incorporating the map, seems to me this, "land lying within the boundaries as shown in the map and near the northern boundary line is a *gopath*." The map is referred to in the leases not for the purpose of showing the site of the *gopath*, which is not mentioned at all but for the purpose of showing the boundary lines, and the mistake in the drawing of the *gopath* at the place is immaterial. Even if there had been a description in the lease of the *gopath* in the manner I have stated, that, in my judgment, would not have affected the boundary as marked in the map, as it would be merely a false description—a mere false demonstration, which does not effect that which is already sufficiently conveyed. The well-known rule is "as soon as there is an adequate and sufficient definition, with convenient certainty, of what is intended to pass by a deed, any subsequent erroneous addition will not vitiate it": Parke, B., in *Llewellyn* v. *Earl of*

Jersey (1). In *Mellor* v. *Walmsley* (2) there was a conveyance of land, the exact dimensions being stated in the parcels and marked on a plan and stated to be "bounded on the west by the seashore," which was not a fact. The majority of the Court of Appeal held that the latter words must be rejected. In *Lyle* v. *Richards* (3), the boundary of a leasehold was described as, "a line drawn from J. V.'s house to a bound stone", and the description of the parcels was followed by the words, "which said premises are particularly delineated by the map on the back of this sett." On this map the boundary line appeared to be drawn from the northeast corner of the house. The position of the house itself was incorrectly represented in the map. It was held that the map was a part of the description and that the boundary line must be taken as drawan on the map. The reasoning of these cases appear to me to be applicable to the case before us. In my judgment the northern boundary of plaintiff's land is the line drawn on the settlement map, and the fact that the *gopath* is erroneously delineated there does not affect the question. In this view, on the report of the Commissioner appointed for relaying the map which has not been objected to the plaintiff would be entitled to 7 *kanis* 2 *gandas* out of the disputed land, and the northern boundary of plaintiff's *dag* would be the line drawn by the Commissioner in accordance with the settlement map.

A question of limitation was raised by the defendants but as the leases of both parties commenced from 1312 there does not appear to be any substance in it, and no reliance can be placed by defendant on possession prior to that date in support of his plea.

I would, therefore, set aside the decree of the Court of Appeal below and decree the appeal in the terms set forth above with costs in all Courts.

Walmsley, J.—I agree.

Appeal allowed.

Z. K.

(1) (1843) 11 M. & W. 183; 12 L. J. Ex. 243; 63 R. R. 569; 152 E. R. 767.
(2) (1905) 2 Ch. 164; 74 L. J. Ch. 475; 93 L. T. 574; 53 W. R. 581; 21 T. L. R. 591.
(3) (1866) 1 H. L. 222; 35 L. J. Q. B. 214; 12 Jur. (N. S.) 947; 15 L. T. 1.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 326 CONNECTED WITH NO. 327 OF 1921.

June 5, 1922.

Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

KUNJ BEHARI LAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

ABDUL HADI—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 165—U. P. Land Revenue Act (III of 1901), s. 36—Co-sharers—Suit for profits against Lambardar—*Negligence, whether question of fact or law—Ex-proprietary rent, assessment of—Duty of* Lambardar *—Collection made by unauthorised person—Liability of* Lambardar.

In a suit for profits under section 165 of the Agra Tenancy Act, against the *Lambardar*, the question of the negligence of the *Lambardar* is a question of mixed fact and law which is open to review in second appeal. [p. 1033, col. 1.]

Under section 36 of the U. P. Land Revenue Act, it is not the exclusive duty of the *Lambardar* to apply for the assessment of ex-proprietary rent, and if such rent is not assessed the co-sharers are as much to blame as the *Lambardar*. [p. 1034, col. 1.]

Where such rent has not been assessed it cannot be taken into account in a suit for profits against the *Lambardar*, nor is the *Lambardar* liable for a collection made by an unauthorised person who had no right to make it.

Second appeal from a decree of the Additional District Judge, Moradabad.

Messrs. *Iqbal Ahmad*, *R. K. Malaviya* and *K. N. Malaviya*, for the Appellant.

The Hon'ble Mr. *Raza Ali*, for the Respondent.

JUDGMENT.—These appeals arise out of two suits for profits brought by two plaintiffs, Kunj Behari Lal and Baldeo Prasad. In both cases the defendant Abdul Hadi is the *Lambardar*.

It appears from the evidence on record, and is also admitted by Counsel here;

that the two plaintiffs and the defendant joined together in purchasing the village in execution of a decree. They bought the property for a sum of Rs. 141. It seems that the proprietors were persons whose estate was very heavily encumbered and this probably accounts for the small sum which was paid for the purchase of the property.

The plaintiffs came into Court suing for their share of the profits for the years corresponding to 1916, 1917 and 1918. The defendant joined issue and the result of the trial in the First Court was that the plaintiffs were given decrees, the learned Assistant Collector assessing the sum which was due to them on the gross rental of the village.

The reason why the Assistant Collector did this was that in his opinion the defendant *Lambardar* had been guilty of negligence and, therefore, not entitled to have the profits assessed upon the actual collections for the years in suit.

In appeal the learned District Judge has differed from the Court of first instance and has come to a finding that in the peculiar circumstances of the case the defendant *Lambardar* was not guilty of negligence which rendered him liable to have the account for profits taken up on the gross rental.

The first ground which has been taken in both the appeals (the grounds in both the appeals are identical) is that the learned Judge of the Court below was wrong in his finding regarding this question of negligence.

It has been ruled by this Court that in cases of this kind the question of negligence is a question of mixed fact and law which is open to review in second appeal.

The reasons given by the learned Judge in support of his finding are (1) that the collections made by the *Lambardar* amounted to 70 per cent. of the present assets, (2) that the situation of the parties was a peculiar one inasmuch as they were recent purchasers of this property and that their tenure of the property was precarious inasmuch as the estate which they purchased was very heavily encumbered.

In these circumstance the learned Judge agreed with the plea put forward by the defendant that the plaintiffs could not reasonably expect him to incur large expenditure in litigation against the tenants of the village without the plaintiffs themselves taking a share and contributing to the costs of bringing suits.

There is evidence on the record which appears to indicate that the work of collecting rents in this village is not an easy one, and we further notice that a considerable area of the village is still held by the ex-proprietors who set up the claim that they were entitled to hold these lands as *sir* lands.

Having regard to the admitted facts of the case it seems to us that we ought not to disturb the finding of the lower Appellate Court on this question of negligence. The points which were brought to the notice of the learned Judge are really not in dispute and, in the circumstances, we are not prepared to say that in this case the defendant *Lambardar* is proved to be guilty of any default which in the circumstances might properly be called negligence. We think that the learned Judge was entitled to say that in the circumstances the defendant has discharged his duty as far as it was reasonably possible for him to do.

The next question we are asked to consider in these appeals is with respect to the the rents of ex proprietary lands. The learned Judge for certain reasons given in his judgment was of opinion that in assessing the profits divisible between the parties the rent of the lands held in expropritary tenure should not be taken into account. According to the Judge it would be unreasonable, in face of the *ex zemindar's* contention that they were in proprietary possession of these lands, to expect a *Lambardar* unsupported by his fellow co-sharers to sue the ex-*zemindars* for rent. This is not a very good reason which the learned Judge gives. There is, however, a much stronger reason apparent from the facts which are before us. It appears that although mutation had taken place, and the names of the new purchasers of this village had been brought on the Revenue Records, no steps had been taken to obtain the assessment of rent upon the very large holding which still remains in possession of the ex-proprietors.

It is useless for the plaintiffs to argue that the *Lambardar* is solely to blame for this. That is not the case. Under section 36 of the Land Revenue Act the rent of these ex-proprietary holdings ought ordinarily to be assessed at the time of the mutation proceedings and under sub-section (4) of the same section it is provided that if for any reason an order assessing the rent is not passed at the time of mutation then an application can be made either by the landholder or the tenant or any co-sharer directly interested in the matter to have the ex-properietary rent assessed.

We do not think it is the exclusive duty of the *Lambardar* to apply for the assessment of ex-proprietary rent and if this has not been assessed, as it obviously has not been in this case, then the plaintiffs are just as much to blame as the *Lambardar*. We may further point out that inasmuch as no rent has been assessed on these lands no suit for arrears would lie. This disposes of the point regarding the claim for a share of the ex-proprietary rent.

The third point which has been argued before us is with respect to a sum of Rs. 25. According to what is stated in the judgment of the learned District Judge this sum of Rs. 25 in dispute was collected in 1324 F. by a person not authorised to collect it. It appears that the person who got possession of this sum of money was a lady named Hassanara who is the wife of one of the ex-proprietors; and it further appears from certain evidence on record that this sum came into her possession by the sale of certain trees situated in the village. If this lady claiming to be a co-sharer sold these trees and pocketed the money, we very much doubt whether for the purposes of a suit of this kind the sum realised in the manner by her ought to be treated as collections for which the *Lambardar* would be liable to account to the other co-sharers. So far as we can see this lady is not a co-sharer at all and the proper remedy of the present co-sharers would seem to be to join together and bring a suit in the Civil Courts for the recovery of this sum which has been misappropriated by thepreson in question. We think the Judge was right in not taking this sum of Rs. 25 into account in assessing the profits payable to the plaintiffs in the suits. So far, therefore, as the appeals are concerned we find that there is no reason to interfere with the judgment of the Court below.

Cross-objections have been filed by the defendant. One of the points raised is that the Courts below were wrong in their statement of the Government revenue of the village. It seems that the plaintiffs gave one figure and the defendant gave a lower figure, and the *patwari*, who probably knows more than either of the parties, gave a figure which the Courts below have accepted. We have no reason to believe that the *patwari* was likely to be mistaken in such an important matter.

The other matter which is raised in cross objections is that the Courts below ought to have allowed the defendant certain costs amounting to Rs. 9-1-0 which had been incurred in ejecting certain tenants. Copies of the decrees are on the record which support the case that a sum of Rs. 9 was spent by the defendant *Lambardar* in ejectment cases against certain tenants. These costs were awarded to him by the Revenue Court but they were incurred all the same. In the circumstances we think the plaintiff in each case is liable to be debited with one-third of this sum, *i. e.*, Rs. 3 in each instance. The result, therefore, is that the appeals fail and are dismissed with costs including in this Court fees on the higher scale, if any. The cross-objections are allowed to the extent that the sum awarded in each instance by the Court below will be reduced by Rs. 3. We make no order as to costs regarding the cross-objections.

Appeals dismissed.

Z. K.

BHULU BEG *v.* JATINDRA NATH SEN.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2152 OF 1919.

February 10, 1922.

Present:—Justice Sir N. R. Chatterjea, KT., and Mr. Justice Pearson.

BHULU BEG—DEFENDANT No. 1—APPELLANT

versus

JATINDRA NATH SEN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 95—Execution of decree—Delivery of possession—Symbolical possession, effect of.

The delivery of symbolical possession to an auction-purchaser or to a person claiming under him operates as the delivery of actual possession as against the judgment-debtor and gives a fresh start of limitation even in a case coming under O. XXI, r. 95, of the Civil Procedure Code. [p. 1037, col. 1.]

Case-law discussed.

Appeal against a decree of the Subordinate Judge, Second Court, Howrah, dated the 15th August 1919, reversing that of the Munsif, Second Court at Ulluberia, dated the 21st February 1918.

Babu *Sarat Ch. Mukherjee*, for the Appellant.

Mr. *Asiranjan Chatterjee*, for the Respondents.

JUDGMENT.—The property in dispute in this case is alleged by the plaintiff to have belonged to one Khoda Buksh and held by the defendant No. 1 as tenant under him. Certain heirs of Khoda Buksh obtained a decree for rent against the defendant No. 1 and in execution of the decree put up the property to sale. The defendant No. 6 purchased it on the 13th June 1904. Formal possession was taken by the purchaser on the 29th April 1905 and in September 1910, he conveyed the lands to the plaintiff.

The suit was for establishment of the plaintiff's title and for recovery of possession.

The defence *inter alia* was that the property did not belong to Khoda Buksh nor did the defendant No. 1 hold it under him as tenant. A question was also raised whether one Ohijuddin Ahmed had a one-third share in the property.

With regard to the last question, the learned Subordinate Judge came to the conclusion that there was some *nishkar* property in which Ohijuddin had one-third share.

So far as the disputed property was concerned, the learned Judge on a consideration of the evidence came to the conclusion that the property belonged to Khoda Buksh alone.

The next and the main defence was that the defendant No. 1 had been in possession for more than 12 years inspite of the auction-purchase by defendant No. 6 and that, therefore, the plaintiff's suit was barred by limitation. It appears, as stated above, that the auction-purchaser obtained only formal possession through Court. That was within 12 years of the suit.

It is contended before us by the learned Pleader for the defendant-appellant that where the property sold is not in the possession of tenants or other persons entitled to occupy the same, the purchaser must obtain actual possession, and symbolical possession delivered in such a case cannot give the purchaser a fresh start for limitation.

The question whether symbolical possession operates, as between the decree-holder and the judgment-debtor, as actual possession, was considered in two Full Bench decisions of this Court. In the case of *Juggobundhu Mookerjee* v. *Ram Chunder Bysack* (1), it was laid down that delivery of possession by going through the process prescribed by section 224 of Act VIII of 1859 is the only way in which the decree of the Court awarding possession to the plaintiff can be enforced; and as, in contemplation of law, both parties must be considered as being present at the time when the delivery is made, such delivery must, as against the defendant, be deemed equivalent to actual possession. To the same effect is the decision in the case of *Joggobundhu Mitter* v. *Purnanund Gossami* (2). In these two cases, however, the only possession which could be delivered was symbolical possession because the land was in the occupancy of tenants.

It has accordingly been contended on behalf of the appellant that, that principle cannot apply to a case where the

(1) 5 C. 584; 5 C. L. R. 548; 3 Shome L. R. 68; 2 Ind. Dec. (N. S.) 979.

(2) 16 C. 530; 8 Ind. Dec. (N. S.) 350.

decree-holder or purchaser could obtain actual possession and we have been referred to the cases of *Shoteenath Mookherjee* v. *Obhoy Nund Roy* (3) and *Mahadev Sakharam Parkar* v. *Janu Namji Hatley* (4).

In those cases, it was held that the delivery of merely formal possession of immoveable property (in the cases where the property is not in the possession of a tenant or other person entitled to occupy the same), to a purchaser at a Court sale cannot prevent limitation running in favour of the judgment-debtor where the latter remains in actual possession.

These authorities are no doubt in favour of the appellant, and the view taken in these cases at one time was taken in some other cases in this Court. See the case of *Pearee Mohun Poddar* v. *Jugobundhu Sen* (5), though in some other cases a different view was taken [see *Asudullah* v. *Shaik Akbar Ali* (6) and *Mahomed Wali* v. *Noor Buksh* (7)]. Some of the cases on the point were considered by Birch and Mitter, JJ., in *Umbicka Churn Goopta* v. *Madhub Ghosal* (8) and the learned Judges held that formal possession given to a decree-holder by an officer of the Court in execution of his decree is sufficient to give him a fresh cause of action and, notwithstanding that he may never have obtained actual possession he or his assigns may sue to recover possession at any time within 12 years from the time when such formal possession, was given. The learned Judges dissented from the view taken by Markby, J., in *Pearee Mohun Poddar* v. *Jugobundhu Sen* (5), as being opposed to the decision of the Judicial Committee in *Gunga Gobind Mundul* v. *Bhoopal Chunder Biswas* (9), where their Lordships observed that the decree and execution put an end altogether to limitation, and that it was immaterial whether the decree-holder obtained actual possession or not. It may be pointed out, however, that in the case before the Judicial Committee, the property was in the possession of tenants.

In a later decision, the same view was adopted. In the case of *Lokessur Koer* v. *Purgun Roy* (10), Garth, C. J., was of opinion that the plaintiff having been put in possession under the decree by an officer of the Court, the form in which possession was given was quite immaterial. He said: "All that was necessary was for the officer of the Court to go upon a portion of the land, and give the plaintiff possession of that portion in respect of the whole; and any formal mistake which may have been made by the officer in the mode of giving possession could not prejudice the plaintiff." It was accordingly held following the decision in *Juggobundhu Mookerjee* v. *Ram Chunder Bysack* (1), that as between the parties to the suit, formal possession operates, in point of law and in fact, as a complete transfer, of actual possession from the one party to the other.

This principle was followed in the case of *Shama Charan Chatterji* v. *Madhub Chandra Mookerji* (11), where the learned Judges held that the delivery of formal possession in execution of a decree for possession gives a cause of action against a defendant who remains in occupation of the premises, which may be enforced in a regular suit.

Then in the case of *Hari Mohan Shaha* v. *Baburali* (12), where the auction-purchaser who had obtained symbolical possession brought a suit for possession of land within 12 years of the date on which he obtained symbolical possession, it was held that the suit was not barred. Maclean, C. J., observed as follows:—"Be that as it may, we have the fact which cannot be got over, that possession, call it symbolical possession if you will, was given by a Civil Court in this case to the plaintiff, and in the case of *Lokessur*

(3) 5 C. 331; 5 Ind. Jur. 136; 2 Ind. Dec. (N. S.) 822.
(4) 14 Ind. Cas. 447; 36 B. 373; 14 Bom. L. R. 115.
(5) 24 W. R. 418.
(6) 7 W. R. 60.
(7) 25 W. R. 127.
(8) 4 C. 870; 4 C. L. R. 55; 4 Ind. Jur. 180; 2 Ind. Dec. (N. S.) 551.
(9) 19 W. R. 101; 2 Suth. P. C. J. 750.
(10) 7 C. 418; 3 Ind. Dec. (N. S.) 819.
(11) 11 C. 93; 5 Ind. Dec (N. S.) 820.
(12) 24 C. 715; 12 Ind. Dec. (N. S.) 1146.

Koer v. *Purgun Roy* (12), it was laid down that the formal possession given by a Civil Court under an execution operates in point of law and of fact, as between the parties, as a complete transfer of possession from one party to the other..... .....It may be that it was wrongly given by reason of the fact that actual possession ought to have been given under section 318 of the Code, but still possession was given to the plaintiff by a Civil Court; and, under the circumstances, it seems to me that the period of limitation must begin to run from the date of that possession being given." See also *Mir Waziuddin* v. *Deoki Nandan* (13), where the learned Judges considered the question whether the auction-purchaser at a sale for arrears of revenue has 12 years from the date on which formal possession is delivered to him by the Collector.

So far as our Court is concerned, all the later decisions are in favour of the view taken by the lower Court.

In the Madras High Court, the view taken by this Court has been adopted. See *Govind Bidiraji Bhukta* v. *Akella Venkata Sastrula* (14), where it was held that the delivery of symbolical possession, even though erroneously made, *i.e.* even though made under circumstances which do not make section 319 applicable operates to give the person so put in possession a fresh cause of action and to place the judgment-debtor in the position of a trespasser.

The Allahabad High Court has also taken the same view; see *Jagan Nath* v. *Milap Chand* (15).

The Bombay High Court, as stated above, has taken a different view in the case of *Mahadev Sakharam Parkar* v. *Janu Namji Halley* (4), but the weight of authority is in favour of the view that symbolical possession as against the judgment-debtor operates as actual possession and gives a fresh start of limitation even in a case coming under section 318 corresponding in O. XXI, r. 95, of the present Code. We must accordingly hold that the suit is not barred by limitation.

It has been contended by the learned Pleader for the appellant that even if this principle can be availed of by the auction-purchaser, the plaintiff being a *benamidar* cannot take the benefit of the principle.

But the defendant No. 6 was the certificated purchaser and the plaintiff claims under him. In these circumstances, we think that the principle applies to the plaintiff also.

The learned Pleader attacked the finding of the learned Subordinate Judge on he question of title of Khoda Bukhsh. There is evidence in support of the finding and the finding was arrived at upon a consideration of the whole evidence.

We think, in these circumstances, that the appeal must fail and is dismissed with costs.

Z. K.

Appeal dismissed.

(13) 6 C. L. J. 479 at pp. 481, 482.
(14) 17 M. L. J. 598.
(15) 28 A. 722; 3 A. L. J. 504; A. W. N. (1906) 213.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 140-B OF 1921.
July 15, 1922.

Present:—Mr. Prideaux, A. J. C.

SUBHANALI—DEFENDANT—APPELLANT

versus

BODULAL AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 53—Fraudulent transaction—Plaintiff what must prove—Mortgage to pay off debts—Payment to some creditors—Mortgage, whether can be challenged.

In a case under section 53 of the Transfer of Property Act, it must be shown that the transfer though for a valuable consideration, was for the

SUBHANALI v. BODUBAL.

purpose of defeating or delaying creditors, and should be known to the transferee as such. [p. 1039, col. 1.]

A transfer to pay off some creditors to the exclusion of others is not fraudulent.

Appeal against a decision of the Additional District Judge, Akola, dated the 19th March 1921.

Mr. *D. W. Kathalay*, for the Appellant.

Mr. *A. V. Khare*, for the Respondents.

JUDGMENT.—The facts of this case are that the plaintiffs sue on a registered mortgage-deed dated 4th March 1915 executed by one Rukhmai, widow of Mahadeo, for Rs. 300. A house that was sold was the subject-matter of the mortgage. A suit was filed on the same mortgage by plaintiffs against Rukhmai, Suit No. 156 of 1917 on the file of the Subordinate Judge, Basim. A conditional decree was passed therein on the 18th March 1918 and made final on the 10th May 1919. The plaintiffs took out execution, but failed to get possession of the mortgaged house as the defendants were found to be in its possession: hence the present case. The house originally belonged to one Kondai; on her death it is admitted that her sole heir was Rukhmai who executed the mortgage in suit to liquidate Kondai's debt to the plaintiffs. The defendant's case is that after the mortgage in suit one Chunnilal Kishanlal Marwari had obtained a decree in Suit No. 103 of 1915 and attached the same house in execution of a simple money-decree. It was sold in execution of the decree and purchased by one Sheodan Singh who in turn sold it to the defendant No. 1; the second defendant was a tenant of the first defendant. It was urged for the defendant that the house was the property of Kondai who died on the 31st Octobor 1914. Chunnilal obtained a decree against Kondai's estate and it was in execution of the decree that the house was put to auction and sold and was purchased as already stated by Sheodan Singh, the predecessor-in-title of the previous defendant. It was contended that the defendant thus claims the property through Kondai and not through Rukhmai who had no right to mortgage the property. Ignorance of the mortgage in suit was affected, and it was argued that as the date of the mortgage was only one day previous to the decree in Suit No. 103 of 1915, the mortgage appears to be a fraudulent or bogus transaction. The case went to trial on the following issues:—

1. Did Rukhmai execute the mortgage in suit for the debt due by Kondai?

2. Is the mortgage genuine or is it bogus as alleged by defendant No. 1?

3. Could Rukhmai execute the mortgage in suit?

4. Can plaintiffs sue twice on the same mortgage-deed. If not, is this suit maintainable?

5. Can plaintiffs claim more than Damdupat under the circumstances of the suit?

6. To what reliefs are plaintiffs entitled?"

The Trial Judge came to the following findings. Rukhmai, the heir of Kondei, executed the mortgage in suit for debts due by Kondai. The mortgage in suit was genuine and not bogus. On the death of Kondai her brother's widow, Rukhmai, took possession of Kondai's property and satisfied that lady's debts. Rukhmai had power to execute the mortgage in suit. The plaintiffs could not sue twice on the same mortgage against the same defendants, but the present defendants were no parties to the former suit which was filed against Rukhmai: hence the present suit was maintainable. The plaintiffs could not claim more than Damdupat as the parties to the mortgage are Hindus and the present suit is based on a mortgage; nor were the defendants liable to pay the costs of the former suit. A preliminary decree for Rs. 600 with proportionate costs was passed against defendant No. 1.

On appeal the question, whether Rukhmai executed the mortgage in suit, was answered in the affirmative. Due attestation of the mortgage was held established, as also was the passing of due consideration. The appeal was dismissed.

It is not here disputed that Rukhmai was the heir of Kondai, but it is urged that the mortgage was voidable under section 53 of the Transfer of Property Act, it being a fraud on creditors. The argument is that the mortgage was executed to defeat Chunnilal's decree known

to be coming, which decree should have been satisfied out of the property itself. Now the consideration of the mortgage was practically all money due by Kondai and I do not see how Rukhmai could be prevented from satisfying the claims of certain of Kondai's creditors to the exclusion of others, and she by this mortgage defrayed certain of Kondai's debts. The fact that there were other debts due by Kondai, debts that could be recovered by suits against Kondai's property, does not affect the case. In the present case the auction sale really took place subject to the mortgage, for Chunnilal's debt was not a secured one, and if Chunnilal liked to bring the house to sale without mentioning the fact of the mortgage, possibly being unaware of it, any purchaser of the house would be bound by the legal mortgage existing on it. The fact of the mortgage having been executed does not itself imply that its execution was made to defeat creditors. The more natural interpretation would be that as the property was left by Kondai, and there is no evidence to show that nothing but this house was left, the mortgage was executed to satify the claims of some of the creditors. There is authority for the view that in cases under section 53, Transfer of Property Act, it must be shown that the transfer though for a valuable consideration, was for the purpose of defeating or delaying creditors, and should be known to the transferee as such. It is not shown in the present case that the mortgagee knew that the present transfer was with the object of defeating other possible claims against Kondai's estate. The arguments advanced in this Court are new.

For the reasons above given I am of opinion that there is no force in the present appeal. It fails and is dismissed with costs. The appellant will pay the respondetns' costs.

Appeal dismissed.

K. S. D.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 707 OF 1920.

August 1, 1921.

Present:—Mr. Justice Jwala Prasad, Acting Chief Justice, and Mr. Justice Ross.

JAMUNA RAI—DEFENDANT—APPELLANT

versus

RAMTAHALL RAUT AND OTHERS—PLAINTIFFS—RESPONDENTS.

Court-fee—Mortgage-suit—Interest pendente lite, award of—Appeal—Court-fee payable.

Plaintiffs instituted a suit to enforce a mortgage and paid Court-fees on the principal sum plus interest at the bond rate up to the date of the suit. They also claimed interest *pendente lite* and future interest up to the date of realisation. Their suit was dismissed. They appealed and paid the same Court-fees on the memorandum of appeal as they had paid on the plaint. The Appellate Court decreed the suit and to the sum claimed in the plaint added a sum by way of interest at the bond rate from the date of suit up to the date of its decree. In second appeal:

Held, that the plaintiffs were bound to pay additional Court-fees on the amount of interest *pendente lite* awarded by the lower Appellate Court. [p. 1040, col. 2.]

Srinivasa Row v. *Ramaswami Chetti*, 10 M. L. J. 144, *Ramasami* v. *Subbasami*, 13 M. 508; 4 Ind. Dec. (N. S.) 1066, distinguished.

Second appeal from a decree of the District Judge, Darbanga, dated the 1st April 1920.

Mr. *Janak Kishore*, for the Appellant.

Mr. *Md. Hasan Jan*, for the Respondent.

JUDGMENT.

Jwala Prasad, Actg. C. J.—The learned Vakil for the respondents disputes the view taken by the Stamp Reporter that there is a deficiency on the part of the respondents with respect to the Court-fee payable by them in the lower Appellate Court to the extent of Rs. 9. The respondents were plaintiffs in the case and instituted the suit to enforce a mortgage claiming Rs. 757-3-3 principal, with interest at the bond rate up to the date of the suit. They also claimed interest *pendente lite* and future interest up to the date of realization at the rate entered in the bond. The suit was dismissed by the Munsif. They appealed to the District Judge, paying a Court-fee on the aforesaid sum of Rs. 757-3-3, which they had paid on the plaint. The lower Appellate Court reversed the decision of the Munsif and decreed the plaintiffs' suit with costs in both the Courts. As to interest;

the decree directed that interest was to be paid at the bond rate up to the date of grace, which was six months from the date of the decree, namely, 1st April 1920. There was also direction as to future interest up to the date of payment.

The lower Appellate Court prepared the decree stating the principal to be Rs. 311 and interest at the bond rate of 2 per cent per annum up to the 8th September 1918, the date of filing the plaint, making a total of Rs. 757-3-3, upon which Court-fee was paid on the plaint as well as on the memorandum of appeal. To this sum the lower Appellate Court added in the decree a further sum as interest at the bond rate from the date of the plaint up to the date of its decree, namely, 1st April 1920. This sum came up to Rs. 117-3 no Court-fee was paid by the plaintiffs upon this additional sum added in the decree.

It may be conceded that the suit having been dismissed the plaintiffs were entitled to value their appeal at the sum of Rs. 757-3-3 claimed in the plaint in respect of the principal and interest up to the date of filing the plaint and they were not bound to value the future interest, which they claimed from the date of the suit up to the date of realization, or to pay any Court-fee thereunder, as was held in *Srinivasa Row* v. *Ramaswami Chetti* (1) and *Ramasami* v. *Subbusami* (2). But in the present case the plaintiff obtained a decree not only for Rs. 757-3-3 at which they had valued their appeal and which they had claimed in the plaint but for a larger sum, namely, Rs. 874-6-3 which was arrived at by adding Rs. 117-3-0 as interest from the date of the suit, up to the date of the lower Appellate Court's decree. The plaintiffs cannot contend that this sum has been wrongly entered in the decree as there is no cross-appeal on their behalf. This is not, therefore, an unascertained sum but has now been specified in the decree and the plaintiffs are entitled to recover it by mere execution of the decree.

It has been well-settled, that the plaintiff-decree-holder seeking to enforce a decree directing payment of future interest, is bound to pay the Court-fee upon the interest claimed by him in execution for which no Court-fee was paid in the suit. There can hardly be any doubt that a mortgagee seeking to enforce the mortgage and praying to recover the amount due thereunder has to pay Court-fee not only upon the sum decreed but also upon the interest that becomes due to him subsequent to the decree and which he claims in the execution. It is also obvious that the lower Appellate Court was not bound and should not have passed a decree for a larger sum than that claimed by the plaintiffs in the memorandum of appeal unless, before the judgment was pronounced, an amendment of the memorandum of appeal was allowed and proper Court-fee paid in *Percival* v. *Collector of Chittagong* (3). The plaintiffs accepted the decree of the Court below and it appears that the decree was signed by the Pleaders of the parties. The value of the appeal was, therefore, admittedly increased, by adding to the decree, the amount of future interest from the date of the institution of the suit to the date of the lower Appellate Court's decree. The plaintiffs are, therefore, bound to pay additional Court-fee and the view taken by the Stamp Reporter appears to be correct.

The deficit Court-fee having just been paid, the appeal will be heard.

Ross, J.—I agree.

Z. K.

(3) 30 C. 516.

(1) 10 M. L. J. 144.
(2) 13 M. 508; 4 Ind. Dec. (N. S.) 1066.

JAGDAMBA KUMARI *v.* WAZIR NARAIN.

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.

December 20, 1922.

Present:—Lord Buckmaster, Sir John Edge, Sir Lawrence Jenkins and Lord Salvesen.

Rani JAGDAMBA KUMARI—DEFENDANT—APPELLANT

versus

Thakur WAZIR NARAIN SINGH—PLAINTIFF—RESPONDENT.

Hindu Law—Joint family—Impartible estate—Separation, how effected—Income, whether forms part of estate.

It is competent to a member of a joint family to separate himself from the family by a clear and unequivocal intimation of his intention to sever and this is also true with regard to an impartible estate but as in that case the person separating forfeits his chance of inheriting the whole of the estate by survivorship, it requires strong evidence to establish such separation. [p. 1042, col. 1.]

Gira Bai v. *Sadashiv Dhundiraj*, 37 Ind. Cas. 321; 43 C. 1031; 20 C. W. N. 1085; 4 A. L. J. 824; 20 M. L. T. 78; 12 N. L. R. 113; (1916) 2 M. W. N. 65; 18 Bom. L. R. 621; 4 L. W. 114; 24 C. L. J. 207; 31 M. L. J. 455; 43 I. A. 151 (P. C.), *Kawal Nain* v. *Budh Singh*, 40 Ind. Cas. 286; 39 A. 496; 15 A. L. J. 581; 2 P. L. W. 57; 21 C. W. N. 986; 33 M. L. J. 42; 19 Bom. L. R. 642; 26 C. L. J. 101; (1917) M. W. N. 514; 6 L. W. 330; 44 I. A. 159 (P. C.), followed.

The income from an impartible estate, when received, does not form an accretion to the original property but is the absolute property of the owner of the estate. [p. 1042, col. 2.]

Parbati Kumari Debi v. *Jagadlis Chunder Dhabal*, 29 C. 433; 29 I. A. 82; 6 C. W. N. 490; 4 Bom. L. R. 365; 8 Sar. P. C. J. 205 (P. C.), referred to.

Surabjit Partab Bahadur Sahi v. *Indarjit Partap Bahadur Sahi*, 27 A. 203 at p. 253; 2 A. L. J. 720; A. W. N. (1904) 244, *Janki Pershad Singh* v. *Dwarka Pershad Singh*, 20 Ind. Cas. 73; 35 A. 391; 17 C. W. N. 1029; 14 M. L. T. 110; 25 M. L. J. 34; (1913) M. W. N. 030; 18 C. L. J. 200; 11 A. L. J. 818; 15 Bom. L. R. 853, 16 O. C. 216; 40 I. A. 170 (P. C.), *Murtaza Husain Khan* v. *Mohammad Yasin Ali Khan*, 36 Ind. Cas. 299; 38 A. 552; 20 M. L. T. 362; 14 A. L. J. 1083; 18 Bom. L. R. 884; 31 M. L. J. 804; (1916) 2 M. W. N. 555; 25 C. L. J. 1; 19 O. C. 290; 1 P. L. W. 122; 21 C. W. N. 410; 4 O. L. J. 8; 4 L. W. 538; 43 I. A. 259 (P. C.), distinguished.

Appeal against the decision of Mr. Justice Chapman and Mr. Justice Roe, in F. A. No. 456 of 1911, dated the 31st January 1917, modifying that of the Subordinate Judge, Hazaribagh, dated the 18th September 1911.

Messrs. *De Gruyther*, *K. C.*, *Ralkes* and *Palat*, for the Appellant.

Messrs. *Dunne*, *K. C.*, and *Kenworthy Brown*, for the Respondent.

JUDGMENT.

Lord Buckmaster.—The appellant in this case is the widow of Raja Saroda Narain. The respondent is the nearest male agnate of the deceased, being the son of one Nilkantha Narain, the original plaintiff in the suit, who was the son of Bharath Singh. The proceedings were instituted for the purpose of establishing the title of the plaintiff to an estate known as the Serampore Raj or *gaddi* and certain moveable and immoveable property, cash and securities which had been purchased out of the income of that estate. The questions with regard to the estate and the monies and property representing the investments from this income are distinct, and need to be separately considered. They have both been decided adversely to the appellant, with the exception of the claim to certain Government securities which will be more specially referred to hereafter. Serampore Raj or *gaddi* is impartible, and the family is governed by the Mitakshara Law. If there had been no division of the family the property would have passed to the plaintiff, but it is asserted that Bharath Singh separated from his father in his lifetime, and that consequently neither he nor the plaintiff was joint in estate with Raja Saroda Narain.

Now, the facts upon which the alleged separation is based have been concurrently found by the two Courts, and are no longer the subject of dispute. The argument properly open to the appellant is not upon the facts themselves, but that these facts, when accepted, do establish separation. The facts are these: The village of Chowrah was granted at a date not precisely ascertained but many years ago by the then Raja to the plaintiff's father Barath Singh by way of maintenance on a *mokurari* grant at a nominal rent. The plaintiff's father, who died in 1879, does not appear to have gone to reside at Chowrah, but the plaintiff went there about 1885, when the then Raja was a minor and his estate was under the management of the Court of Wards. The effect of this change of residence necessarily effected a separation in food

and mess. The High Court hold distinctly that there was no separation in religion, and the learned Subordinate Judge holds that there was no separation beyond the separate living in the maintenance village and the consequent separate messing.

The cases of *Girja Bai* v. *Sadashiv Dhundiraj* (1) and *Kawal Nain* v. *Budh Singh* (2) are clear decisions that it is competent to a member of a joint family to separate himself from the family by a clear and unequivocal intimation of his intention to sever and this is also true with regard to an impartible estate but as in that case the person separating forfeits his chance of inheriting the whole of the estate by survivorship, it requires strong evidence to establish such separation.

The latter case in *Kawal Nain* v. *Budd Singh* (2) illustrates this. It was there found that the separation relied on was a complete separation in worship, in food and in estate; and, further, there was good reason for the complete separation, and that consequently the requisite evidence was forthcoming. In this case these conditions are lacking, and their Lordships are unable to think that there has been any misapplication of the principles of law which regulate this question, and the findings of fact are sufficient to defeat the appellant's claim.

The second question gives rise to greater difficulty. It appears that Raja Saroda Narain, when he inherited the estate, was a minor. The estate was then placed under the custody of the Court of Wards. On his obtaining majority the Raja entered into possession and appears to have managed the estate with care and skill. Towards the end of his life misfortune overtook him and he became insane. His estate was once more placed under the custody of the Court of Wards, and so remained until his death in 1907.

Originally the estate was in debt, and as there is no evidence of any acquisition of property from other source, it follows that all the estate possessed by the Raja other than the impartible Raj was derived from the income of the Raj itself. In the end this income produced very considerable property. There were certain villages, certain mortgages— usufructuary and otherwise—sums due on bonds and decrees, Government promissory-notes to the extent of two lacs, and other moveable and immoveable properties. With the exeeption of the Government promissory-notes the whole of these have been awarded to the plaintiff upon the ground that they represented an accretion to the estate and descended with it. Their Lordships think that this conclusion is wrong, and that its error is due to the idea that the produce of the impartible estate naturally belongs to and forms an accretion to the original property. In fact, when the true position is considered there is no accretion at all. The income when received is the absolute property of the owner of the impartible estate. It differs in no way from property that he might have gained by his own effort, or that had come to him in circumstances entirely disassociated from the ownership of the Raj. Nor could the monies have been used by him for the purpose of acquiring or endowing an impartible estate. It is, therfore, a strong assumption to make that the income of the property of this nature is so affected by the source from which it came that it still retains its original character.

It is possible that this confusion is due to the consideration of the position with regard to an ordinary joint family estate. In such a case the income, equally with the corpus, forms part of the family property, and if the owner of the estate mixes his own monies with the monies of the family—as, for example, by putting the whole into one account at the Bank, or by treating them in his accounts as indistinguishable—his own earnings share with the property with which they are mingled the character of joint family property; but no such considerations necessarily apply to the income from impartible

(1) 37 Ind. Cas. 321; 45 C. 1031; 20 C. W. N. 1085; 14 A. L. J. 822; 20 M. L. T. 78; 12 N. L. R. 113; (1916) 2 M. W. N. 65; 18 Bom. L. R. 621; 4 L. W. 114; 24 C. L. J. 207; 31 M. L. J. 455; 43 I. A. 151 (P. C.).

(2) 40 Ind. Cas. 286; 39 A. 496; 15 A. L. J. 581; 2 P. L. W. 57; 21 C. W. N. 986; 33 M. L. J. 42; 19 Bom. L. R. 642; 26 C. L. J. 101; (1917) M. W. N. 514; 6 L. W. 330; 44 I. A. 159 (P. C.).

property. The whole of the evidence on the matter in the present case, as stated by the High Court, is as follows:—

"Some new properties were acquired out of the savings of Serampore *gadi*. When there were savings in my hand I used to send the money to the Raja and take receipts from him. The money was utilised by the Raja by giving loans and purchasing other properties. On some occasions the Raja used to lend the money himself, and these sums are not entered in our books. When the loan was given through us, then we used to keep accounts of such money. I can't give the sums that passed through our hands or their probable amount. The moneys that passed through our hands were invested in loan and also in purchasing *zemindaris*. The incomes of *zemindaris* purchased were also entered in our books. It was treated as part of the income of the estate. Loans with interest re-paid were also entered in our books. That money was also treated as part of the estate. All this was done at the instance of the Raja. Loans advanced by the Raja personally and not through our hands and those that were not entered in the estate account at the time of the advance, the money when repaid used sometimes to come to our hands and sometimes paid to the Raja direct. Those that came to our hands were entered in our book. What was so entered into the estate account was considered as estate money with the Raja's consent. I can't say if the Raja purchased any landed estate out of the money advanced by him personally."

For the reasons already given such a statement is insufficient to affect the property with the character of impartibility. Whether it be possible in any circumstances to treat moveable property as an accretion to a landed estate of this character is a matter not arising for decision.

It is true that in *Sarabjit Partab Bahadur Sahi* v. *Indarjit Partap Bahadur Sahi* (3) it was decided that moveable property could be so regarded, but as the point does not arise here their Lordships need only say that they must not be regarded as accepting the soundness of that decision. The facts here are not very different from those in *Parbati Kumari Debi* v. *Jagadis Chunder Dhabal* (4), where it was held that the evidence was inadequate to show that certain *mouzahs* bought out of the savings of the *zemindar* were attached to the *zemindari*. In both *Janki Pershid Singh* v. *Dwarki Preshad Singh* (5) and *Murtaza Husain Khan* v. *Mohammad Yasin Ali Khan* (6) the addition of family property to the original Raj is considered. Both these cases dealt with property other than moveable property. In the present case their Lordships can see no evidence in the facts stated of any sufficient intention to treat the acquired properties—whether the *mouzahs*, mortgages or other personal estate—as part of the original Raj. The consequence is that to that extent the appellant succeeds, and the decree of the High Court must be varied by declaring that the decree for possession made in favour of the respondent be further varied by providing that it shall not include items Nos. 2, 3, 5, 6, 7 and 9 in Schedule A to the plaint. The respondent will pay the costs of the appeal.

Their Lordships will humbly advise His Majesty accordingly.

K. S. D.

Decree varied;
Appeal partly allowed.

Solicitors for the Appellant:—Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondent:—Messrs. *Pugh & Co.*

(3) 27 A. 203 at p. 253; 2 A. L. J. 720; A. W. N. (1904) 244.

(4) 29 C. 433; 29 I. A. 82; 6 C. W. N. 490; 4 Bom. L. R. 365; 8 Sar. P. C. J. 205 (P. C.).

(5) 20 Ind. Cas 73; 35 A. 391; 17 C. W. N. 1029; 14 M. L. T. 110; 25 M. L. J. 34; (1913) M W. N. 630; 18 C. L. J. 200; 11 A. L. J. 818 15 Bom. L. R. 853; 16 O. C. 216; 40 I. A. 170 (P. C.).

(6) 36 Ind. Cas. 299; 38 A. 552; 20 M. L. T. 362; 14 A. L. J. 1083; 18 Bom. L. R. 884; 31 M. L. J. 804; (1916) 2 M. W. N. 555; 25 C. L. J. 1; 19 O. C. 290; 1 P. L. W. 122; 21 C. W. N. 410; 4 O. L. J. 8; 4 L. W. 538; 43 I. A. 269 (P. C.).

JOHARA BANOO v. GANGA CHANDRA.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 178, 390 AND 397 OF 1920.

February 24, 1922.

Present:—Mr. Justice Greaves and Mr. Justice B. B. Ghose.

IN APPEAL NO. 178 OF 1920.

Srimati JOHARA BANOO AND OTHERS—DEFENDANTS—APPELLANTS

versus

GANGA CHANDRA CHOWDHURY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 160, 167—Sale of tenure in execution of rent-decree—Annulment of incumbrances—Settlement khatian, *entry in, after annulment, effect of*—Kabuliyat, *construction of—Fixity of rent—Enhancement dependent upon enhancement by superior* talukdar, *effect of.*

An entry in a Settlement *khatian* in respect of a tenure made after the tenure has been sold in execution of a rent-decree and the incumbrances on it have been annulled, cannot affect the rights acquired under the sale and annulment. A clause in a *kabuliyat* that if in future any enhancement of rent or cesses is made according to law by the superior *talukdar* or by the Collectorate, the landlord would be entitled to realise the enhanced rent and cesses from the tenant, does not affect the question whether the tenants hold at a fixed rate of rent under the *kabuliyat*. [p. 1045, col. 1.]

Appeal against a decree of the Additional District Judge, Noakhali, dated the 13th November 1919, modifying that of the Munsif, First Court at Lakhipur, dated the 1st September 1917.

Babu *Romesh Chandra Sen*, for the Appellants.

Babu *Dhirendra Lal Kastgir* and *Nagendra Nath Bose*, for the Respondents.

JUDGMENT.—These three appeals Nos. 178, 390 and 397 arise out of two connected suits. Appeal No. 178 arises out of Suit No. 2548 of 1916 and Appeals Nos. 390 and 397 arise out of Suit No. 2547 of 1916. The two connected suits were brought to recover possession of a tenure which had been purchased by an auction-purchaser at a rent sale and he claimed to have annulled some incumbrences subsisting in the land, namely a *howla* and a *raiyati* interest The First Court dismissed both the suits, but the Second Court decreed the suits. In Appeal No. 178 there are two sets of appellants, namely, defendant No. 6, the *howladar* and defendants Nos. 15, 16 and 17 whom I may describe as the holders of a *raiyati* at a fixed rate subject to that contention urged on their behalf that they do not in fact hold at a fixed rate. Appeal No. 390 is preferred by defendant No. 9, a *raiyat* and Appeal No. 397 is preferred by the *howldar*.

Four or rather five questions have been urged before us in these appeals. First, it is said that so far as the *raiyat* are concerned, they hold at fixed rents and have a right of occupancy and they are not encumbrancers, but have protected interests. Secondly it is said that if they are wrong on this first point they are not to be deemed *raiyats* holding at fixed rates of rents having regard to the terms upon which they hold. It is said that their rents being liable to be increased they cannot be said to be *raiyats* holding at fixed rate of rents. These two questions, of course, concern only the *raiyats* and not the *howladars*.

The third question which is raised affects both the *howladars* and the *raiyats* and the contention thereunder was that the decree in respect of which the purchase was made was not a rent-decree because of certain irregularities which I shall presently mention.

Fourthly it is said that these *howladars* are protected by virtue of the provisions of section 160 (*b*) of the Bengal Tenancy Act, and lastly, although this question has not been pressed, it is urged that inasmuch as the notices were issued by the Deputy Collector they were not valid. As I have said this fifth question was not pressed; I need not dwell on it.

So far as the first question is concerned, reliance is placed on a recent decision in the case of *Sarbeswar Patra* v. *Maharaja Sir Bejoy Chand Mahatap* (1) as authority for the proposition that a *raiyat* who holds at a fixed rate and who has occupied his holding for a continuous period of more than twelve years has a protected interest within the meaning of section 160 of the Bengal Tennacy Act and that his interest cannot be annulled by a notice under section 167.

(1) 63 Ind. Cas. 986; 34 C. L. J. 233; 26 C. W. N. 151; 49 C. 280; (1922) A. I. R. (C.) 287.

JOHARA BANOO v. GANGA CHANDRA;

So far as the second question is concerned reliance is placed on the provisions of Exhibit 13, namely, that if in future any enhancement of rent or cesses be made according to law by the superior *talukdar* or by the Collectorate the landlord would be entitled to realise the enhanced rent and cesses from the tenants thereunder; and it is said, that by virtue of the provisions of Exhibit 13, the holdings could not be said to be held at a fixed rate of rent.

The third point is raised in this way. It is said that a certain minor was not properly represented by a guardian *ad litem*, and that consequently the decree so far as he is concerned is void with the result that this is not a rent-decree within the Bengal Tenancy Act. What happened is this. Apparently the minor in question is a son of Kali Charan Chakrabarty. His brother was guardian under the Guardians and Wards Act and the learned Judge quite rightly appointed him a guardian *ad litem* of the minor and he was duly served, but he never appeared and in fact the decree was passed *ex parte*. Accordingly it is said that there was no consent by the guardian *ad litem* to act as such, and reliance is placed on the authorities to which we were referred, that in circumstances of this nature the decree was void as against the minor.

Then, so far as the fourth point is concerned, reliance is placed on the fact that these *howalas*, it is said, were within the Government *khas mahal* and that in recent Settlement proceedings the rent was settled for a period of ten years, and consequently it is said, that having regard to the entries made in the Settlement *khatian*, they must be taken to be under-tenures recognised by the Settlement proceedings, within the provisions of section 160, sub-section (*b*) of the Bengal Tenancy Act.

So far as the third point is concerned, namely, whether the decree was in fact a rent decree or not, it does not seem to us that this question was really raised in the first Court. If it had been properly raised it might well have been that evidence would have been forthcoming to show that the brother who is named as gaurdian *ad litem* of the minor in fact consented to the appointment, and we do not think that in these circumstance, in second appeal, we ought to allow this matter to be gone into as the necessary materials are not before the Court to arrive at a certain conclusion as to whether consent was in fact given or not.

So far as the fourth question is concerned, it seems to us that reliance cannot be placed, under these circumstances, on the entry in the Record of Rights. The sale was in 1911, notices were issued to annul the incumbrances in the year 1912, the suit was commenced in 1916 and the Record of Rights was not published until March 1917. In these circumstances it is difficult to see how the entries made in the Record of Rights can affect the rights purporting to have been acquired by virtue of the annulment made by the notices of 1912. This disposes of the appeal so far as the *howladars* are concerned. In the result the appeal of defendant No. 6 in No. 178 fails and Appeal No. 397 also fails.

The first two qustions remain which concern the *raiyats*. So far as the second question is concerned it seems to us that upon the true construction of Exhibit 13, we must hold that the holdings were held at a fixed rate of rent, the provisions for enhancement by the immediate landlord were in respect of enhancements under circumstances over which the immediate landlord has no control; and under these circumstances it seems to us these provisions cannot preclude us upon a true construction of the whole document from holding that these holdings are holdings at a fixed rate of rent.

So far as the first question is concerned on behalf of the respondent it is sought to distinguish the case in *Sarbeswar Patra* v. *Maharaja Sir Bejoy Chand Mahtap* (1) by saying that the defendants Nos. 15, 16 and 17 were not the original tenants and that they bought the rights of defendants Nos. 12, 13 and 14 and that inasmuch as there is no finding that defendants Nos. 15, 16 and 17 have themselves acquired occupancy rights the

decision in *Sarbeswar Patra* v. *Maharaja Sir Bejoy Chand Mahatap* (1) is distinguishable on this ground. It is also sought to be argued that there is no evidence that defendants Nos. 12, 13 and 14 had themselves occupancy rights but I do not think that this argument is open having regard to the time during which they have been on the land. We think that so far as this first question is concerned the matter has been left in an unsatisfactory position and we accordingly remand Appeal No. 178 so far as defendants Nos. 15, 16 and 17 are concerned and also Appeal No. 390 for a finding as to whether the defendants Nos. 15, 16 and 17 in Appeal No. 178 have acquired a right of occupancy in the land in suit, as also defendant No. 9 in Appeal No. 390 whose case stands on the same footing and it will be for the Court to consider this point in the light of the decision in *Sarbeswar Patra* v. *Maharaja Sir Bejoy Chand Mahatap* (1).

We accordingly remand the cases, that is Appeals Nos. 178 and 390, to the first Court for these points to be determined by the Munsif. The judgment of the Court below, so far this point is concerned, is set aside and the cases are sent back to the First Court for a decision after determination of this point. If the learned Munsif thinks it necessary that fresh evidence should be adduced he will be at liberty to allow the parties to do so. The costs of these appeals will abide the decision of the Munsif.

Appeal No. 397 of 1920 is dismissed with costs.

Appeals dismissed.

W. C. A.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 32 OF 1923.

April 10, 1923.

Present :—Mr. Justice Daniels.

EAST INDIAN RAILWAY COMPANY —DEFENDANT—APPLICANT

versus

FIRM GOPI KRISHNA-KASHI PRASAD —PLAINTIFF—OPPOSITE PARTY.

Railway Company— Unreasonable delay—Damage to goods ndependent of loss or deterioration—Risk-Note B, whether affords protection.

The damage done to goods carried by the Railways by reason of unreasonable delay in transit but independent of loss or deterioration, is not one protected by Risk-Note B; and the Railway is liable for the same.

Ram Kishun Ram v. *North Western Railway*, 77 Ind. Cas. 1020; 20 A. L. J 973: (1923) A. I. R. (A.) 122, *Secretary of State* v. *Firm Jiwan and Abdullah*, 71 Ind. Cas. 609; 21 A. L. J. 220; 45 A. 380; (1923) A. I. R. (A.) 426, distinguished.

East Indian Railway Company v. *Firm Kishin Lal-Tikhamal*, 73 Ind. Cas. 986; 21 A. L. J. 438; 9 O. & A. L. R. 531; 45 A. 530; (1924) A. I. R. (A.) 7, followed.

Civil revision from an order of the Judge, Small Cause Court, Ghazipur, dated the 30th November 1922.

Mr. *B. K. Mukerji*, for the Applicant.

Mr. *S. N. Verma*, for the Opposite Party.

JUDGMENT.—This is a revision directed against an order of the Small Cause Court and raises a question of the liability of the Railway Company under Risk-Note B. The goods in question were consigned from Tarighat near Ghazipore on the East Indian Railway to Manbhum, on 26th January 1922. The goods were not lost nor were they destroyed but the Railway Company took five months to convey them and they did not reach their destination until 25th June 1922. The delay was unquestionably unreasonable. The Trial Court finds that owing to this delay damage was suffered by the plaintiff quite independently of any deterioration of the goods. The *ghee* was in fact sent with a view to a marriage which had already taken place before the consignment was received. The Risk Note B under which the goods were despatched protected the Railway Company from any claim for damages due to the loss, destruction or deterioration of the goods or for damage to the consignment except in

certain specified cases. On the finding of fact of the Court below the cause of action in this case was not due to any of the special events against which the Railway is protected by the Risk-Note. It was, therefore, outside the protection afforded by the note and the cases in *Ram Kishun Ram* v. *North Western Railway* (1) and *Secretary of State* v. *Firm Jiwan and Abdullah* (2) are distinguishable. The case is somewhat similar to *East Indian Railway Company* v. *Firm Kishin Lal-Tirkhamal* (3) recently decided by me. On the finding of fact of the Court below the revision cannot succeed and I accordingly dismiss it with costs.

A ground that the damages were wrongly assessed was taken in the grounds of revision but was not argued and I cannot, therefore, take notice of it.

Application dismissed.

M. H.

(1) 77 Ind. Cas. 1020; 20 A. L. J. 973; (1923) A. I. R. (A.) 122.
(2) 71 Ind. Cas. 609; 21 A. L. J. 220; 45 A. 380; (1923) A. I. R. (A.) 426.
(3) 73 Ind. Cas. 986; 21 A. L. J. 438; 9 O. & A. L. R. (A.) 531; 45 A. 530; (1924) A. I. R. (A.) 7.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE
No. 237 OF 1920.
March 29, 1922.

Present:—Justice Sir John Woodroffe, Kt., and Mr. Justice B. B. Ghose.

SHIB CHARAN CHAKRABURTTY AND OTHERS—PLAINTIFFS—APPELLANTS
versus
BEPIN BEHARY CHAKRABURTTY AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 155, notice under—Tenant not required to remedy misuse—Notice, validity of.

A notice under section 155 of the Bengal Tenancy Act which does not require the tenant to remedy the misuse, the misuse being capable of remedy, is bad in law, and no claim for compensation can be based on such notice.

Appeal against a decree of the Subordinate Judge, Jessore, dated the 4th of November 1919, reversing that of the Additional Munsif, Narail, dated the 20th of August 1918.

Dr. *Jadunath Kanjilal*, for the Appellant.

Babu *Surendra Chandra Sen* (with him Babu *Hemendra Chandra Sen*), for the Respondents.

JUDGMENT.

Woodroffe, J.—This appeal has taken some time but the point is very simple. It arises out of a suit brought by the plaintiff against the defendants for recovery of *khas* possession of certain plot of land by ejecting the defendants therefrom and for recovery of a certain sum of money claimed by way of compensation for misuse of the land. The defence is that no notice was served and that if it was served it was invalid. The point which comes before us for decision is this: whether the decision of the High Court when it made a remand in this matter is conclusive. I am of opinion that it is not conclusive in the sense in which it has been urged before us by the appellant to-day. The question then is, that being so and there being no bar to the decision by the Subordinate Judge, whether his decision on that particular point with regard to the notice is correct. He finds on the evidence as a question of fact that "the misuse is capable of remedy and that when the notice was

issued the plaintiff knew it well that the misuse complained of was capable of remedy." Then, after referring to the notice, he says that "the notice shows that the plaintiff did not ask the defendants to remedy the misuse though it was capable of remedy." Accordingly he holds that the notice was not good in law. As regards the claim for compensation there is no ground of appeal nor is it sustainable, the notice having been held to be bad.

In my opinion, the appeal fails and must be dismissed with costs and in addition one gold *mohur* for further hearing on the 29th March 1922.

Ghose, J.—I agree.

Z. K.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

January 23, 1923.

Present:—Lord Buckmaster, Lord Phillimore, Sir John Edge, Sir Lawrence Jenkins and Lord Salvesen.

Kumar NARESH NARAYAN ROY —APPELLANT

versus

SECRETARY OF STATE FOR INDIA —RESPONDENT.

Riparian owners—Navigable river—Accretions—Re-formations in situ—Law applicable—Evidence Act (I of 1872), s. 43—Judgment not inter parties, when relevant.

The bed of a public navigable river is the property of the Government though the banks may be the subject of private ownership. If there be slow accretion to the land on either side, due, for instance, to the gradual accumulation of silt, this forms part of the estate of the riparian owner to whose bank the accretion has been made. If private property be submerged and subsequently again left bare by the water, it belongs to the original owner. [p. 1049, col. 2.]

A decree obtained by a co-sharer as to his share of a plot of land as against a third party is not admissible as evidence of title in a subsequent suit by another co-sharer, but it becomes admissible where a partition of the plot of land has been made by the co-sharers in consequence of that decree.

Appeal from a judgment of the Calcutta High Court (Mr. Justice Beachcroft and Mr. Justice Greaves), dated the 4th March 1919, reversing that of the Subordinate Judge, Nadia, dated the 19th June 1917.

Messrs. *A. M. Dunne, K. C.*, and *W. Wallach*, for the Appellant.

Messrs. *DeGruyther* and *Kenworthy Brown*, for the Respondents.

JUDGMENT.

Lord Phillimore.—This action was brought in the year 1912 by the plaintiff, who is a *zemindar* for a declaration of his proprietary right to certain land in the District of Nadia, for a declaration that he had been twice assessed for revenue in respect of it, and for a return of the overpaid revenue in past years. He succeeded in the Court of the Subordinate Judge, but that judgment was reversed on appeal, and now he has appealed to His Majesty in Council.

The case made by the plaintiff was that the tract of land in question was within the collection or block or *taraf* of villages known after the name of its principal village as the Taraf Jotashai in the Parganah of Laskarpur; his case being that this *parganah* consists of seven *mouzahs* or villages described as Jotashai Ramkristopur, Nowsera Ramkrishnapur, Kadirpur, Sadasibpur, Bilarajpur (also known as Bahirmadi), and Mallikpur. He did not profess in his pleadings to say in which village the tract was situate, but generally averred that it was within this block or *taraf*, and that the whole had been settled with his ancestor at the Permanent Settlement in the year 1793. He said that the tract sometime afterwards had become diluviated and now was re-formed *in situ*.

The written statement of the Secretary of State traverses the allegations that the lands were re-formed *in situ*, or that they were in the block Jotashai, or had been settled with the plaintiff's ancestor, and raised certain other defences which will be dealt with later.

Upon this contention being raised, a local investigation was ordered to ascertain

whether the disputed lands are re-formations *in situ* of Taraf, Jotashai in Parganah Laskarpur of the Rajshahi Collectorate, and the Commissioner was directed to make a map of the disputed land and to show therein the lines of block Jotashai, as depicted in the maps of Mukanda Narayan Chowdhuri and Purna Chandra Chatterji. He was directed also to ascertain, with the help of Major Rennell's map of the Ganges prepared in 1780, the Revenue Survey Map, the Diara Survey Map and the Thak Survey Map of Jotashai, whether the disputed land formed part and parcel of Parganah Laskarpur at the time of the Decennial Settlement; to plot those maps in his map; to plot the lines of the *khas mahal* map of *chur* Marichar Diara as prepared by Babu Bijoy Krishna Bose, Deputy Collector, in 1883-84, to which, according to the defence, the disputed land appertained.

The Commissioner found that the land in question was in block Jotashai and was a re-formation *in situ* of land formerly belonging to that block or taraf. He arrived at this finding after a very careful enquiry, making a personal visit to the site and taking much evidence. He also produced a map on which he had plotted the lines of the other maps according to the directions given him. His report having been filed, it was at one time intimated on behalf of the Secretary of State that objections would be raised to it, but no objections were raised, and no application was made to have the report referred back to the Commissioner.

The case then came on for hearing upon this report, some oral evidence on behalf of the plaintiff, which did not carry the matter any further and a good deal of documentary evidence, including the proceedings and decrees in former litigation, the relevancy and probative force of which latter have undergone much discussion at their Lordships' bar.

The general nature and character of the plaintiff's case was as follows: The River Ganges called in this part of its course the Padma, has changed its channels frequently and considerably since the date of the Decennial Settlement in 1783, which was made permanent ten years later, in 1793. In these circumstances the principles upon which a Tribunal should act in a claim of this kind are to be found in a judgment delivered in 1917 in the case of *Haradas Acharjya Chowdhuri* v. *Secretary of State for India in Council* (1) where it was said by their Lordships:—

"The River Ganges....rests so uneasily in its bed that its boundaries can never at any moment be defined with the certainty that their limitation will be long observed. Frequently the river leaves its course, flows over large tracts of land, leaving other areas bare, and then again its waters recede, giving back the lands submerged in whole or in part to use and cultivation. It is obvious that difficulties as to ownership must arise in these circumstances, and of the extent and complication of these difficulties the present case affords an excellent illustration. The general law that is applicable is free from doubt. The bed of a public navigable river is the property of the Government though the banks may be the subject of private ownership. If there be slow accretion to the land on either side, due, for instance, to the gradual accumulation of silt, this forms part of the estate of the riparian owner to whose bank the accretion has been made. (See Regulation XI of 1825.) If private property be submerged and subsequently again left bare by the water, it belongs to the original owner. [*Lopez* v. *Muddun Mohun Thakoor* (2).]

This being so, the plaintiff's case was developed as follows:—

The Ganges in this part of its course divides two districts known as Rajashahi on the north and Nadia on the south. Laskarpur was a *parganah* in Rajashahi; and, therefore, to the north of the river; and anything in Laskarpur must be taken to have been north of the river at the time of the Permanent Settlement. The river, flowing in a general direction from west to east but with many deviations

(1) 43 Ind. Cas. 361; 22 M. L. T. 438; 26 C. L. J. 590; (1918) M. W. N. 28; 20 Bom. L. R. 49 (P. C.).
(2) 13 M. I. A. 467; 5 B. L. R. 521; 14 W. R. 11 (P. C.); 2 Suth, P. C. J, 336; 2 Sar. P. C. J. 594; 20 E. R. 625.

and curves to the north and south, has now altered its course some miles to the northward, leaving a bed which can still be traced, where it probably flowed about 1850. In the course of its shift from south to north it diluviated and again set free large portions of the Parganah of Laskarpur. The tract in dispute, which was in the southern portions of the *parganah*, was, as the plaintiff contended, in existence as dry land at the time of the Permanent Settlement, and was included in it. If so, it must have been diluviated shortly after, first re-appeared as an island, and now has become, as indeed land further north of it has also become, a permanent portion of the land on the southern side of the river.

The case for the Secretary of State was that the burden of proof of this averment lay upon the plaintiff, and that he had not made it out, and that for all that could be now traced this land may well have been part of the bed of the river at the time of the Permanent Settlement, and, therefore not part of Laskarpur and never settled for.

The land in dispute, which is roughly of a hatchet shape, and is coloured violet on the Commissioner's map, formed part of an irregular area of considerably larger size coloured yellow, and came to the plaintiff from some estate or interest, the exact nature of which must be hereafter considered, by virtue of a deed of partition on the 13th December 1909, between the Secretary of State; the widow of a co-sharer, and the Court of Wards acting for the plaintiff who was then an infant.

The oldest map known to be in existence is Major Rennell's survey prepared in 1780, which the Commissioner or *Amin* was directed to plot upon the map which he prepared. With regard to this map, in the case already cited, *Haradas Acharjya Chowdhuri* v. *Secretary of State for India in Council* (1), their Lordships made the following observations :—

"Rennell's map is undoubtedly, both owing to its difference in scale, to the different purpose of its preparation, and to the difficulty of assigning fixed points from which the survey was made, a map which it is hard to incorporate into the Survey of 1859. And, again, the variability of the river renders reliance upon it difficult. As has been already said, their Lordships are not, however, prepared to disposses the appellants because of this difficulty. It may be that any assumption that can now be made cannot be exact, but some assumption is necessary."

The Commissioner, as directed, plotted Rennell's map upon the one which he prepared. There was one fixed point which could be relied upon. A factory called Harishankara on the south bank was in existence in Rennell's map, and has remained ever since. Taking this point, and reducing the scale as best he could, the *Amin* plotted the river with a curve sweeping over two-fifths of the south-eastern part of the land in dispute, leaving the rest dry land to the north, which would be so far according to the plaintiff's contention, but putting the two-fifths in the bed of the river. In so doing, however, he put the site of two of the seven villages which constituted the block Jotashai, Sadashibpur and Mallikpur, under the bed of the river, and, inasmuch as they must have been at the time of the settlement to the northward of the river, it followed that at some portion of its course over the map, the river must have been more to the southward than it was shown by this plotting, and if the curve retained its outline but was shifted bodily to the southward all except, perhaps, a very small part of the land in dispute would have been dry land on the north bank. It would have been just possible to shift the river bodily to the southward for this purpose, and yet leave the factory standing. If for some reason the course of the river was a little narrower it could have been done more easily. But there was apparently no physical reason why the curve should have retained the same outline, and if the north turn began a little more to the westward and nearer the factory the land in dispute would have been under the bed of the river.

The next map which the Commissioner had to deal with was what was called the Diara Map, prepared about the year 1850, at which time the *mahalwar* regis-

ter of Laskarpur showed the plaintiff's ancestor and predecessor-in-title as a proprietor of a great number of *mouzahs* still in existenee, with a number of others noted as missing villages. Some of the seven villages to which the plaintiff referred in his plaint appear in one columu. some in the other, and some as to part in both.

The river bed, according to its course at that time is still traceable, and flowed apparenty through the middle of the land in dispute. About this time appeared a *chur* called Marichar Diar—Diar meaning land emerging from water —which is said on behalf of the Secretary of State to comprehend the land in dispute. At the time when the Commissioner made his survey the river was two miles to the north and the factory a mile to the south of the land in dispute. He reckoned the area of the tract marked yellow as 20,004 *bighas*. The tract coloured violet is roughly about one-quarter of the tract coloured yellow.

There has been much previous litigation with regard to the tract coloured yellow and the lands adjacent to it. Their Lordships deem it unnecessary to refer to the earlier cases as they were summarised in a judgment delivered by this Board on the 21st March, 1906, in a case to which reference will now be made.

This was a suit brought by Rani Hemanta Kumari Debi in 1895 against the Secretary of State and Maharaja Jaga Dindra Nath Bahadur, the Rani claiming to be the proprietor of a *zemindari* right in a 2 annas 15 *gundas* share of a premanently settled estate in Laskarpur, and alleging that the lands claimed by her within the area of block Jotashai had been permanently settled by the Government with her predecessor-in-title. The lands in which she was claiming her right were the larger block marked yellow in the plan annexed to the present suit, of which the part coloured violet is that for which the present appellant is suing. The Rani succeeded in the Court of first instance, that decision was reversed by the High Court, but restored by the judgment of this Board. The result was to decide that the lands in which she claimed a fractional share being comprised in block Jotashai lying between the village Jotashai on the north and the southern boundary of the *chur* are a re-formation *in situ* of lands which before diluviation were comprised in Parganah Laskarpur.

This was a recovery by a co-sharer as against the Secretary of State of her right in the lands for which the plaintiff is suing in the present suit. It is not in itself conclusive, because the plaintiff was not a party to that suit. Objection, indeed, was made in that suit by the Secretary of State that the Rani could not sue without making other co-sharers parties, and the answer made by the Court was that it was unnecessary as the judgment would only decide her right, and would not be binding either in favour of or against other co-sharers. It was rejected by the High Court even as evidence; and this rejection might have been right, if it stood alone. But it was followed by a deed of partition, dated the 19th December 1909, between the Rani, an officer of the Court of Wards acting for the present plaintiff, then an infant, and a representative of the Secretary of State, whereby the tract marked yellow was divided between the three parties according to their several shares or supposed shares. The Rani took a portion, the Secretary of State two other portions, and the plaintiff the portion coloured violet. There is no reference in the deed to the Rani's successful suit, but it is clear that the partition was made in consequence of the decree in that suit and with the view to work it out, and in their Lordships' opinion this introduces the decree in the Rani's suit. Moreover, the deed describes the lands as being "in block Jotashai," which is in itself an important admission.

Mr. Justice Beachcroft, in his judgment in the High Court, after commenting upon the error into which the Subordinate Judge had fallen in treating the judgment in the Rani's case as conclusive proceeded as follows: "The error would not be of much significance if we had in this case the evidence which was given in Rani Hemanta Kumari's case, for it would then be sufficient to adopt the

reasoning used in that case. But we have not." And he proceeded to refer to certain additional materials mentioned in the judgment in that case. It is satisfactory to their Lordships to think that there was that additional evidence; for in the present case, the evidence, apart from the inference to be drawn from this decision, and from a statement to be hereafter referred to on the map of Ramkristopur, is not very conclusive.

Careful and detailed as is the report of the Commissioner, and careful and detailed as is the judgment of the Subordinate Judge, very little positive evidence to support the case of the plaintiff can be extracted from the report or the judgment, if the Rani's case and the conclusion arrived at in it be excluded. The comment of the Judges in the High Court that the Commissioner's conclusion appears to depend upon the curve of the river in this part having retained the same outline is a forcible one, as is the argument submitted by Counsel for the respondents at their Lordships' bar to the effect that plaintiff cannot show in which one of the seven villages, which formed the Taraf of Jotashai, the lands in question were situate at the time of the settlement, accompanied by his analysis of the facts which are known with regard to the boundaries of many of those villages, leaving only a residuum of uncertain area in which this tract could be put if it was dry land at the time of the settlement.

Their Lordships, however, cannot accept his contention that there is a distinction between the *taraf* and the block. Certainly there was no such distinction in the minds of those who gave judgment in the Rani's case. A perusal of that judgment would show that the words "taraf" and "block" are used interchangeably.

At the same time, their Lordships feel that it is possible to be over-critical of the Commissioner's report and that among the many physical features which he saw and upon which he reported, there may have been some which pointed to traces of old channels of the river which would have supported his conclusion in a manner not directly apparent upon the face of his report; and they are much impressed by the fact that he was not cross-examined or given any opportunity to meet criticisms upon it.

There is one passage in the report of the Commissioner to which their Lordships' attention was specially directed. He has dealt with the boudaries of four of the seven villages in the block, and pointed out that, in his view, the remaining three could not be traced, and he proceeds to say that it would be not impossible that the sites of these three missing villages had been encrouched upon by the river at the time of the Revenue Survey—that is, about 1850—54,-and consequently could not be then surveyed and mapped. His report then proceeds as follows:—

"There is no clear and positive evidence before me to show that the river site at the time of the Revenue Survey was previously the site of those three villages. But the fact that the site belonged to Parganah Iaskarpur is amply proved by the statement contained in the Revenue Survey Map of Ramkristopur."

For some unexplained reason this map does not form part of the record. It is, therefore, impossible to say with certainty that this statement was of such a kind as to be receivable in the present suit under section 36 of the Indian Evidence Act. But no objection having been taken to the report and the Commissioner not having been examined or cross-examined, their Lordships think that they ought to treat it as admissible evidence and if so, it adds, considerable weight to the material upon which the Commissioner formed his conclusion.

Upon the whole, their Lordships think that the Commissioner's report, coupled with the decree in the Rani's case, was sufficient to turn scale in favour of the plaintiff. Their Lordships are glad in dealing with a cass in which the public interest is involved to be able to reach this conclusion. It would be unfortunate if, with regard to the same land, a decree could be made in favour of one co-sharer and another decree made against another co-sharer upon the same title.

There remain one or two points to be dealt with. In the partition deed which has been much relied upon, and which is

indeed the only link by which it is possible to connect the Rani's judgment with the present case, and in which this land is described as being in block Jotashai, it is stated, when the plaintiff's share comes to be set out in the schedule that it was "settled for periods". This, it is contended, is an admission that there was no Permanent Settlement, and an admission upon which the Secretary of State can rely as against the plaintiff. The plaintiff, it is true, repudiated this partition deed, which was effected on his behalf by the Court of Wards during his minority, but only a few days before he attained his majority, and contended that the partition proceedings were not binding upon him; but the Subordinate Judge held the contrary, and gave him a declaratory decree on the footing of the partition proceedings, and in the High Court his Counsel accepted this position. But the words in the schedule "settled for periods" may be accepted as a correct description, but not as an admission that the settlement was *de jure*. This question leads their Lordships to consider the points raised in India and by the respondents' case before their Lordships, but not so much insisted upon at the bar, that the plaintiff was bound by a compromise entered into by his mother who was his predecessor-in-title, and a decree passed in pursuance of that compromise in 1881, or by a settlement which he took with the Government in 1910. The first of those contentions was not accepted by the Subordinate Judge or by the High Court. The Government were not parties to the compromise, or to the decree and as Mr. Justice Greaves in the High Court observed, there is on the record a letter from the Collector of Rajshahi expressly stating that the Government was not a party to that suit.

As regards the second, the Subordinate Judge held that the plaintiff need not bring a suit for the purpose of having the settlement, which was said to have been forced upon him in 1910, set aside, as his purpose would be equally served by his obtaining a declaratian that he was not liable to double assessment for the disputed land.

This objection does not seem to have been deemed by the High Court worthy of further notice. It re-appears, however, in the case for the respondents before this Board, but was not much insisted upon in argument, and being rather a point of procedure than of substance, is, therefore, not one on which the Government would be desirous of relying, and their Lordships do not think it should prevail.

The defence of the Limitation Act was dealt with by the High Court, and their Lordships see no reason to differ from the view there taken.

The ground upon which the High Court differed from the Subordinate Judge was not that the evidence showed that this disputed tract had been under the bed of the river, but that the burden of proof lay upon the plaintiff, and that he had not proved with sufficient conclusiveness that it was dry land to the north of the river at the time of the Permanent Settlement, and the High Court put aside the judgment of this Board in the Rani's suit, as not being evidence.

The grounds upon which their Lordships differ from the High Court are that the decree in the Rani's suit, followed by the partition deed, must, in their Lordships' view, be regarded as material, and that the High Court have not attached sufficient weight to the conclusions of the Commissioner, derived from examination on the spot, and his reference to the map of Ramkristopur, unchallenged as his conclusions were by examination and cross-examination.

Upon the whole, their Lordships will humbly recommend His Majesty that the decree of the High Court be set aside, and the decree of the Subordinate Judge be restored, and that the plaintiff do have his costs in the Court below and of this appeal, these costs to be paid by the Secretary of State.

Appeal allowed.

N. H.

Solicitors for the Appellant:—Messrs. *W. W. Box & Co.*

Solicitors for the Respondents:—*India Office.*

PATNA HIGH COURT.

(STAMP REFERENCE)

Re FIRST CIVIL APPEAL NO. 226 OF 1922.

October 30, 1922.

Present :—Justice Sir Jwala Prasad, KT.

KALI PRASAD SINGH—PLAINTIFF—APPELLANT

versus

MATHURA PRASAD SINGH—DEFENDANT—RESPONDENT.

Court Fees Act (VII of 1870), s. 7 (ix)—Mortgage suit—Interest, future—Appeal—Court-fee payable.

When a mortgage suit is dismissed the plaintiff is entitled to value his appeal at the sum claimed in the plaint in respect of the principal and interest up to the date of filing the plaint and is not bound to value the future interest which he may claim from the date of the suit up to the date of realization, or to pay any Court-fee thereon. But if any future interest is determined by the Trial Court and is entered in the decree then the plaintiff, on appeal by the defendant, is bound to pay additional Court-fee on the sum of interest so added in the decree as having accrued from the date of the suit up to the date of the preparation of the decree in the lower Court. Again, if the plaintiff filing an appeal on the valuation stated by him in the lower Court, obtains a decree in the Appellate Court for a sum higher than that actually claimed by him in the lower Court, he is bound to pay Court-fee on such additional sum, and when future interest is added in the decree of the Appellate Court, he would not be able to execute his decree unless he pays Court-fee on the future interest.

Case-law discussed.

Reference made to the Taxing Judge by the Taxing Office.

Mr. *Brij Kishore Prasad*, for the Appellant.

JUDGMENT.—This is a reference to me as Taxing Judge. The plaintiffs' suit for recovery of a debt due under a mortgage was dismissed by the Subordinate Judge of Shahabad. The plaintiffs have appealed to this Court and have valued their appeal at the same amount (Rs. 8,072-10-6) as the plaint. The question referred to me is as to whether the Court-fee paid by the appellants on the aforesaid valuation is sufficient, or, whether, it is incumbent upon them to pay Court-fee upon the interest calculated at the bond rate from the date of the suit to the date of the presentation of their appeal to this Court.

There is a great conflict of opinion on this point. The learned Vakil on behalf of the appellants has relied upon the following cases:—*Vithal Hari Athavle* v. *Govind Vasudeo* (1), *Ram Bujhawan Prasad Singh* v. *Natho Ram* (2), *Bhagwati Prasad Singh* v. *Bishun Pragash Narain* (3) and *Bhawani Prasad* v. *Kutub-un-nissa Bibi* (4). The contrary view was taken by the late Taxing Judge, Mr. Justice Coutts, in the case of *Mahanth Janki Saran Das* v. *Harbans Deo*, unreported S. A. No. 489 of 1920. His view is supported by the decision of the Judicial Commissioner of Oudh in *Gobardhan Das* v. *Narendra Bahadur Singh* (5). The Madras Court decision in the case of *Srinivasa Row* v. *Ramaswami Chetti* (6), favours the contention of the appellants. No decision of the Calcutta High Court exactly applicable to the case has been placed before me. The view taken in *Percival* v. *Collector of Chittagong* (7), seems to be that an Appellate Court cannot pass a decree for a larger amount than that claimed in the memorandum of appeal, unless, before the judgment is pronounced, an amendment of the memorandum of appeal is allowed and the addtional Court-fee is paid in.

On a consideration of all these cases it appears to me that when a suit is dismissed the plaintiff is entitled to value his appeal at the sum claimed in the plaint in respect of the principal and interest up to the date of filing the plaint and is not bound to value the future interest which he may claim from the date of the suit up to the date of realization, or to pay any Court-fee thereon. But if any future interest is determined by the Trial Court and is entered in the decree then the plaintiff, on appeal by the defendant, is bound to

(1) 17 B. 411; 9 Ind. Dec. (N. S.) 27.
(2) 70 Ind. Cas. 483; 3 P. L. T. 146; (1922) A. I. R. (Pat.) 59.
(3) 70 Ind. Cas. 953; 3 P. L. T. 310; 6 P. L. J 670; (1922, Pat. 73; (1922) A. I. R. (Pat.) 386.
(4) 27 A. 559; 2 A. L. J. 263; A. W. N. (1905) 84.
(5) 50 Ind. Cas. 798; 22 O. C. 1; 1 U. P. L. R. (O.) 29.
(6) 10 M. L. J. 144.
(7) 30 C. 516;

pay additional Court-fee on the sum of interest so added in the decree as having accrued from the date of the suit up to the date of the preparation of the decree in the lower Court. Now if the plaintiff, filing an appeal on the valuation stated by him in the Court below, obtains a decree in this Court for a higher sum than that actually claimed by him in the Court below, he is bound to pay Court-fee on such additional sum and when future interest is added in the decree of this Appellate Court he would not be able to execute his decree unless he pays Court-fee on future interest. This view seems to be in accordance with that expressed in *Jamuna Rai* v. *Ramtahal Raut* (8) as well as in agreement with the views of the Bombay, Madras and Allahabad High Courts. The decision of a Division Bench of this Court, dated the 25th July 1922 in the case of *Bhagwati Prasad Singh* v. *Bishun Pragash Narain* (3), virtually overrides the view taken by the late Taxing Judge in the earlier case of *Mahanth Janki Saran Das* v. *Harbans Deo*, unreported S. A. No. 489 of 1920.

I, therefore, direct that the valuation given by the appellants be accepted as sufficient.

Z. K. *Order accordingly.*

8) 77 Ind. Cas. 1039; 3 P. L. T. 790; (1922) A. I. R (Pat.) 387; 1 Pat. 19.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION NO. 173 OF 1922.

August 17, 1923.

Present :—Sir Lallubhai Shah, KT., Chief Justice, and Mr. Justice Crump.

MOTILAL JASRAJ—PLAINTIFF —APPLICANT

versus

CHANDMAL HINDUMAL AND ANOTHER —DEFENDANTS—OPPONENTS.

Civil Procedure Code (Act V of 1908), O. XXX, r. 1—Suit against firm—Firm sued through manager —Death of manager, effect of.

Plaintiff brought a suit against firm *M* and described the defendant as "*C*, as the manager and owner of shop *M*." It was subsequently discovered that *C* had died before the institution of the suit;

Held, (1) that the suit was in substance, though not in form, against the firm *M* and the addition of the words "*C*, as the manager and owner of" in the description of the defendant were mere surplusage;

(2) that, therefore, it was not necessary to bring on the record the legal representatives of *C*, and the suit could be continued against firm *M* as having been properly filed on the date of its original institution.

Application against a decree of the First Class Subordinate Judge, at Nasik, in Small Cause Suit No. 577 of 1921.

Mr. *D. S. Varde*, for the Applicant.
Mr. *P. V. Kane*, for the Opponents.

JUDGMENT.—The question in this application is one of limitation. It arises on the following facts. The plaintiff, who is the manager and owner of the firm of Fojmal Jasraj, sued the defendant originally, which was the firm of "Manmal Chandmal." The suit was in respect of goods said to have been supplied by the plaintiff on January 6, 1918. It was also said that there was a part payment on May 16, 1918. The suit was filed on May 30, 1921, which was the opening day after the summer vacation of that year. The description of the defendant as given in the suit originally was "Chandmal Hindumal as manager and owner of the shop 'Manmal Chandmal'." It appears, however, that Chandmal had died on September 27, 1920. An application to bring the heirs on record was made in August 1921, and an order was made

thereon directing two persons, Manmal Hindumal and Kesarimal Brijlal as the heirs of Chandmal on September 27, 1921, to be brought on the record. The learned Judge dismissed the suit with costs on the preliminary ground that the suit must be taken to have been filed on the date on which these heirs were brought on the record, and that on that footing it was time-barred. We think, however, that though not in form, but in substance, the plaintiff sued the firm of "Manmal Chandmal." If he had simply described the defendant as "the firm of Manmal Chandmal" without mentioning the names of the owners or partners of the firm, the description would have been sufficient, having regard to the provisions of O. XXX of the Civil Procedure Code. In that view the further description of the defendant Chandmal Hindumal as "the manager and owner of the firm" may be treated as a mere surplusage. The suit would have been good if the firm had been sued without any further description, and it seems to us that on May 30, 1921, when the suit was filed, undoubtedly the firm was sued. It would be open then on service of the summons upon this firm for any of the partners or owners of this firm at the date of the suit, to come forward to defend the suit. It is really unnecessary to have the heirs of Chandmal on the record as such. The suit could have been, and should have been, treated as having been filed against the firm of "Manmal Chandmal"; and in that view it could not be said that it was beyond time on the footing that the heirs were brought on the record in September 1921.

If there is any other question of limitation in the suit, that will have to be considered when the suit comes to be heard. But the present finding on the first issue that the suit is barred cannot be accepted; and the suit must be heard and decided on the footing that it was properly filed on May 30, 1921, as against the firm of "Manmal Chandmal."

We make the Rule absolute, set aside the decree of the lower Court and send back the case for disposal according to law.

Costs of this application to be costs in the suit.

Z. K.

Rule made absolute.

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Admission, *erroneous, whether binding.*
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——— *Co-owners—Denial of title—Ouster.*
The mere assertion by one co-owner in possession of property that the other co-owner has no right to the property is not sufficient to constitute ouster. It might be inferred by evidence of exclusion of the other persons interested in the property uninterrupted for a very long time. B KESHAV NARAYAN *v.* RAMCHANDRA GANESH, (1922) A. I. R. (B.) 156 521

——— *Equity of redemption, adverse possession of—Usufructuary mortgagor's interest, nature of.*
There can be adverse possession of the interest of a usufructuary mortgagor and it will depend on the facts of each case whether the person claiming title through such adverse possession has established his claim or not.
The right of ownership in usufructuarily mortgaged property does not pass to the mortgagee, leaving only the equity of redemption to the mortgagor. The right of ownership together with the right of redemption remains with the mortgagor, and until the property is actually foreclosed and the sale becomes absolute, the right of ownership does not pass. The doctrine is equally applicable to conditional sales and usufructuary mortgages.
Saadut Alee Khan v. *Collector of Saran,* (1858) Beng. S. D. A. 841; 17 Ind. Dec. (o. s.) 617, approved
Although the possession of usufructuarily mortgaged property by a trespasser can be adverse to the mortgagor, the burden of proving when it became so rests on the former. *Prima facie,* by his act of possession the trespasser merely ousts the mortgagee who is entitled to hold the property.

Adverse possession—concld.

Peria Aiya Ambalam v. *Shunmuga Sundaram,* 22 Ind Cas. 615; 38 M. 903; 15 M. L. T. 122; 26 M. L. J. 140; 1 L. W. 119; (1914) M. W. N. 417, approved.
Per *Simpson, A. J. C.*—There can be prescription against a mortgagor, but ordinarily there can be no prescription against him unless he is entitled to immediate possession. *Contra non valentem agere nulla currit praescriptio.* The fact that he would be entitled to bring a suit for declaration is of no consequence A party is never bound to bring a suit for declaration. O JAI GOBIND SINGH *v.* ABHAIRAJ SINGH, 10 O. L. J. 216; 9 O. & A. L. R. 651; 26 O. C. 308; (1924) A. I. R. (O.) 40 125

——— *Mortgagee—Money spent on property by person in possession—Charge—Overt act—Execution of decree—Symbolical possession, delivery of, effect of—Municipal Committee, whether can acquire adversely.*
The mere fact that a person in possession of property over which he asserts title as owner has spent money on the property for which he would have a charge over the property does not convert his possession into that of a mortgagee.
It is open to a mortgagee to assert his ownership over mortgaged property by doing an overt act and giving notice of his intention to the mortgagor.
The mere fact that formal possession of property is given to a decree-holder in execution of his decree does not bring about any change in the possession or title of third persons.
There is nothing to prevent a Municipal Committee from acquiring property by adverse possession. L MUHAMMAD RAMZAN *v.* MUNICIPAL COMMITTEE, ALIPUR, (1923) A. I. R. (L.) 534 509

——— *Remote reversioner.*
An adverse possession of the property of the last male holder is not adverse to a remoter reversioner during the lifetime of the nearest reversioner, that is so long as his right to possession does not accrue. L HASTI *v.* HIRA, 4 L. L. J. 201; (1922) A. I. R. (L.) 37 222

Agra Tenancy Act (II of 1901), ss. 10, 165— *U. P. Land Revenue Act (III of 1901), s. 36—Purchaser of* khud kasht *land—Suit for profits—Rent suit—Assessment of rent.*
A purchaser of *khud kasht* land is not entitled to sue the co-sharer landlords for profits under section 165 of the Agra Tenancy Act. His suit is a simple one for rent against his vendor ex-proprietary tenant. As a preliminary step, however, it is necessary for him to have the rent assessed by the Collector with reference to the provisions of section 10 of the Agra Tenancy Act and section 36 of the Land Revenue Act. A KISHORI *v.* PARSADI; (1922) A. I. R. (A.) 319 382

——— s. 57—*Landlord and tenant—Ejectment—Non-payment of rent whether ground for ejectment.*
Under a compromise defendant was allowed to retain possession of certain plots of land so long as he paid the rent fixed by the compromise but if he failed to pay the rent he was liable to be ejected;

Agra Tenancy Act—concld.

Held, that although the compromise was binding on the parties the defendant could not under section 57 of the Agra Tenancy Act be ejected for mere non-payment of rent in the absence of a decree for arrears of rent as required by clause (*a*) of the section. A KUBER DAS *v.* RAM DIN KALWAR, 20 A. L. J. 769; (1923) A. I. R. (A.) 14; 45 A. 5 927

——— s. 95 (a)—*Suit for declaration that plaintiff is sole occupancy holding, whether cognizable by Revenue Court.*

A suit for a declaration that the plaintiff is the sole occupancy tenant of a holding is maintainable, under section 95 (*a*) of the Agra Tenancy Act, in the Revenue Court alone. A CHITTO *v.* GANGA SAHAI, (1923) A. I. R. (A.) 527 638

——— s. 165—*U. P Land Revenue Act (III of 1901), s. 36—Co-sharers—Suit for profits against* Lambardar—*Negligence, whether question of fact or law—Ex-proprietary rent, assessment of—Duty of* Lambardar—*Collection made by unauthorised person—Liability of* Lambardar.

In a suit for profits under section 165 of the Agra Tenancy Act, against the *Lambardar*, the question of the negligence of the *Lambardar* is a question of mixed fact and law which is open to review in second appeal.

Under section 36 of the U. P. Land Revenue Act, it is not the exclusive duty of the *Lambardar* to apply for the assessment of ex-proprietary rent, and if such rent is not assessed the co-sharers are as much to blame as the *Lambardar*.

Where such rent has not been assessed it cannot be taken into account in a suit for profits against the *Lambardar*, nor is the *Lambardar* liable for a collection made by an unauthorised person who had no right to make it. A KUNJ BEHARI LAL *v.* ABDUL HADI, 4 U. P. L. R. (A.) 200 1032

——— s. 167—*Suit for ejectment as sub-tenant dismissed by Revenue Court—Subsequent suit on same allegations in Civil Court*—Res judicata.

Where a suit for a person's ejectment as a sub-tenant is dismissed by a Revenue Court, a subsequent suit on the same allegations in a Civil Court is barred by *res judicata*. A JOKHU *v.* DEOKINANDAN PANDEY, (1923) A. I. R. (A.) 489 630

——— s. 194—*Co-sharers—Death of tenant without heirs—Co-sharer, right of, to eject persons in occupation—Partition informal*—Phatbandi, *effect of.*

Where there are a large number of co-sharers in a village an informal partition between the co-sharers is the only means by which the rent can be realised and the revenue paid. Where such a partition or *phatbandi* has been in existence and recognised in a village for a long time, it is quite sufficient to entitle a co-sharer in whose share particular plots fall to collect the rent and eject the tenants of those plots, and the land is not removed from his share merely because a particular tenant happens to die without heirs. A JOKHU RAI *v.* BHABHUTI RAI, (1923) A. I. R. (A.) 559 760

Amendment *of plaint in second appeal.*

The High Court will not in second appeal allow a plaint to be amended so as to allow the plaintiff to impeach a previous decree on allegations of irregularities not mentioned in the original plaint. M DEVI PRASAD *v.* JAGANNADHARAJU, 46 M. L. J. 12; (1924) M. W. N. 125; 33 M. L. T. 243; (1924) A. I. R. (M.) 281 464

Appeal, second—*Finding based on inadmissible evidence—Evidence material—High Court, whether will interfere.*

Where a finding of fact is based on inadmissible evidence and it is not possible to say that such evidence formed no more than a negligible part of the basis of the finding resting on it, the High Court will interfere in second appeal. N RAOJI *v.* WARLU, 3 N. L. J. 313; 18 N. L. R. 182; (1923) A. I. R. (N.) 107 911

——— *Finding of fact, conclusions drawn from, whether can be challenged.*

Although in second appeal findings of fact cannot be impugned, it is nevertheless open to a party to challenge the correctness of the conclusions drawn from such findings. L BAJ SINGH *v.* PARTAP SINGH, (1923) A. I. R. (L.) 497 473

——— *Finding of fact—Misreading of Trial Court's judgment.*

A finding of fact based on a misreading of the First Court's judgment and without taking into consideration a point specially raised in the grounds of appeal is not binding on the High Court in second appeal. L BASANTI *v.* CHANDA SINGH, (1923) A. I. R. (L.) 502 475

——— *Jurisdiction, question of, whether can be raised for first time.*

A question relating to jurisdiction which is a pure question of law and can be dealt with on the record as it stands without any further evidence being recorded can be taken in second appeal although it was not urged before the lower Appellate Court. L RAM KISHAN *v.* RAUSHAN, (1923) A. I. R. (L.) 551 532

Arbitration—*Reference to five arbitrators—Majority award binding—Two arbitrators failing to act—Award by remainder, whether valid.*

The parties to a case referred their dispute to the arbitration of five arbitrators and agreed to abide by the award of the majority of them. Two of the arbitrators did not take part in the arbitration proceedings and the remaining three made an award and filed it in Court;

Held, (1) that the intention of the parties was that all the five arbitrators should take part in the arbitration and should there be any difference of opinion among them the opinion of the majority should prevail, and that they did not intend that if only a majority of the arbitrators acted and made an award the award would be binding;

(2) that, therefore, the award was invalid and was not binding on the parties. R ABDULLA *v.* M. V. R. S. FIRM, 2 Bur. L. J. 229; (1924) A. I. R. (R.) 153 866

Arbitration Act (IX of 1899), s. 10—*Special case, stating of—Discretion of arbitrator—Refusal to state special case—Remedy—Interest after date of award—Power of arbitrator.*

Arbitration Act—concld.

It is within the discretion of an arbitrator to refuse to state a special case for the opinion of the Court, and his refusal to do so does not amount to misconduct.

Where a party to an arbitration asks the arbitrator to state a special case and is refused, he should on such refusal apply to the Court forthwith to revoke the submission.

An arbitrator is not entitled to award interest after the date of his award. C SEWDUTRAI NARSARIA *v.* TATA SONS LTD., 27 C. W. N. 494 **769**

——— **s. 15**—*Civil Procedure Code (Act V of 1908), O. XXI, r. 16—Assignment of award—Execution—Procedure.*

Inasmuch as under section 15 of the Arbitration Act, an award when filed is enforceable as a decree, all the provisions of the Code of Civil Procedure applicable to the execution of decrees, apply to an award so filed.

Where a person in whose favour an award has been made assigns it to a third person, such assignee is entitled under r. 16 of O. XXI of the Civil Procedure Code, to execute the award against the person against whom it was made. C GLADSTONE WYLLIE & CO. *v.* JOOSUB PEER MAHOMED & CO., 27 C. W. N. 666; (1924) A. I. R. (C.) 117 **868**

Arms Act (XI of 1878), s. 4—*Bolts and bars of rifles, whether arms—Arms, whether must be in serviceable condition.*

The word "arms", as defined in section 4 of the Arms Act, includes parts of arms as well, and bolts and bars of rifles are, therefore, "arms" within the meaning of this section.

Nurdin v. *Empress*, 38 P. R. 1889 Cr. followed.

It is not necessary that an arm or a part of an arm should be in a serviceable condition before it can fall within the definition contained in section 4 of the Arms Act. L KARM DIN *v.* EMPEROR, (1923) A. I. R. (L.) 617; 25 Cr. L. J. 539 **1003**

——— **ss. 5, 19 (a)**—*Arms Rules, Sch. II—Manufacture of* kirpans *by Sikhs—Offence.*

The entry in Schedule II to the Arms Rules which excludes "*kirpans* possessed or carried by Sikhs" from the prohibitions and directions contained in the Arms Act, refers to *kirpans* actually in existence and in the possession of or carried by Sikhs. In other word, a Sikh can possess or carry a *kirpan* without a license, and is not prevented by any provisions in the Arms Act from dealing with a *kirpan* which he possesses in any way he likes. But the entry does not exempt the manufacture of *kirpans* from the operation of the prohibition contained in section 5 of the Arms Act.

The manufacture of *kirpans*, therefore, without a license, is an offence falling under clause (*a*) of section 19 of the Arms Act. L EMPEROR *v.* BASTA SINGH, 3 L. 437; (1923) A. I. R. (L.) 267; 25 Cr. L. J. 342 **230**

——— **s. 19 (e) and (f)**—*"Armed," meaning of.*

According to the Vernacular use of the word "armed" in Sind, a person is to be deemed "armed" within the meaning of section 19 (*e*) of the Arms Act, notwithstanding the fact that he

Arms Act—concld.

is equipped with an "arm" which is not capable of immediate use as an "arm." S EMPEROR *v.* MAHOMED PUNJAL, 25 Cr. L. J. 448 **736**

——— **s. 19 (f)**—*Chhavi found in house in joint occupation of two persons—Possession.*

Where a *chhavi* is found in a house in the joint occupation of two persons it cannot be said with any degree of certainty that one of them was in exclusive possession thereof for the purposes of section 19 (*f*) of the Arms Act. L ALIA *v.* EMPEROR, (1923) A. I. R. (L.) 513; 25 Cr. L. J. 399 **447**

Assam Land and Revenue Regulation (I of 1886), s. 154—*Partition—Imperfect partition—Jurisdiction of Civil Court—Partition of definite tract.*

Section 154 of the Assam Land and Revenue Regulation does not bar by a Civil Court an imperfect partition, on the basis of possessory title, of specific lands, forming a definite tract and a specific share of a revenue-paying estate, provided that the partition does not involve a partition of the entire estate.

No property can be included in a suit for partition unless each of the parties to the suit claims an interest therein. C RAJENDRA NARAIN *v.* SATISH CHANDRA, 50 C. 948; (1924) A. I. R. (C.) 233 **795**

Bengal Alluvion and Diluvion Act (IX of 1847), ss. 3, 6, *scope of—Revenue Survey map, value of—Additional revenue, when can be assessed—*Malikana, *meaning of*—Quasi *rent charge, whether tenure.*

Per *Mookerjee, J.*—The expression "any such new map" in section 6 of the Bengal Alluvion and Diluvion Act refers to the "new map" made according to "new Survey" as contemplated in section 3 of the Act. That section provides for periodical surveys at intervals of not less than ten years, after a Revenue Survey has been completed and approved. The object of the "new Survey" is to ascertain the "changes" that may have taken place since the date of the last survey, that is, changes by alluvion or dereliction (not changes by possession). Section 6 then imposes upon the Revenue Authorities the duty to assess what may be called added land, whenever, on inspection of the new map, it appears that land has been added to an estate paying revenue directly to Government. There must consequently be a comparison between two maps, made at an interval of not less than ten years and each showing the revenue paying estate concerned. That estate must, accordingly, be in existence as a revenue paying estate, if not before, at least on the date of the first of the two maps taken as the basis for comparison.

Section 3 of the Bengal Alluvion and Diluvion Act is all comprehensive in scope, and sections 5 and 6 both refer to all estates paying revenue directly to Government, no matter whether they were or were not in existence in 1793. What is essential to attract the application of the Act is that there should have been in the case of the estate concerned, a Revenue Survey.

Bengal Alluvion and Diluvion Act—concld.

The Revenue Survey map is taken as the basis of comparison, but the comparison of the maps is not conclusive. The comparison sets the Revenue Authorities in motion, and they may, then, on the best materials they can procure, proceed to assess what land they deem to be assessable.

It is only when on inspection of the new map it appears that land has been added, that there is legislative authority for assessment of additional revenue.

When the proceedings have been commenced in accordance with the statutory requirements there are no restrictions prescribed as to the evidence to be used for the solution of the problem in controversy. What is liable to be assessed with revenue is land not previously assessed—not land which has been formed since the Revenue Survey map. There is no inflexible rule of law that the state of things depicted on the Revenue Survey map was in existence at the time of the Permanant Settlement. Proof of the existence, at a particular time, of a fact of a continuous nature only gives rise to a rebuttable presumption within logical limits that it exists at a subsequent time or has previously existed.

The fact that the proprietor of the original estate had a right to receive *malikana* does not necessarily entitle him to an accretion. The *malikana* holder is entitled to receive periodically a specified amount from the income of land. This right may have the qualities of a rent charge but this is not sufficient to show that the land or estate is still held by him as *zemindar* immediately from Government, and unless this is established, he cannot maintain his title to the accretion.

Per *Rankin, J.*—In every case the question what lands were included in the Permanent Settlement, is a question of fact, and not of law.

Jagadindra Nath Roy v. *Secretary of State*, 30 I. A. 44; 30 C. 291; 7 C. W. N. 193; 5 Bom. L. R. 1; 8 Sar. P. C. J. 412 (P. C.), followed.

Government cannot under Bengal Alluvion and Diluvion Act levy an additional revenue from any area within the limits of a settled estate: there must be land added to the estate.

Malikana is a right to a sum of money and it is charged on the land. It may be described as a *quasi* rent charge. But the reservation by Government of a sum to be paid to Government by the immediate holder of resumed lands, which sum is to go to the persons who have refused to take settlement from Government, does not operate to prevent the new estate from being an entirely independent tenure in substitution for and in extinguishment of the *zemindar's* original interest in the newly settled lands. Physically land is added to land. In point of right, the right to the new land is *accretio* to the right to the old. A *quasi* rent charge is not tenure or *dominium*. The right to take settlement enures to the tenure-holder. C SAUDAMINI DASSYA *v.* SECRETARY OF STATE FOR INDIA, 38 C. L. J. 471; 50 C. 823; (1924) A. I. R. (C.) 197 707

Bengal Land Revenue Sales Act (XI of 1859), *applicability of*—Howla *surrendered to Government*—Karsha, *whether can be sold for arrears of rent.*

A *Howladar* holding a *Howla* under Government *Khasmehal* surrendered the unexpired term of the *Howla* to the Government. There was a *Karsha* in the *Howla*, which fell into arrears and was sold at the instance of Government under the Bengal Land Revenue Sales Act:

Held, (1) that the *Karsha* was liable for the rent payable to the *Howladar*, and the arrangement which the *Howladar* entered into with the Government had not the effect of changing the rent into revenue, thereby rendering the *Karsha* liable to sale under the provisions of the Bengal Land Revenue Sales Act;

(2) that the sale purporting to have been made under the Act was, therefore, without jurisdiction: C UKILUDDI AKAN *v.* ASMAT ALI MUNSHI, 27 C. W. N. 723; (1923) A. I. R. (C.) 714 29

——— **ss. 2, 3, 6, 33**—*Estate, when can be put up for sale—Collector, duty of—Suit to set aside revenue sale—Plaintiff, what must show—Grounds not taken before Commissioner, whether can be urged in suit.*

Under sections 2 and 3 of the Bengal Land Revenue Sales Act a Collector has no power to put up an estate for sale unless there is an arrear of revenue in respect of that estate and unless the latest date of payment fixed by the Board of Revenue has expired and the default has not been made good.

Whenever a person seeks to have a revenue sale set aside on the ground that there was no authority in the Collector to sell an estate, having regard to the fact that the latest date fixed for payment by the Board of Revenue had not expired at the date when the property was put up for sale, he should, in order to enable the Court to decide the point, give the dates of the revenue *kists* according to the original settlement and *kistbandi*.

A sale is a sale made under the Bengal Land Revenue Sales Act, within the meaning of that Act, when it is a sale for arrears of Government Revenue, held by the Collector or other officer authorised to hold sales under the Act, although it may be contrary to the provisions of the Act either by reason of some irregularity in publishing or conducting the sale, or in consequence of some express provision for exemption having been directly contravened.

When the validity of a sale for arrears of revenue is impeached it is of the utmost importance that all questions arising in connection therewith, should be determined speedily, and when the sale has once been confirmed by the Commissioner, the purchaser should not be exposed to the danger of having his sale set aside on new grounds.

Where a sale for arrears of revenue has been held contrary to the provisions of the Bengal Revenue Sales Act, section 33 of the Act would constitute a bar to a suit brought in a Civil Court to set aside the sale upon grounds of objection which were not declared and specified

Bengal Land Revenue Sales Act—concld.

in an appeal to the Commissioner. **Pat** JAGDISHWAR NARAYAN *v.* MUHAMMAD HAZIQ HUSSAIN, (192) Pat. 142 **851**

Bengal Public Gambling Act (II of 1867), ss. 5, 8—*Money on person of gambler—Forfeiture.*

What is liable to forfeiture under section 8 of the Bengal Public Gambling Act, are those things which may be reasonably suspected to have been used or intended to be used for the purpose of gaming. The private property of an individual, such as money or jewellery on his person, who is found gaming in a gaming house cannot be seized and forfeited under the section, unless it is quite clear that there was attached to such private property the taint that it was reasonably suspected to have been used or intended for the purpose of gaming. **Pat** LACHMI NARAIN MARWARI *v.* EMPEROR, (1923) Pat. 220; 4 P. L. T. 622; 1 P. L. R. 229 Cr.; (1924) A. I. R. (Pat.) 42; 25 Cr. L. J. 321 **177**

Bengal Tenancy Act (VIII of 1885), s. 5 (5)—*Tenant, status of—Tenure-holder—Area of holding—Presumption—Mode of user, evidence of, whether admissible—Transfer of tenure—Settlement by Government—Agreement between Government and settlement holder, whether can be taken advantage of by tenant.*

Defendants were entered in the revenue papers as "tenure-holders" of an area exceeding fourteen hundred *bighas*, and had from the very inception of their tenancy cultivated the land through tenants:

Held, that the defendants must be held to be the tenure-holders of the land.

Bibhudendra v. *Debendra Nath*, 27 Ind. Cas. 432; 20 C. L. J. 140 and *Debendra Nath Das* v. *Bibudhendra Mansingh Bhramarbar Roy*, 45 Ind. Cas. 411; 27 C. L. J. 543; 5 P. L. W. 1; 22 C. W. N. 674; 16 A. L. J. 522; 23 M. L. T. 384; (1918) M. W. N. 379; 20 Bom. L. R. 743; 35 M. L. J. 214; 45 I. A. 67; 45 C. 805 (P. C.), followed.

Where a tenure is treated as transferable in the hands of the original tenure-holder it must be treated as transferable in the hands of the transferee also.

An engagement between the Government and a settlement holder that the latter would respect the rights of the tenants as recorded in the settlement papers, may be invoked by a tenant for his own benefit and protection even though he may not be himself a party thereto.

Chandramoni Mohanti v. *Manmatha Nath Miller*, 5 Ind. Cas. 301; 11 C. L. J. 68; *Jahandar Baksh Mullick* v. *Ram Lal Hazra*, 5 Ind. Cas. 565; 37 C. 449; 11 C. L. J. 364; 14 C. W. N. 470 and *Manmath Nath Roy* v. *Ameer Khan*, 46 Ind. Cas. 98; 3 P. L. J. 394, relied on.

In considering the status of a tenant a reference to the mode of user of the land is legitimate when the terms of the original grant are ambiguous or cannot be proved by direct evidence. C HEMANTA KUMAR DEBI *v.* MIDNAPUR ZEMINDARI CO., 35 C. L. J. 193; (1923) A. I. R. (C.) 25 **261**

Bengal Tenancy Act—contd.

——— **s. 7**—*Landlord and tenant—Enhancement of rent*—Kabuliyat, *construction of—Tenant liable to pay rent for excess area—Fixity of rent.*

A stipulation in a *kabuliyat* that the tenure-holder is to pay rent for lands besides those mentioned in the *kabuliyat* which may be under his cultivation, or which may be found to be excess lands upon measurement at the rate mentioned in the *kabuliyat*, does not imply that the rate of rent is to be fixed in perpetuity and would not be liable to enhancement. C SURJA PROSAD *v.* MIDNAPUR ZIMINDARI CO. LTD., 38 C. L. J. 369 **954**

——— **s. 51**—Rent suits—*Res judicata*—Presumption. *See* CIVIL PROCEDURE CODE, 1908, S. 11 **334**

——— **s. 105**—*Landlord and tenant*—Mokarari patta—*Fixity of rent—Presumption—Enhancement of rent, whether permissible.*

The use of the term *mokarari* implies fixity of rent, and where a *mokarari patta* provides that the lessee is to hold down to his sons, grandsons etc., the tenure becomes *mourusi mokarari*.

Ram Narain Singh v. *Chota Nagpur Banking Association*, 36 Ind. Cas. 321; 43 C. 332, *Mahanund Sahay* v. *Saidunnessa Bibi*, 8 C. L. J. 525, 12 C. W. N. 154, *Gayratulla Sardar* v. *Girish Chandra*, 12 C. W. N. 175, *Reshee Case Law* v. *Satish Chandra Paul*, 61 Ind. Cas. 774; 35 C. L. J. 901 (1922) A. I. R. (C.) 123, followed.

Mere forbearance on the part of a landlord to enforce enhancement of rent does not justify the inference that the tenure is not enhanceable. But no question of presumption arises where the terms of the contract have been reduced to writing.

Jagabandhu Saha v. *Magnamoyi Dassi*, 36 Ind. Cas. 884; 24 C. L. J. 363; 44 C. 555; 22 C. W. N. 89, *Guru Charan Nandi* v. *Sarab Ali*, 52 Ind. Cas. 79; 30 C. L. J. 9; 23 C. W. N. 1041, followed.

A *mokarari patta* contained the following clause: "Becoming entitled to make sale and gift etc., you down to your sons, grandsons etc. in succession shall continue to peacefully enjoy and possess on payment of the rent according to the demands prevalent in the *Perganah* without any enhancement or abatement of the rate of rent according to the different classes of lands. If you hold possession of any land in excess to what is mentioned in this *patta* and if any land be found upon measurement to be in excess, then you shall separately pay the rent thereof according to the rates of different classes of land; and if the area of the land be found to be less, you shall get abatement of rent under a settlement at the aforesaid rates. The rates of rent according to classes will, in fact, never be enhanced or abated":

Held, that the landlord had by the grant of the *patta* precluded himself from exercising the right vested in a *Zemindar*, holding under the Permanent Settlement, to raise, from time to time, the rents, according to the *Paraganah* or current rates, of all the rent-paying lands within his *Zemindari*. C BHAIRAB CHANRA DAS *v.* MIDNARUR ZEMINDARI CO. LTD., 38 C. L. J. 372 **1015**

Bengal Tenancy Act—contd.

——— **s. 120**—Zerait *land—Lease for term of years—Sub-lessee, position of.*

Tenancy is created by a contract, either express or implied, between the landlord and the tenant, or by Statute. A lessee of *zerait* land for a term of years has no right to settle the land with sub-tenants for a term exceeding the term of his own lease. On the expiry of the term of such lease the rights of the lessee in the land together with those of his sub-lessees come to an end. **Pat** JOGENDRA SINGH *v.* KESHO PRASAD SINGH, (1922) A. I. R. (Pat.) 429; 1 Pat. 764; (1923) Pat. 113; 1 P. L. R. 91 **929**

——— **s. 144.** *See* CIVIL PROCEDURE CODE, 1908, SS. 16 (4), 20, 21, O. XXI, R. 3 **253**

——— **s. 148.** *See* CIVIL PROCEDURE CODE, 1908, O. I, R. 3 **10**

——— **s. 148**—*Rent suit—Summary procedure—Question of title.*

There is no rigid rule of law to the effect that in a rent suit properly so called and filed under the provisions of section 148 of the Bengal Tenancy Act a question of title may not be determined if it arises.

The procedure prescribed by section 148 of the Bengal Tenancy Act is not a special jurisdiction but a summary procedure. **C** TIN KARI BOSE *v.* NOGENDRA PPOSAD BASU, 27 C. W. N. 716; 50 C. 807; (1923) A. I. R. (C.) 699 **10**

——— **s. 153**—*Sale, setting aside of—Fraud and irregularity—Appeal.*

An appeal lies from an order setting aside a sale under section 153 of the Bengal Tenancy Act on the ground of fraud and irregularity, notwithstanding that the amount claimed is less than Rs. 50 in value. Unless there is irregularity alone and irregularity untainted with fraud, the appeal lies. **C** JATIRAM GAYAN DAS *v.* DINO NATH, (1922) A. I. R. (C.) 103 **520**

——— **s. 155,** *notice under—Tenant not required to remedy misuse—Notice, validity of.*

A notice under section 155 of the Bengal Tenancy Act which does not require the tenant to remedy the misuse, the misuse being capable of remedy, is bad in law, and no claim for compensation can be based on such notice. **C** SHIB CHARAN *v.* BEPIN BEHARY, 27 C. W. N. 144, (1923) A. I. R. (C.) 149 **1047**

——— **ss. 160, 167**—*Sale of tenure in execution of rent-decree—Annulment of incumbrances—Settlement* khatian, *entry in, after annulment, effect of*—Kabuliyat, *construction of—Fixity of rent—Enhancement dependent upon enhancement by superior* talukdar, *effect of.*

An entry in a Settlement *khatian* in respect of a tenure made after the tenure has been sold in execution of a rent-decree and the incumbrances on it have been annulled, cannot affect the rights acquired under the sale and annulment. A clause in a *kabuliyat* that if in future any enhancement of rent or cesses is made according to law by the superior *talukdar* or by the Collectorate, the landlord would be entitled to realise the enhanced rent and cesses from the tenant, does not affect the question whether the tenants hold at a fixed rate of rent under the *kabuliyat*. **C** JOHARA BANOO *v.* GANGA CHANDRA, (1922) A. I. R. (C.) 222 **1044**

——— **s. 173.** *See* CIVIL PROCEDURE CODE, 1908, O. XXI, R. 90 **522**

Bombay Civil Courts Act (XIV of 1869), s. 32—*Suit for declaration that certain nominations of Municipal Councillors are invalid—Secretary of State, whether necessary party—Jurisdiction of Sub-Judge to try suit.*

To a suit for a declaration that the nomination of certain members to a Municipality by the Commissioner is invalid and illegal, the Secretary of State for India is a necessary party.

Section 32 of the Bombay Civil Courts Act, ousts the jurisdiction of a Subordinate Judge to try a suit to which the Secretary of State for India is a party, irrespective of the fact whether he was impleaded as a party at the time when the suit was filed or after the suit had been received and registered by the Court. **B.** SECRETARY OF STATE FOR INDIA *v.* NARSIBHAI DADABHAI, 25 Bom. L. R. 992; (1924) A. I. R. (B.) 65; 48 B. 43 **241**

Bombay Court of Wards Act (I of 1905), ss. 11, 22. *See* GUARDIANS AND WARDS ACT, 1890, **s.** 19 (*c*) **702**

Bombay District Municipal Act (III of 1901) s 48(f). *See* BOMBAY PRIMARY EDUCATION (DISTRICT MUNICIPALITIES) ACT, 1908, **s.** 1 (3) **186**

Bombay Hereditary Offices Act (III of 1874), ss. 9, 11, 11A—Vatan, *alienation of—Order declaring alienation null and void—Liability to pay full rent, commencement of.*

On 5th October 1904 an order was made by a Collector under section 11 of the Bombay Hereditary Offices Act declaring the alienation of a *vatan* to be null and void and that the land was liable to assessment at the rate of full rent prescribed under clause (2) of section 9 of the Act, but the amount of the full rent was not assessed till July 6th 1908:

Held, that under section 11A of the Act the full rent assessed was payable from the date of the order declaring the liability of the land to pay the full rent and not from the date on which the amount of the full rent was actually assessed. **B.** DHONDI SUBHANE POWAR *v.* SECRETARY OF STATE FOR INDIA, 25 Bom. L. R. 705; (1923) A. I. R. (B.) 478 **146**

Bombay Land Revenue Code (Act V of 1879), s. 53—*Occupancy rights—Assessment paid by tenants—Presumption—Fixity of tenure*—Miras *land.*

In the Satara District the fact that the tenants pay the amount of assessment may not be conclusive, but affords a strong presumption that the tenants have attained to occupancy rights by virtue of their long holding.

The word *miras* should not be used in connection with persons who by virtue of their long holding are presumed by reason of the provisions of section 53 of the Bombay Land Revenue Code to have acquired fixity of tenure. **B.** SITARAM SADASHIV SHASTRI SAPRE *v.* PARSHURAM BHAU PATIL, (1923) A. I. R. (B.) 449 **878**

Bombay Land Revenue Code—concld.

——— s. 153—*Bombay Revenue Jurisdiction Act (X of 1876), s. 4 (c)—Suit for declaration of invalidity of forfeiture, maintainability of.*

Where an order of forfeiture made by the Collector under section 153 of the Bombay Land Revenue Code is *intra vires*, a suit for a declaration that the order is invalid is barred by section 4 (*c*) of the Bombay Revenue Jurisdiction Act. **B.** DHONDI SUBHANE POWAR *v.* SECRETARY OF STATE FOR INDIA, 25 Bom. L. R. 785: (1923) A. I. R. (B.) 478 **146**

——— s. 166—*Arrears of rent—Forfeiture—Notice, contents of.*

Section 166 of the Bombay Land Revenue Code does not make it obligatory on the Collector to specify in the notice issued under that section for what years the land revenue is in arrears. **B** DHONDI SUBHANE POWAR *v.* SECRETARY OF STATE FOR INDIA, 25 Bom. L. R. 785: (1923) A. I. R (B.) 478 **146**

Bombay Prevention of Gambling Act (IV of 1887), s. 3—*Common gaming house, what is—"Used for the profit or gain of the owner," meaning of.*

In order to prove that a house is a common gaming house within the meaning of section 3 of the Bombay Prevention of Gambling Act it is sufficient to show that the house is one in which instruments of gaming are kept or used for the profit or gain of the person keeping or using such place, *i. e.*, where the person keeping or using the house knows that profit or gain will in all probability result from the use of the instruments of gaming. The profit or gain may not actually result from such use. But if profit or gain is the probable and expected result of the game itself and if that is the purpose of keeping or using the instruments, it would be sufficient to bring the case within the scope of the definition. But the prosecution must establish that the purpose is profit or gain. This may be done either by showing that the owner was charging for use of the instruments of gaming or for the use of the house, room or place, or in any other manner that may be possible under the circumstances of the case, having regard to the nature of the game carried on in that house. **B.** EMPEROR *v.* DATTATRAYA SHANKAR PARANJPE, 25 Bom. L. R. 1089; 47 B. 960; (1924) A. I. R. (B.) 184; 25 Cr. L. J. 531 **995**

Bombay Primary Education (District Municipalities) Act (I of 1918), s. 1 (3)—*Bombay District Municipal Act (III of 1901), s. 48 (f)—Bye-Laws of Surat Municipality—Bye-Law No. 4, whether ultra vires—Information for purposes of census.*

Under section 48 (*f*) of the Bombay District Municipal Act, read with section 1 (3) of the Bombay Primary Education (District Municipalities) Act, a Municipality has power, with the previous sanction of the Governor-in-Council, to make bye-laws so far as they are not inconsistent with the Act, among other things, with reference to the taking of a census within the Municipal District.

Bye-law No. 4 of the Bye-laws of the Surat Municipality is not *ultra vires*, and a person who refuses to supply the information required under the bye-law is liable to the penalty provided in bye-law No. 5 **B.** PARSHOITAM JAGJIVAN *v.* EMPEROR, 25 Bom. L. R. 767; (1924) A. I. R. (B.) 47 25 Cr. L. J. 330 **186**

Bombay Primary Education (District Municipalities) Act—concld.

——— ss. 7, 8, 9, 10, *scope of—School Committee, powers and duties of—Attendance order, failure to obey—Reasonable excuse—Instruction, meaning of—Duty of Court.*

The two necessary conditions of a valid conviction under section 10 of the Bombay Primary Education (District Municipalities) Act are: (1) that there must be an order passed by the School Committee under section 9 of the Act, that is an order passed in strict compliance with the procedure laid down in that section; and (2) that the parent must be shown to have failed to comply with the provisions of section 7 of the Act on and after the date specified in such order.

The powers conferred on the School Committee by the Bombay Primary Education (District Municipalities) Act are wide. They are in curtailment of the right of the parent to give efficient instruction to his child according to his own ideas. It is, therefore, essential that an attendance order passed by the Committee must be shown to have been passed in strict compliance with the procedure therein prescribed, namely "after giving the parent an opportunity of being heard and after such enquiry as it considers necessary" as laid down in section 9 of the Act. The direction as to enquiry in the section is not merely permissive, it has a compulsory force.

It is not essential that the "instruction" referred to in section 8 (*b*) of the Bombay Primary Education (District Municipalities) Act, in order to be efficient should conform to the standards as adopted in the recognised primary schools.

When a complaint is made to a Court under section 10 of the Bombay Primary Education (District Municipalities) Act, it is the function of the Court to see whether it is proved that the parents failed to send the child to a recognised school, without reasonable cause, on or after the date specified in the attendance order. **B.** NEMCHAND NATHA *v.* EMPEROR, 25 Bom. L. R. 896; 47 B. 942; (1924) A. I. R. (B.) 105; 25 Cr. L. J. 338 **226**

Bombay Regulation (II of 1827), s. 5—*Interlocutory order—Interference by High Court.*

The second clause of section 5 of Bomby Regulation II of 1827 confers on the High Court the power to interfere with interlocutory orders. **B.** SECRETARY OF STATE FOR INDIA *v.* NARSIBHAI DADABHAI, 25 Bom. L. R. 992; (1924) A. I. R. (B) 65; 48 B. 43 **241**

Bombay Revenue Jurisdiction Act (X of 1876), s. 4 (c). *See* BOMBAY LAND REVENUE CODE, 1879, s. 153 **146**

——— ss. 4, 12, *scope of—Summary Settlement, question of—Reference to High Court—Lands held by Shri Tatya Maharaj, whether subject to Summary Settlement.*

A claim that certain lands were not validly subjected to Summary Settlement falls within the purview of section 4 of the Bombay Revenue

Bombay Revenue Jurisdiction Act—concld.

Jurisdiction Act and can, therefore, be validly referred for decision to the High Court under section 12 of the Act.

The application in or about the year 1864 of the Summary Settlement under Bombay Acts II and VII of 1863 to lands then held by Shri Tatya Maharaj was valid and legal. **P. C. MAHARAJA OF KOLHAPUR** *v.* **SHRI BALA MAHARAJ**, (1923) A. I. R. (P. C.) 194; (1923) M. W. N. 638; 26 Bom. L. R. 252; 48 B. 1 100

Broker. *See* **PRINCIPAL AND AGENT** 263

Buddhist Law, Burmese—*Adoption—Publicity and notoriety—Ceremony, whether required.*

There is no special ceremony in Burmese adoption but the adoption must be a matter of publicity and notoriety. Where an alleged adopted daughter has lived continuously in the house of her alleged adoptive father from her babyhood for twelve or thirteen years and the latter is entered in the register of the school in which she studied as her parent and has paid for her fees and clothing, it is strong evidence of the publicity and notoriety of the adoption. **P. C. MA THAN THAN** *v.* **MA PWA THAN**, (1923) A. I. R. (P. C.) 156; 33 M. L. T. 361; 1 R. 451; 2 Bur. L. J. 260; 46 M. L. J. 334 63

——— *Succession—Death of parent—Marriage of surviving parent—Death of latter—Partition, right of—Causes of action, separate.*

So long as a Burman Buddhist husband and wife are alive their property, from whatever source derived, forms one estate, in which all members of the family have an interest, but which is under the control of the husband and wife. If one of the couple dies and the surviving partner marries again, the property is ordinarily treated as the property of the second marriage during the continuance of that marriage, and forms one estate together with property acquired during the second marriage. It is only on the death of the surviving spouse of the first marriage that the manner in which the property is acquired becomes important.

Similarly when, after the death of the common spouse, the surviving widower or widow retains the property still intact and no partition takes place the estate is still one estate only. It is only when the claim to partition is made that the importance of the manner in which the property is acquired arises.

The children of the first marriage have a right to sue for partition on the death of the first parent but if they fail to exercise that right, the estate remains an undivided family estate and a fresh cause of action accrues to them on the death of the surviving parent. **Bur. MAUNG LU GALE** *v.* **MAUNG LU PO**, 4 U. B. R. (1922) 140; (1923) A. I. R. (R.) 110 53

Bundelkhand Encumbered Estates Act (I of (1903), s. 12. *See* **MORTGAGE** 753

Burma Municipal Act (III of 1898), s. 42A—*License to sell pork—Failure of licensee to produce stamp-paper—Cancellation of license—Damages, suit for—Good faith.*

Plaintiff was a licensee of the defendant Municipality for slaughtering pigs and selling pork. He was called upon by the Municipality to produce stamp paper for executing the license, which he failed to do. The Municipality thereupon cancelled his license and served a notice upon him as the result of which he was prevented from slaughtering pigs and selling pork for two days. He sued the Municipality for damages;

Held, (1) that in the absence of any bye-law or other authority empowering the Municipality to cancel the plaintiff's license simply because he had committed default in producing the stamp paper, the action of the Municipality amounted to a breach of contract for which the plaintiff was entitled to recover damages;

(2) that under the circumstances of the case the Municipality were not protected by section 42A of the Burma Municipal Act. **R. SAN YEIK** *v.* **MUNICIPAL COMMITTEE OF PEGU**, 2 Bur. L. J. 231; (1924) A. I. R. (R.) 132 864

Burma Village Act (VI of 1907), s. 12—*Refusal to obey requisition of Headman—Knowledge of requisition—Burden of proof.*

In Settlement Operations Headmen have to assist Settlement Officials by turning out villagers for such duties as soil classification, holding-marking, crop-reaping, etc., and a villager who refuses to comply with such a requisition by a Headman is guilty of an offence under section 12 of the Burma Village Act.

Under section 12 of the Burma Village Act the prosecution has to prove that the accused was either present at the time when the requisition was made or was informed of it in time to obey it. **L. B. PAN BU** *v.* **EMPEROR**, 11 L. B. R. 412; (1923) A. I. R. (R.) 81; 25 Cr. L. J. 371 419

Calcutta Municipal Act (III of 1899), ss. 408, 409, 622—*Requisition, failure to comply with—Construction by occupier—Discharge of owner from liability, extent of—Procedure under s. 409, effect of.*

Sub-section (3) of section 622 of the Calcutta Municipal Act, does not discharge from liability an owner who has not complied with a requisition, merely because the occupier of a portion of the land has rendered compliance with the requisition impracticable in part. The owner is discharged from liability under the section only to the extent that compliance is rendered impossible by the conduct of the occupier.

Non-compliance with a requisition under section 408 of the Calcutta Municipal Act imposes a liability on the owner. If the requisite improvements are carried out by the General Committee under section 409 of the Act, the default on the part of the owner vanishes, but till the work is completed, the default remains, entire or partial, and the liability of the owner to be prosecuted still continues in operation.

It is not the practice of a Court of Equity to interfere with the acts of Corporate bodies, unless

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they are manifestly abusing their powers. CF. CORPORATION OF CALCUTTA *v.* BIJOY KUMAR ADDY, 27 C. W. N. 787; 50 C. 813; 38 C. L. J. 350; (1924) A. I. R. (C.) 334 529

Calcutta Rent Act (III of 1920), ss. 2 (f) (ii), 15 (3)—*Policy of Act—"First-letting," meaning of—Sub-lease.*

The Calcutta Rent Act was intended for the protection of tenants generally, and not merely of lessees to the exclusion of sub-lessees.

The words "first let" in section 2 *(f) (ii)* of the Calcutta Rent Act, cannot be construed to mean the first letting between the tenant and the sub-tenant.

When an entire building is let out, a subsequent sub-letting of a part of it is not the "first letting" of such part within the meaning of section 2 *(f) (ii)* of the Calcutta Rent Act. The first-letting of the entire building is the first-letting contemplated by the section. C. REBEIRO *v.* JACOB 27 C. W. N. 569; (1923) A. I. R. (C.) 553 623

C. P. Tenancy Act (XI of 1898), s. 60, *whether retrospective—Occupancy tenant, lease granted by validity of.*

The heir of an occupancy tenant inherits the tenancy with the liabilities attached to it. If a valid lease has been created by the deceased occupancy tenant, his heir can inherit the occupancy rights only subject to such lease.

There is nothing in the language of section 60 of the C. P. Tenancy Act which points to an intention on the part of the Legislature to interfere with rights validly created before the passing of the Act. N. LAHINI *v.* BALA, 18 N. L. R. 85; (1922) A. I. R. (N.) 227 708

C. P. Tenancy Act (I of 1920), s. 97, *applicability of—Land and trees belonging to different persons.*

The prohibition against the attachment of trees apart from the land on which they stand, contained in section 97 of the C. P. Tenancy Act, has no application where the trees and the land belong to different persons. N. GULSHER KHAN *v.* RAMSWARUP, 19 N. L. R. 150, (1924) A. I. R. (N.) 42 620

Champertous agreement. *See* CONTRACT ACT, 1872, S. 23 372

Charge, *property subject to, recovery of.* *See* LIMITATION ACT, 1908, Sch. I, Arts. 144, 148 113

Chota Nagpur Tenancy Act (VI of 1908), ss. 2, 52—*Legal representative—Personal decree.*

Where a person takes possession of the property of a deceased person, he can be made personally liable, as a legal representative, to the extent of the property of the deceased which he has appropriated or disposed of or which may still be in his possession. O MIHI LAL *v.* BABU LAL, (1922) A. I. R. (O.) 200 306

——— **s. 139—*Civil Procedure Code (Act V of 1908), O. VII, r. 10—Jurisdiction of Civil and Revenue Courts—Ejectment of tenant, suit for, whether cognizable by Civil Courts—Ejectment of trespasser, suit for—Defendant held to be tenant—Procedure—Return of plaint—Dismissal of suit.***

Under section 139 of the Chota Nagpur Tenancy Act a suit to eject a tenant of agricultural land is not cognizable by a Civil Court.

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Where in a suit for ejectment filed in a Civil Court, which is based on the allegation that the defendants are trespassers, the Court finds that the defendants are not trespassers but non-occupancy *raiyats* the proper procedure is not to return the plaint for presentation to the proper Court but to dismiss the suit altogether, as the allegation on which it is based has not been upheld. Pat. JAGESHWAR KUER *v.* TILAKDHARI SINGH, 2 Pat. 746, (1924) A. I. R. (Pat.) 267; 5 P. L. T. 422 587

Civil Procedure Code (Act V of 1908), s. 2 (11)—*Legal representative, who is—Manager of shrine—Successor, whether legal representative—Decree against manager personally, whether can be executed against successor.*

The expression "legal representative," as defined in section 2 (11) of the Civil Procedure Code, means a person who in law represents the estate of a deceased person, and includes any person, who intermeddles with the estate of the deceased and, where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued.

The interest of the manager of a shrine in the shrine and the property attached to it comes to an end on his death, and a person who is appointed to succeed him in the management of the property cannot be said to be his legal representative. Therefore, a decree obtained against the former in his personal capacity cannot be executed against the latter. L. RAM SINGH *v.* WARYAM SINGH, 5 L. L. J. 459; (1924) A. I. R. (L.) 251 585

——— **s. 10, *scope of—Dismissal of suit—Suit when premature.***

Section 10 of the Civil Procedure Code does not bar a suit, nor has a Court any jurisdiction thereunder to dismiss a suit: the section merely enacts that the trial of one of two or more suits in which the same issue is directly and substantially involved, is not to be proceeded with until the cognate case pending in another Court is disposed of.

Provided there is valid cause for it, a suit cannot be said to be premature under section 10 of the Civil Procedure Code. Pat DULHIN SONA KUER *v.* BIBI ALE FATIMA 157

——— **s. 11—*Bengal Tenancy Act (VIII of 1885), s. 51—Rent-suits—Res judicata—Presumption.***

Whether the decision in a previous rent-suit operates as *res judicata* in a subsequent rent-suit, must be determined with reference to the question whether the issue in the previous suit related to the amount of rent payable for a particular period or to the rent payable for the full term of the lease. In the former contingency, the decision is not *res judicata*, in the latter event it is.

The decision in a previous rent-suit for a particular period of the lease may, however, be taken to determine the rent claimed in that suit, and

to give rise to a presumption under section 51 of the Bengal Tenancy Act that the rent for the subsequent years remained the same. The effect to be given to this presumption depends on the whole evidence. Pat MANNOO LAL *v.* LALJI CHAUBE, (1922) A. I. R. (Pat) 213 334

——— s. 11—Res judicata—*Declaration, suit for, dismissal of—Possession, suit for, on same grounds, whether barred,*

Plaintiff brought a suit for a declaration that he was occupancy tenant of a certain holding. The Court went into the merits of the case and dismissed the suit. He then brought a suit for possession of the holding against the same defendants and on the same allegations which he had put forward in the declaratory suit, and contended that his previous suit should have been dismissed on the ground that he was not in possession of the holding and that the Court had erred in deciding the suit on the merits and the matter was not, therefore, *res judicata*:

Held, that the matters raised in the subsequent suit being the same as those raised in the former suit and having been decided in the former suit, they operated as *res judicata*. A KASHI RAI *v.* KALI KUERI, (1923) A. I. R. (A.) 554 756

——— s. 11—*Suit cognizable by Revenue Court—Decision by Revenue Court—Suit in Civil Court*—Res judicata.

Plaintiff sued in the Revenue Court for a declaration against her landlord and certain other persons that she was the sole occupancy tenant of a certain holding. The suit was dismissed. She then brought a suit in the Civil Court for substantially the same relief:

Held, that the suit in the Civil Court was barred by the principles of *res judicata*.

If after a decision by a Revenue Court of a suit, cognizable by such Court, the losing party comes to the Civil Court for a relief which would have the effect of setting aside the decree of the Revenue Court, the civil suit would not be maintainable and would stand barred by the principles of *res judicata* A CHETTO *v.* GANGA SAHAI, (1923) A. I. R. (A.) 527 638

——— s. 11 Expl. IV—Res judicata—*Causes of action different—Amendment of plaint, refusal to allow, effect of.*

Plaintiff sued to recover his share in his father's property under a partition effected by the father in his lifetime and under the father's Will. At a late stage of the suit he applied for leave to amend the plaint and claim partition in the alternative. Leave to amend was refused and the suit was dismissed on the ground that the partition effected by the father was unequal and unfair. Plaintiff subsequently sued for partition of the property:

Held, that the plaintiff's claim to partition was not *res judicata* inasmuch as

(*a*) the causes of action in the two suits were different and the plaintiff was not bound to claim partition in the alternative in the earlier suit;

(*b*) the plaintiff's failure to claim partition in the earlier suit was due to the action of the Court in refusing leave to the plaintiff to amend the plaint.

Where a certain claim is omitted from the plaint and the plaintiff realising his mistake before the record is closed asks for leave to amend; which is refused, though the omission of the claim from the plaint is due to the plaintiff, the rejection of the prayer for amendment is the direct cause of the omission of the claim from the suit. B MAHADEVAPPA *v.* KASHIRAO, 25 Bom. L. R. 797; (1923) A. I. R. (B.) 467 93

——— s. 11 Expl. IV—Res judicata—*Plea not taken in previous suit whether can be taken in subsequent suit.*

In a suit by a minor through his next friend to set aside a sale of the minor's property held in execution of a decree against the minor, the plea that the minor was not properly represented in the suit in which the decree was passed and that, therefore, the decree and the sale are null and void might and ought to be put forward as a ground of attack and if the plea is not taken, the decision in the suit would operate as *res judicata* in a subsequent suit by the minor to set aside the decree on the ground that the minor was not properly represented in the suit. M YEZZU MALAYYA *v.* TALLURI PUNNAMMA, 46 M. L. J. 291; 19 L. W. 410 628

——— s. 11 Expl. VI, O. VII, r. 4—*Representative suit—Community of interest—Frame of suit—Plaint—Hinda Law—Joint family—Property acquired by collateral succession, whether joint family property—Manager, whether can sue or be sued.*

In order to make Explanation VI to section 11 of the Civil Procedure Code applicable to a case there ought to be a community of interest claimed on the strength of a common title and the claim must have been made in good faith for the enforcement or defence of that common right on behalf of all persons having such common interest. The common interest may rest on the existence of a joint family, in which that interest is vested, or may rest on a joint title otherwise obtained.

Where a person who claims joint property sues in a representative capacity in assertion of a common title he has to state under O. VII, r. 4 of the Civil Procedure Code that he has taken the necessary steps to enable him to sue in that capacity. Where he sues to enforce his personal right against persons only some of whom he impleads, knowing, that others are interested in denying his title or are in possession, without stating the capacity in which the persons who are actually impleaded, are sued, those who are not made parties are not bound by it unless the persons impleaded act in a representative capacity and profess to defend a common title in good faith on behalf of themselves and their co-owners.

Property inherited by right of collateral succession cannot be treated as joint family property in respect of which the manager as such can sue or be sued so as to bind the rest of the family. O HAUSLA BAKHSH SINGH *v.* RAJ BAKHSH SINGH, 4 U. P. L. R. (O) 47 1028

——— ss. 16, 20—*Suit for accounts and partition of joint family property—Jurisdiction of Court to deal with property outside British India.*

Civil Procedure Code—1908—contd.

In a suit for accounts of dealings with and a partition of joint family property filed in a British Court, the Court has jurisdiction to deal with immoveable property situate in a Native State. L RAM KISHAN *v.* RAUSHAN, (1923) A. I. R. (L.) 551 **532**

——— **ss. 16 (4), 20, 21, O. XXI, r. 3**—*Bengal Tenancy Act (VIII of 1885), s. 144—Rent suit—Cause of action—Place of suing—Execution of decree—Sale of immoveable property outside jurisdiction, validity of—Jurisdiction, want of, effect of.*

Section 144 of the Bengal Tenancy Act merely lays down where the cause of action in suits between landlord and tenant shall, for the purposes of the Code of Civil Procedure, be deemed to have arisen; it does not say in which Court the suit is to be instituted. To ascertain this recourse must be had to the provisions of section 20 of the Code.

Where the landlord only wants a money-decree the suit may be instituted in the Court within the local limits of whose jurisdiction the tenant resides; where, however, the landlord seeks a decree for rent or ejectment, the suit must be treated as one for recovery of immoveable property within the meaning of section 16 (4) of the Civil Procedure Code and must be instituted in the Court within the local limits of whose jurisdiction the property is situate.

The only case in which a Court is entitled to sell immoveable property beyond the local limits of its jurisdiction is that provided in O. XXI, r. 3 of the Civil Procedure Code. A sale of such property in any other case is without jurisdiction and a nullity. If a Court has no jurisdiction over the subject-matter, its judgments and orders are mere nullities, and may not only be set aside at any time by the Court in which they are rendered, but be declared void by every Court in which they are presented. If a Court has no jurisdiction, its judgment is not merely voidable but void and it is wholly unimportant how precise, certain and technically correct its proceedings and decisions may have been; if it has no power to hear and determine the cause, its authority is wholly usurped and its judgments and orders are the exercise of arbitrary power under the forms, but without the sanction, of the law. These principles apply, not only to original Courts but also to Courts of Appeal. Accordingly where an Appellate Court does not possess jurisdiction to review the action of the Court below, jurisdiction cannot be conferred upon it by consent of the parties, and any waiver on their part cannot make up for the lack or defect of jurisdiction.

The provision contained in section 21 of the Civil Procedure Code is an exception to the well established rule that where the Court has no inherent jurisdiction over the subject-matter of suit, its decree is a nullity, even though the parties may have consented to the jurisdiction of the Court, and cannot be so interpreted as to have a wider application than what is justified by its terms.

Civil Procedure Code—1908—contd.

Section 21 of the Civil Procedure Code does not bar a defendant from questioning the validity of an execution sale held without jurisdiction which is the root of the plaintiff's title. C KUNJA MOHAN CHAKRAVARTY *v.* MANINDRA CHANDRA ROY, 27 C.W.N. 542; (1923) A. I. R. (C.) 619 **253**

——— **ss. 20, 115**—*Place of suing—Jurisdiction, order deciding—Revision—Interference by High Court.*

No hard and fast rule can be laid down as to whether a revision is competent against an erroneous order deciding that a Court has jurisdiction to try a suit, and each case must be decided on its own merits. Ordinarily, however, interference in revision is inadvisable in such cases and should only be exercised in exceptional cases to remedy an injustice.

Jagan Nath-Dewan Chand v. *Jagan Nath-Moti Chand*, 71 Ind. Cas. 38, relied on.

Where a defendant is by law entitled to have the case tried in his own Province it is a grave injustice to him to insist on its trial in another Province which will put him to very great expense, merely because the Trial Court has erroneously held that it has jurisdiction to try the case. L SITA RAM-RAM DHAN *v.* BENARSI DAS-PURAN CHAND, (1923) A. I. R. (L.) 565 **764**

——— **ss. 22, 23**—*Transfer of suit—"Subordinate," meaning of—Original Side, whether subordinate to Appellate Side.*

Section 22 of the Civil Procedure Code deals with all Courts in which suits may be instituted including the Original Side of a High Court.

The word "subordinate" in section 23 (3) of the Civil Procedure Code refers merely to subordination in the sense that appeals lie from one Court to the other, although the Court may not be a subordinate Court for administrative purposes.

It is difficult to hold that a Court whose decrees and orders are liable to be reversed on appeal is not subordinate to the Court which has the jurisdiction to reverse its decisions.

For administrative purposes the Original Side of a High Court is not subordinate to the Appellate Side but for the purposes of appeals it is subordinate, using that expression in its ordinary sense and without any reference to its technical subordination in the sense of its being a Court of a lower grade.

The Appellate Side of a High Court has, therefore, power to order the transfer of a case pending on the Original Side. L B RAMANATHAN CHETTY *v.* RAMANATHAN CHETTY, 11 L. B. R. 446; (1923) A. I. R. (R.) 82 **408**

——— **s. 24**—*Transfer of suit—Apprehension of party.*

In dealing with an application for the transfer of a suit it is the apprehension on the part of the applicant that he will not get a fair and impartial trial of the suit in the Court in which it is pending that should receive consideration, but the apprehension must be such as a reasonable man might

reasonably be expected to entertain. L AHAD SHAH *v.* AYSHAN BEGUM, (1923) A. I. R. (L.) 564 762

——— s. 47—*Execution by legal representative o decree-holder—Plea of estoppel personal against legal representative.*

Section 47 of the Civil Procedure Code is wide enough to permit any valid objection to be taken by the judgment-debtor to the execution of a decree by the decree-holder or his legal representative.

On an application by the legal representative of a deceased decree-holder, to execute a decree obtained by the deceased, it is open to the judgment-debtor to raise any defence such as that of estoppel which is personal to the legal representative, since the latter combines in his person as such not only those rights to which he has succeeded on account of the death but also those objections to which he has rendered himself liable in consequence of his separate agreement if any with the judgment-debtor. M ARUMACHELA GOUNDAN *v.* SWAMINATHA AIYAR, 19 L. W. 27 (1924) M. W. N. 144; 46 M. L. J. 240 547

——— s. 47, *scope and object of—Dispute between different parties—Mortgage decree—Order settling in what order different properties are to be sold—Appeal, whether lies.*

Section 47 of the Civil Procedure Code should be read as relating to all questions arising between any of the parties to the suit and not merely between parties who are opposed to each other in the suit. The object of the section is the cheap and speedy settlement of all disputes at the stage of execution:

Raynor v. *Mussoorie Bank, Limited*, 7 A 681 at p. 686; A. W. N. (1885) 204; 4 Ind. Dec. (N. S.) 880; *Yagnasami Ayyar* v. *Chidambaranatha Mudaliar*, 61 Ind. Cas 961; 13 L. W. 15 and *Bhagwati* v. *Banwari Lal*, 1 Ind. Cas 416; 31 A. 82 at p. 98; 5 M L. T. 185; 6 A. L. J. 71, distinguished.

Prosunno Kumar Sanyal v. *Kali Das Sanyal* 19 C. 683; 19 I. A. 166; 6 Sar. P. C. J. 209; 9 Ind. Dec. (N. S.) 898, followed.

An order passed in the course of execution proceedings for the settlement of the terms of a sale proclamation under a mortgage decree by which the mortgaged items in the possession of different parties are directed to be sold in a particular order is not merely administrative but is one relating to execution or satisfaction of the decree and is, therefore, appealable. M THOPPAI VEDAVIASA AIYAR *v.* THE MADURA HINDU SABHA NIDHI CO. LTD., 18 L. W. 311; (1923) M. W. N. 682; 45 M. L. J. 478; (1924) A. I. R. (M.) 365 148

——— s. 47, O. XXI, rr. 58, 63—*Decree for possession, failure to execute, effect of—Admission of decree-holder's title by judgment-debtor—Suit, fresh, whether barred—Adverse possession.*

Plaintiff obtained a decree for possession of a house against the defendant but failed to execute it as the latter admitted his title and paid the costs of the suit. Subsequently the defendant asserted an adverse title to the house and plaintiff again brought a suit for possession of the house;

Held, (1) that in view of the admission by the defendant of plaintiff's title subsequent to the decree in the previous suit the present suit was not barred by the provision contained in section 47 of the Civil Procedure Code;

(2) that defendant's possession after the admission made by him was not adverse to the plaintiff. A JETHU MISIR *v.* GODAWARI DUTT, 20 A. L. J. 619; (1922) A. I. R. (A.) 411 107

——— s. 47, O. XXI, r. 90. *See* LIMITATION ACT, 1908, SCH. I, ARTS. 166, 181 631

——— s. 47, O. XXI, r. 90—Execution of decree—Sale, application to set aside. *See* LIMITATION ACT, 1908, s. 10, SCH. I, ARTS. 166, 181 957

——— s. 47, O. XXI, r. 90—*Limitation Act (IX of 1908), Sch. I, Art. 166—Execution of decree—Sale, application to set aside, on ground of absence of attachment—Appeal, second, whether lies—Limitation—Sale, whether nullity.*

Where a judgment-debtor seeks to set aside an execution sale on the ground that there was no valid attachment of the property, the application falls under section 47 and not under O. XXI, r. 90, of the Civil Procedure Code and there is a right of second appeal in the case.

Sheodhyan v. *Bholanath*, 21 A. 311; A.W.N. (1899) 84; 9 Ind. Dec. (N. S.) 907, dissented from.

Rasaraj Kunai v. *Prasanna Kumar Roy*, 15 Ind. Cas. 506; 40 C. 45, relied on.

Art. 166 of Schedule I to the Limitation Act applies to every application filed under the Code of Civil Procedure to set aside a sale made in execution of a decree, irrespective of the specific section or Order and rule of that Code applicable to such application.

Satish Chandra Kanungoe v. *Nishi Chandra Dutta*, 54 Ind. Cas. 431; 46 C. 975, relied on.

An execution sale held without a previous attachment is not a nullity. R. MA PWA *v.* MUHAMMHD TAMBI, 1 R. 533; (1924) A. I. R. (R.) 124 368

——— s. 64—*Execution of decree—Attachment—Alienation during attachment, validity of.*

Section 64 of the Civil Procedure Code contemplates a claim which remains enforceable and not one which might have been enforceable under an attachment which has since come to an end.

An alienation by the judgment-debtor during the pendency of an attachment which subsequently comes to an end, cannot be avoided by a person whose claim arose under a subsequent attachment. Pat. BHAGWAN LAL *v.* RAJENDRA PRASAD, 4 P. L. T. 409; (1923) A. I. R. (Pat.) 564 1

——— s. 92—*Trusts, public and private, distinction between—Dedication, proof of—Test.*

In private trusts the beneficial interest is vested absolutely in one or more individuals who are, or within a given time may be, definitely ascertained. On the other hand, a public trust has for its object the members of an uncertain and fluctuating body, and the trust itself is of a permanent and indefinite character and is not confined within the limitation prescribed to a settlement upon a private trust. A man can create

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a private trust by building a temple and an idol and endowing it with funds or income for strictly private purposes, not merely retaining the management and control in the hands of himself and his family but restricting the enjoyment to himself and his family or other individuals, and he may out of the warmth of his heart allow other persons outside the original beneficiaries to enjoy from time to time the advantages thereby created. On the other hand, a private individual may construct out of his private purse a private temple and idol retaining the control and management in his own hands and in that of his family or some other selected individuals and yet so conduct himself as to provide conclusive evidence of dedication by implication and by conduct. Once he has shown his intention to dedicate, the matter passes out of his hands and the beneficiaries to whom the use is dedicated have a right in such use. Where there is no express deed of dedication or document creating the trust, the Court has to depend almost entirely upon the history of the place and the user by people generally from time to time to decide whether it is a private or was intended to be a public trust.

In construing a dedication there is a broad difference between conduct which shows that the owner of the property is giving express permission from time to time to particular individuals and conduct which shows that he intends certain members of a class whom he desires to benefit to act indiscriminately without permission, that is to say, as of right A useful test for a Judge to apply to see whether the evidence satisfies the conditions of the private trust, is to ask himself whether any of the acts testified to by the witnesses could have been prevented or penalised by proceedings for trespass. **A. RAM DAS** *v.* **BASANTI**, 20 A. L. J. 789; (1922) A. I. R. (A.) 519 **97**

——— **s. 93**—*Letters Patent (Ran.), cl. 34, applicability of—Appeal—Difference of opinion—Procedure.*

Clause 34 of the Letters Patent (Ran.) does not in all cases override the provisions of section 98 of the Code of Civil Procedure and where that section can properly apply it may be resorted to in spite of the provisions of clause 34.

Clause 34 of the Letters Patent (Ran.) applies only to those cases in which the appeals come before the Court by virtue of a right of appeal given by the Letters Patent. Where an appeal lies under the ordinary law of land, the Letters Patent will not override the provisions of the Civil Procedure Code applicable to the appeal. **R. TIN TIN NYO** *v.* **MAUNG BA SAING**, 1 R. 584; (1924) A. I. R. (R.) 148 **385**

——— **s. 99**—*Issues, failure to frame—Irregularity.*

Where no issues are framed, but all the points arising in the case are dealt with in the judgment and there has been no prejudice to the parties, the irregularity, if any, is covered by section 99 of the Civil Procedure Code. **C. TIN KARI BOSE** *v.* **NOGENDRA PROSAD BASU**, 27 C. W. N. 716; 50 C. 807; (1923) A. I. R. (C.) 699 **10**

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——— **s. 99, O. III, rr. 1, 2, O. IV, r. 1**—*Plaintiff, adult, treated as minor—Plaint presented by next friend—Irregularity, whether curable—Jurisdiction of Court to entertain plaint.*

A Court has no jurisdiction to entertain a suit except upon a plaint properly presented.

Where the plaintiff in a suit is a major, but he is treated as a minor in the plaint and the plaint is presented on his behalf by a next friend the presentation of the plaint is not valid and the Court has no jurisdiction to entertain the suit. The defect is not one which is curable under section 99 of the Civil Procedure Code. **A RUHUL AMIN** *v.* **SHANKAR LAL**, (1924) A. I. R. (A) 54; 45 A 70.; 21 A. L. J. 626 **30**

——— **s. 109**—*Application for leave to appeal to His Majesty in Council—Review of judgment—Judgment on review set aside—Original judgment restored—Application for leave, whether can be continued.*

An application for leave to appeal to the Privy Council against a judgment of the High Court was presented within time. On the same date an application for review of judgment was filed. The latter application was accepted and an order was passed on the former application that as the application for review had been accepted there was no necessity to go on with the application. Eventually the judgment passed on review was set aside by the Privy Council on the ground that it was passed without jurisdiction, and the previous judgment was restored. It was then sought to obtain a certificate on the basis of the application for leave to appeal to His Majesty in Council:

Held, that the order passed on the application did not amount to a dismissal and that the application had remained suspended, and that the original judgment having been restored the application could be proceeded with. **L NEKI** *v.* **CHAJJU RAM**, 4 L. 445; (1924) A. I. R. (L.) 225 **869**

——— **s. 110**—*Appeal to His Majesty in Council—"Decision," meaning of.*

The term "decision" in section 110 of the Civil Procedure Code means, the decision of the suit by the Court, and it is not necessary that the Appellate Court should also affirm the grounds of fact upon which the judgment under appeal was based.

Where, therefore, the District Court decides that plaintiffs are entitled to a half share in the properties of a certain business and the decision of the High Court is the same, that amounts to affirmation of the decision of the District Court and for the purposes of a certificate for leave to appeal to His Majesty in Council it is immaterial that the High Court comes to a different conclusion on the question of fact as to what the business was. **R. S. N. SEN** *v.* **ABDUL AZIZ TAR MUHAMMAD**, 11 L. B. R. 410; (1923) A. I. R. (R.) 55 **400**

——— **s. 110 (3)**—*Appeal to Privy Council—Discretion, exercise of, by High Court—Substantial question of law.*

The question of the exercise of its discretion by the High Court does not involve a substantial question of law within the meaning of section 110

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(3) of the Civil Procedure Code, so as to justify a certificate that the case is a fit one for appeal to the Privy Council. B. GOVINDLAL BANSILAL v. BANSILAL MOTILAL, 24 Bom. L. R. 196; (1922) A. I. R. (B.) 11 941

——— s. 115—*Interlocutory order—Revision.*

The language of section 115 of the Civil Procedure Code is wide enough to include an interlocutory order. The High Court will not, however, interfere with an interlocutory order in revision, save in cases wherein a defeat of the law and a grave wrong are manifest, and are irremediable by the regular procedure. B SECRETARY OF STATE FOR INDIA v. NARSIBHAI DADABHAI, 25 Bom. L. R. 992; (1924) A. I. R. (B.) 65, 48 B 43 241

——— s. 115—*Revision, application for—Inordinate delay.*

An application for revision made more than a year after the order complained of was passed, cannot be entertained unless some good reason can be shown for the delay. O BINDA PRASAD v. BANARSI DAS, 10 O. L. J. 205; 9 O. & A. L. R. 847; (1923) A. I. R. (O.) 2, 2 115

——— s. 115—*Revision—Cause of action, decree passed without—Illegal exercise of jurisdiction.*

If a Court passes a decree in a case in which there is no cause of action, it acts in the exercise of its jurisdiction illegally and interference in revision is justified.

A. promised to pay Rs. 300 in consideration of being a partner in a lease of land unauthorised by law and executed a pro-note in favour of a creditor of the lessor. The lease having fallen through, the creditor sued *A.* for recovery of the amount due under the note:

Held, that the note was invalid under law and no cause of action could be based thereupon. N KASHIRAM v. BARKYA, 7 N. L. J. 13 46

——— s. 115, O. IX, r. 9—*Dismissal of suit for default—Restoration, application for, dismissal of—Revision.*

Where a Court refuses to restore a suit dismissed for default, holding that no sufficient cause has been established for the absence of the plaintiff on the date of hearing, the order is not open to revision, as the Court cannot be said to have acted illegally or with material irregularity. L. PARIDA v. KHAIRA, 3 L. 79; (1922) A. I. R. (L.) 290 336

——— s. 151—*Compromise—Consent-decree—Court induced to sign by fraud—Inherent power to set aside decree.*

Where a Court is induced to sign a compromise decree on the fraudulent representation of one of the parties, that all the parties have consented to it, it has inherent power to set aside the decree on being apprised of the true facts. Pat SADHO SARAN RAI v. ANANT RAI, (1923) Pat. 197; (1923) A. I. R (Pat.) 453, 2 Pat. 731 14

——— s. 151—*Execution of decree—Sale, injunction staying—Sale held in contravention of injunction, validity of—Abuse of process of Court—Inherent power of Court to set aside sale.*

During the progress of a Court sale, the sons of the judgment-debtor filed a suit for partition of the property in the same Court and obtained an *interim* injunction staying the sale. Subsequently on the same day the judgment-debtor applied to the Court for adjournment of the sale which was refused; and the sale was directed to be proceeded with notwithstanding the prior order of the Court staying the sale. The sale was held and confirmed. On an application by the judgment-debtor to set aside the sale:

Held, that though the act of the Court in conducting the sale in disregard of its own prior injunction was not in contravention of any definite provision of law, the procedure must be held to have resulted in an abuse of the process of the Court and the sale must be set aside in exercise of the inherent powers of the Court under section 151 of the Civil Procedure Code.

A legal act done in breach of an injunction will not ordinarily be invalidated on that account and the only consequence of contempt of an injunction is the penalty which the Court is competent to impose. It is, however, different where the proceedings are prosecuted in the Court which issued the injunction and the result is to actually deprive its own injunction of effect. M. REPAKA MAMILLAYYA v. ADDEPALLI VENKATARATNAM, 45 M. L. J. 312; (1923) M. W. N. 672; (1924) A. I. R. (M.) 100 12

——— s. 151—*Inherent power of Court, extent of—Order directing defendant to pay to plaintiff portion of amount in dispute, legality of.*

Section 151 of the Civil Procedure Code saves the Court's inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court, but there is no rule of law or equity which requires, in the interests of justice, that a plaintiff suing to enforce a contract for the payment of money, where the claim is disputed, should be awarded a portion of the amount claimed before his right has been established by the suit brought for that purpose. A Court has, therefore, no jurisdiction to make such an order in the exercise of its powers under section 151 of the Code. Pat GOPAL SARAN NARAYAN SINGH v. SITA LEBI, (1923) Pat. 290; (1924) A. I. R. (Pat.) 69; 2 P. L. R 159 718

——— s. 155, O VI, r. 17—*Appeal—Amendment of grounds of appeal—Appellate Court, power of, to direct amendment.*

The Civil Procedure Code gives the Court full discretion to allow an amendment of pleadings at any stage, and where the grounds of an appeal are not sufficiently clear, the Appellate Court can direct the appellant to amend them. L RAM PIARI v. SULTAN BAKHSH, 3 L. 382; (1923) A. I. R. (L.) 115 207

——— O. I, r. 3—*Bengal Tenancy Act* (VIII of 1885), s. 148—*Joinder of claims—Money had and received to plaintiff's use*

A claim for money had and received to the plaintiff's use may be joined to a claim for rent and may properly be tried under section 148 of the Bengal Tenancy Act. C TIN KARI BOSE v. NOGENDRA PROSAD BASU, 27 C. W. N. 716; 50 C. 807; (1923) A. I. R. (C.) 699 10

Civil Procedure Code—1908—contd.

——— O. I. rr. 3, 5—*Suit for recovery of single plot of land—Several defendants claiming different portions—Misjoinder of parties and causes of action.*

A plaintiff can bring one suit for recovery of posses ion of a single plot of land against several defendants setting up titles to different portions of the same: Such a suit is not bad for misjoinder of defendants or causes of action. N LAXMI NARAYAN *v.* RAMRATAN, 19 N. L. R. 178; (1924) A. I. R. (N.) 55 761

——— O. II, r. 2, *scope of—Different causes of action—Separate suits.*

Order II, r. 2, Civil Procedure Code, requires that every suit shall include the whole of the claim arising from the one and the same cause of action and not that every suit shall include every claim and every cause of action which the plaintiff may have against the defendant. Consequently if the cause of action in the subsequent suit is different from that in the first suit the subsequent suit is not barred. Pat BHAGJOGNI *v.* SAKHI MAHTON, (1923) Pat. 234; (1923) A. I. R. (P.) 575 500

——— O. II, r. 2—*Suit for possession—Mortgage money, right to recover—Abandonment of claim—Subsequent suit, whether barred.*

Where a mortgagee is refused possession of the mortgaged property he can sue for possession, or under section 68 (*c*) of the Transfer of Property Act, he can sue for the mortgage-money. If he sues for possession without suing for the mortgage-money a claim in respect of the latter will become barred by virtue of the provision contained in O. II, r. 8 of the Civil Procedure Code. O UDAIRAJ SINGH *v.* RAM UDIT TEWARI, 10 O. L. J. 376 340

——— O. III, rr. 1, 2. *See* CIVIL PROCEDURE CODE, S. 99 30

——— O. IV, r. 1. *See* CIVIL PROCEDURE CODE, 1908, S. 99 30

——— O. VI, r. 17. *See* CIVIL PROCEDURE CODE, 1908, O. XXII, R. 4 393

——— O. VI, r. 17——*Amendment of plaint, when to be allowed.*

No hard and fast rule can be laid down that an amendment of a plaint must, as a general rule, be allowed wherever a refusal to amend would be likely to result in hardship to the plaintiff. The test to be applied is whether the amendment would or would not occasion injury to the opposite party such as cannot be recouped by costs, and leave to amend should generally be refused if it would.

The mere fact that the suit is on behalf of a religious institution is no ground for departing from the general rule. L SHAMS-UD-DIN *v.* DEVI DAS, (1923) A. I. R. (L.) 505 471

——— O. VI, r. 17—*Appeal, second—Amendment of plaint, whether can be permitted.*

A plaintiff cannot, in second appeal, be allowed to amend his plaint by introducing an entirely new cause of action. L KIRPA *v.* CHINTI, (1923) A. I. R. (L.) 530 518

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——— O. VI r. 17—*Bombay High Court Rules, r.* 266—*Amendment of plaint, after decree—Preliminary decree—Receiver, costs of.*

An amendment of pleadings can, as a general rule, be allowed only during the actual pendency of a suit, and not after the decree has been actually drawn up and sealed.

The Duke of Buccleuch, (1892) P. 201; 61 L. J. P. 57; 67 L. T. 739; 40 W. R. 455; 7 Asp. M. C. 294 and *Sukhdeo Prasad* v. *Lachman Singh*, 24 A. 456; A. W. N. (1902) 114, distinguished.

Where, however, a Receiver has been appointed by the Court in a suit, the Court may, even though the suit be no longer pending, permit parties to intervene on a question as to the Receiver's costs. B KISHEN PRASAD & CO. LTD. *v.* FULLUMAL HIRALAL, 25 Bom. L. R. 888; (1924) A. I. R. (B.) 166 171

——— O. VI, r. 17—*Provincial Small Cause Courts Act (IX of* 1887), *s.* 25—*Amendment of pleadings, refusal to allow—Revision.*

An application for leave to amend a pleading is not a case, and no revision would, therefore, lie either under section 115 of the Civil Procedure Code or under section 25 of the Provincial Small Cause Courts Act, against an order refusing leave to amend. O BADRI PRASAD *v.* MURLIDHAR, 9 O. & A. L. R. 846 558

——— O. VII, r. 2, *applicability of—Partition suit—Mesne profits whether can be claimed—Plaint—Mesne profits, amount of, whether must be stated.*

The rule laid down in O. VII, r. 2 of the Civil Procedure Code which requires a plaintiff to state in the plaint the approximate amount of mesne profits claimed does not apply to a case where mesne profits are claimed only from the date of the institution of the suit.

Where a plaintiff in a suit for partition is not in possession of any of the joint family property, he can claim mesne profits from the date of the suit. R MAUNG LU GALE *v.* MAUNG LU PO, 4 U. B. R. (1922) 140; (1923) A. I. R. (R.) 110 53

——— O. VII, r. 7. *See* SPECIFIC RELIEF ACT, 1877, SS. 12, 22 275

——— O. VII, r. 10. *See* CHOTA NAGPUR TENANCY ACT, 1908, S. 139 587

——— O. VII, r. 10—Order directing return of plaint, when to be made. *See* COURT FEES ACT, 1870, S. 7 (v), (a), (d) 781

——— O. VII, rr. 14, 18, O. XIII, r. 1—*Documents which must be produced at first hearing—Documents produced in answer to case set up by defendant, admissibility of.*

Documents which must be produced by a plaintiff at the first hearing under O. XIII, r. 1, of the Civil Procedure Code, are all documents in the possession and power of the plaintiff on which he intends to rely and which have not already been held in Court and all documents which the Court has ordered to be produced. The documents upon which he intends to rely must refer back to O. VII, r. 14 (2) of the Code which refers to the case where the plaintiff relies upon other documents than those mentioned in the first clause as

evidence in support of his claim. Those documents which are already put in the list must be produced at the first hearing if they have not already been filed in Court and in addition all documents must also be produced which the Court has ordered the parties to produce at that time.

Documents produced by the plaintiff in answer to a case set up by the defendant fall, however, within clause (2) of r. 18 of O. VII of the Code, and need not have been entered in the list attached to the plaint, nor is it necessary to obtain leave of the Court in order that they might be received in evidence. **Pat** MANBODH MISSIR *v.* BHAIRO MISSIR, (1922) Pat. 300; 4 U. P. L. R. (Pat.) 97; (1922) A. I. R. (Pat.) 569; 4 P. L. T. 322 **848**

——— **O. VIII, r. 5.** *See* LIMITATION ACT, 1908, S. 19 **740**

——— **O. VIII, r. 5**—*Admission by one of several defendants, effect of—Plaintiff, failure of, to prove issue against other defendants—Procedure.*

Order VIII, r. 5, of the Code of Civil Procedure, which regards allegations of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted, as taken to be admitted, gives a discretion to the Court to require any facts so admitted to be proved otherwise than by such admission.

A Court cannot in the same suit record one finding in favour of the plaintiff based on the admission of one of the defendants to the suit, and another finding on the same issue against him based on the evidence.

Janki Das v. *Ahmad Husain Khan*, 25 A. 159; A. W. N. (1902) 218, followed.

Plaintiff sued several defendants for the recovery of certain properties basing his title on a certain adoption. One of the defendants admitted the *factum* of the adoption but denied its validity and the rest denied the *factum* also. The Court held that the defendant had failed to prove the *factum* of the adoption:

Held, that on this finding the plaintiff's suit must fail *in toto* and he could not succeed as against the defendant who had admitted the *factum* of the adoption. **A** KUNDAN LAL *v.* MAKUNDI KUNWAR, 45 A. 571; (1924) A. I. R. (A.) 150 **609**

——— **O. VIII, r. 6**—Set-off and counter claim. *See* VENDOR AND PURCHASER **943**

——— **O. IX, r. 9**—*Application for foreclosure decree, nature of—Dismissal in default—Restoration—Revision, whether competent.*

An application for a final decree for foreclosure is not a proceeding in execution.

Where an application for a final decree for foreclosure was dismissed in default and then restored by the Trial Court:

Held, that the Court had jurisdiction to restore the application and the High Court will not interfere with the order of restoration in revision. **O** BABU RAM *v.* RAM DULARI DEBI, 26 O. C. 194; (1924) A. I. R. (O.) 30 **701**

——— **O. IX, r. 9**—*Dismissal of suit for default—Plaintiff, appearance of, immediately afterwards—Restoration, application for—Procedure.*

Where a suit is called and dismissed in default in the plaintiff's absence and the latter appears shortly after and applies for restoration of the suit, the suit ought to be restored and the defendant compensated by an order for costs. **B** IRAPPA *v.* NINGAPPA, (1923) A. I. R. (B.) 480 **901**

——— **O. IX, r. 13**—*Defendant's Counsel expressing inability to proceed with case—Decree for plaintiff*—Ex parte *decree.*

The Pleader for the defendant in a suit stated on the date of hearing that his client and witnesses had not turned up and that he was unable to proceed with the case. The Court thereupon proceeded to decide the suit on the merits and passed a decree. The defendant sought to set aside the decree under O. IX, r. 13, of the Civil Procedure Code:

Held, that by saying that he could not proceed with the case it could not be said that the Pleader had withdrawn himself and the decree passed, therefore, could not be regarded, and set aside, as an *ex parte* decree. **A** SARJU PRASAD *v.* GAJADHAR LAL, (1922) **A. I. R. (A.)** 497 **527**

——— **O. IX, r. 13**—Ex parte *decree, application to set aside—Adjournment of suit—Notice to parties—Court, duty of.*

When a Court finds it necessary to adjourn a pending suit, it is part of the duty of the Court to see that the date fixed for the adjourned hearing is communicated to the parties concerned, or to their legal representatives, or, at any rate, to such of them as are present or represented in Court when the adjournment takes place.

A suit for partition was compromised and a preliminary decree was passed in accordance with the compromise. A Commissioner was also appointed to make a report as to the actual division of the property. On the date fixed for the consideration of the Commissioner's report one of the defendants, who had no notice of the date, was absent and an *ex parte* decree was passed against him:

Held, (1) that in the absence of notice of the date of hearing to the defendant an *ex parte* decree should not have been passed against him;

(2) that the absence of notice was a sufficient cause for setting aside the *ex parte* decree. **A** DURGA PRASAD *v.* HET RAM, 20 A. L. J. 912; (1923) A. I. R. (A.) 79 **91**

——— **O. XI, r. 21**, *scope of—Applicability of rule to orders for production—Production, order for, whether implies discovery or inspection.*

Under the Code of Civil Procedure an order for production of documents is quite different from an order for discovery or an order for inspection and cannot be said to imply either.

Order XI, r. 21 of the Code of Civil Procedure does not apply to cases of non-compliance with an order for production and refers only to orders for interrogatories, discovery or inspection.

Ram Nath v. *Parabhu Dyal*, 65 Ind. Cas. 661, dissented from.

Lyalpur Sugar Mills & Co. v. *Ram Chandra Gur Sahai Cotton Mills & Co.*, 67 Ind. Cas. 731

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44 A. 565; 20 A.L. J. 422; (1922) A. I. R. (A.) 235, followed.

There are several ways of making a party produce a document shown to be in his possession and for which privilege is not established; and the presumption that arises against a party who is called upon and does not produce a document in his possession or power is in itself of serious consequence to him. M SITHAMALLI SUBBAYYER *v.* RAMANATHAN CHETTIAR, 19 L. W. 355; 46 M. L. J. 350; (1924) M. W. N. 340 766

——— O. XII, r. 6—*Usurious Loans Act (IX of 1918), applicability of—Admission by defendant—Court, power of, to redute interest.*

The rule laid down in O. XII, r. 6 of the Civil Procedure Code is merely permissive, and the judgment which the Court may pass under that rule is such as the Court may think just.

The terms of the Usurious Loans Act are very wide and apply to all suits whether heard *ex parte* or otherwise.

A Court can apply the provisions of the Usurious Laons Act for the benefit of a defendant who has confessed judgment. R S. P. R. M. FIRM *v.* MAUNG PO KYA, 1 R. 580; (1924) A. I. R. (R.) 144 382

——— O. XIII, r. 1. *See* CIVIL PROCEDURE CODE, 1908, O. VII, rr. 14, 18 848

——— O. XVIII, r. 2—*Arguments, oral, not addressed—Written arguments put in—Judgment, validity of.*

In O. XVIII, r. 2 of the Civil Procedure Code an option is given to the parties to argue their case when the evidence is concluded and it is for them to decide whether they will avail themselves of this privilege.

On the date fixed for arguments in a case Counsel for the parties expressed their inability to argue the case and were given an opportunity to put in written arguments, which they did. Before writing judgment, however, the Sub-Judge was transferred. Counsel had opportunity to argue the case before his successor but did not avail themselves of it and the latter, therefore, pronounced judgment without hearing Counsel:

Held, that there was nothing illegal in the procedure adopted, and the judgment was perfectly valid. L HARJI MAL *v.* DEVI DITTA MAL, 4 L. 364; (1924) A. I. R. (L.) 107 398

——— O. XXI, r. 2—*Execution of decree—Adjustment out of Court not certified within time, whether can be recognised.*

An Executing Court is justified in refusing to take cognisance of an adjustment which is not certified to the Court within the time allowed by law under O. XXI, r. 2 of the Civil Procedure Code. O HARIHAR PRASAD *v.* SHANKAR DAYAL, 10 O. L. J. 351; 10 O. & A. L. R. 119 337

——— O. XXI, r. 14 (b). *See* PRE-EMPTION 539

——— O. XXI, r. 15—*Execution of decree—Record destroyed—Proof of decree—Secondary evidence.*

When a decree-holder wishes to obtain execution of a decree the record of which he alleges has been destroyed, he must prove the contents of that decree, and this can only be done by means of secondary evidence. For this purpose statements

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of persons who merely heard the judgment pronounced are not admissible in evidence. What is required is an oral account of the contents of the judgment or decree by someone who had read the one or the other. U B MAUNG CHIT U *v.* MAUNG THA KU, 4 U. B. R. (1922) 135; (1923) A. I. R. (R.) 113 258

——— O. XXI, rr. 54, 67, 90—*Execution of decree—Sale proclamation, copy of, not affixed to property—Material irregularity.*

Under O. XXI, rr. 54 and 67 of the Civil Procedure Code a copy of the sale proclamation must be affixed to a conspicuous part of the property to be sold. Failure to do this amounts to a material irregularity in publishing the sale, within the meaning of O. XXI, r. 90 of the Civil Procedure Code. L WISH NATH *v.* RAHMAT ULLAH, (1923) A. I. R. (L.) 671 879

——— O. XXI, r. 63, *applicability of—Suit by unsuccessful claimant against judgment-debtor for return of purchase-money, nature of.*

Order XXI, r. 63 of the Civil Procedure Code is a bar only to a subsequent suit, instituted to establish the right which the plaintiff claimed to the property which was in dispute, in the proceeding in which the objection was raised. It has no application to a suit by the unsuccessful claimant, who had purchased the property from the judgment-debtor, to recover from the judgment-debtor the sale consideration paid by him to the latter. A RATIRAM *v.* BIRMAJIT, 21 A. L. J. 770; 46 A. 45 82

——— O, XXI, r. 63—*Execution of decree—Claim proceedings—Order dismissing claim, effect of—Adverse possession.*

On a claim petition the following order was passed :—

"There is no time to investigate into this claim. Petition is dismissed without investigation on the ground of delay. I may add that the sale will not affect the rights, if any, of the petitioner;"

Held, that the order which expressed no final judgment on the rights put forward was nevertheless an order against the claimant, notwithstanding the erroneous statement that the petitioner's rights would not be affected, and was subject to the provisions of O. XXI, r. 63 of the Civil Procedure Code.

Machi Raju Venkataratnam v. *Vadrevu Ranganayakamma*, 48 Ind. Cas. 270; 41 M. 985 at p. 992; 35 M. L. J. 335; 24 M. L. T. 197; (1918) M. W. N. 599; 8 L. W. 292 (F. B.), followed.

Parambil Saharabi v. *Ali*, 72 Ind. Cas. 857; 44 M. L. J. 141; 17 L. W. 182; (1923) A. I. R. (M.) 295 and *Lakshmi Ammal* v. *Kadiresan Chettiar*, 63 Ind. Cas. 431; 41 M. L. J. 198; 14 L. W. 12; (1921) M. W. N. 495, distinguished.

The rejection of a claim, if not contested by suit within a year from the date of the order, will estop the claimant from pleading adverse possession at the date of the order in a suit to eject him, where possession since the date of the order is insufficient to establish title. M AISAMMA *v.* MOIDIR KUNHI, (1923) M. W. N. 633; 18 L. W. 520; 45 M. L. J. 690; (1924) A. I. R. (M.) 111; 47 M. 160 264

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——— **O. XXI, r. 63**—*Specific Relief Act (I of 1877), s. 42, claim proceedings—Title suit, nature of—Declaration.*

A suit brought under O. XXI, r. 63 of the Civil Procedure Code is a special remedy granted in special circumstances and is not governed by the proviso to section 42 of the Specific Relief Act. Pat BHAGWAN LAL *v.* RAJENDRA PRASAD, 4 P. L. T 409: (1923) A I. R. (Pat.) 564 1

——— **O. XXI, r. 63**—*Title suit—Burden of proof.*

In a suit instituted after the summary rejection of a claim under O. XXI, r. 58 of the Civil Procedure Code, the onus of establishing that the transaction on which the suit is based was entered into in good faith lies on the plaintiff. N MULLA FAIZ ALI *v.* HARKUAR, (1923) A. I. R. (N.) 334 50

——— **O. XXI, r. 89**, *applicability of—Partition suit—Arbitration—Decree on award—Execution sale, setting aside of.*

A suit for partition was, with the consent of the parties, referred to arbitration. The arbitrators made an award by which they directed, *inter alia*, that a certain property should be sold by private treaty, and if not so sold within a year, by the Court, and that the sale-proceeds should be disposed of in a particular manner. The award was confirmed by a decree of the Court, and the property was sold by the Registrar thereof. The defendant applied for the sale to be set aside on is depositing a certain sum which the plaintiff had agreed to accept in full acquittance of his claim, and the question was, whether r. 89 of O. XXI of the Civil Procedure Code applied to the case:

Held, that the sale by the Registrar was a sale in execution of a decree, and that the provisions of r. 89 of O. XXI of the Civil Procedure Code were applicable to the case. C NIRODE NATH *v.* AMULYA DHONE, 27 C. W. N. 466; (1923) A. I. R. (C.) 582. 774

——— **O. XXI, r. 89**—*Payment of deposit money by Vakil's clerk—Application, if incompetent.*

An application under O. XXI, r. 89, Civil Procedure Code, made by the authorised Vakil of a person entitled to apply is not rendered incompetent merely because the actual payment of the deposit money into the Treasury was by a clerk who was neither a Pleader nor a recognised agent within the meaning of O. III, r. 1, Civil Procedure Code. M VENKATAKUTTUMBA RAO *v.* VENTAPPAYYA, 46 M. L. J. 119; (1924) M. W. N. 137; 19 L. W. 298 765

——— **O. XXI, r. 90**—*Bengal Tenancy Act (VIII of 1885), s. 173—Sale of holding—Benami purchase by judgment-debtor—Material irregularity—Sale set aside—Appeal, competency of.*

Where a person interested in the sale of a holding applies to have it set aside under section 173 (3) of the Bengal Tenancy Act on the ground of a *benami* purchase of the holding by the judgment-debtor and also under O. XXI, r. 90 of the Civil Procedure Code on the ground of material irregularity in conducting the sale, and the sale is set aside on both the grounds, the fact that the order setting aside the sale under the Civil Procedure Code is appealable does not entitle the appellant to contest the decision of the Trial Court as regards the ground under the Tenancy Act as well. C AMAR PRASAD *v.* GAGAN CHANDRA, (1922) A. I. R. (C.) 180 522

——— **O. XXI, r. 95**—*Execution of decree—Delivery of possession—Symbolical possession, effect of.*

The delivery of symbolical possession to an auction-purchaser or to a person claiming under him operates as the delivery of actual possession as against the judgment-debtor and gives a fresh start of limitation even in a case coming under O. XXI, r. 95, of the Civil Procedure Code. C BHULU BEO *v.* JATINDRA NATH SEN, 27 C. W. N. 24; (1923) A. I. R. (C.) 138 1035

——— **O. XXII, r. 4, O. VI, r. 17**—*Appeal—Death of respondent—Abatement—Amendment of plaint.*

Where during the pendency of an appeal some of the defendants-respondents die and their legal representatives are not brought on the record within limitation, and the cause of action does not survive against the remaining respondents but it appears that events have happened since the institution of the suit which give the plaintiffs a separate cause of action in respect of the subject-matter of the dispute against each of the defendants, the appeal abates only *qua* the interest of the deceased respondents and the plaintiffs can be allowed to amend their plaint so as to continue the suit against the remaining respondents individually and need not be referred to a separate suit. R MAUNG MU *v.* MAUNG KAN GYI, 1 R. 618; (1924) A. I. R. (R.) 127 393

——— **O. XXII, r. 4, O. XXXIV, r. 1**—*Mortgage—Redemption—Suit by second mortgagee—Appeal—Death of mortgagor—Abatement.*

To a suit by a second mortgagee to redeem from the prior mortgagee the mortgagor is an absolutely necessary party and the suit cannot proceed in his absence.

Where, therefore, during the pendency of an appeal in such a suit the mortgagor dies and his legal representatives are not brought on the record within the period of limitation allowed by the law, the whole appeal abates. L NANAK CHAND *v.* RAM CHAND, 4 L. L. J. 189; (1922) A. I. R. (L.) 101 176

——— **O. XXIII, rr. 1, 3**—*Withdrawal of suit in appeal—Compromise between some parties to circumvent provisions of law, legality of.*

A plaintiff-appellant is not entitled to withdraw his suit in the Appellate Court under O. XXIII, r. 1 of the Civil Procedure Code as a matter of course.

A compromise between some of the parties to a suit, the object of which is to circumvent the law and to harass the other parties to the suit, is unlawful, and the Court will not record such a compromise under O. XXIII, r. 3 of the Civil Procedure Code. O ASHFAQ HUSSAIN *v.* BUNYAD HUSSAIN, (1923) A. I. R. (O.) 252; 9 O. & A. L. R. 415 874

Civil Procedure Code—1908—contd.

——— **O. XXIII, r. 1 (3)**—*Withdrawl of suit without liberty to bring fresh suit—Second suit in respect of same subject-matter, whether barred.*

Plaintiffs brought a suit against certain defendants for a declaration of their right and title to a ticket in a Sweepstake which had won a War Loan Bond. The suit was withdrawn without obtaining leave to bring a fresh suit. Subsequently plaintiffs brought a second suit against the same defendants to recover from them the amount of the Bond which had in the meantime been delivered to them by the Managers of the Sweepstake. One new defendant was added to the suit on the allegation that the other defendants had transferred the bond to him:

Held, that the subject-matter of both the suits was the same within the meaning of O. XXIII, r. 1 (3) of the Civil Procedure Code and the second suit was, therefore, barred under the provisions of that rule. R MAUNG MU *v.* MAUNG KANGYI, 1 R. 618; (1924) A. I. R. (R.) 127 398

——— **O. XXX, r. 1**—*Limitation Act (IX of 1908), s. 6—Suit brought in name of shop—Minority of plaintiff—Extension of limitation.*

Where a suit is filed on behalf of a minor plaintiff describing him as the owner of a shop and claiming extension of limitation on the ground of the plaintiff's minority, the suit is not liable to be dismissed on the ground that it is brought by the shop and not by the plaintiff personally. B CHANBASAPPA MALLAPPA *v.* MALKAPPA LINGAPPA, (1923) A. I. R. (B.) 368 476

——— **O. XXX, r. 1**—*Suit against firm—Firm sued through manager—Death of manager, effect of.*

Plaintiff brought a suit against firm *M* and described the defendant as "*C*, as the manager and owner of shop *M*." It was subsequently discovered that *C* had died before the institution of the suit;

Held, (1) that the suit was in substance, though not in form, against the firm *M* and the addition of the words "*C*, as the manager and owner of" in the description of the defendant were mere surplusage;

(2) that, therefore, it was not necessary to bring on the record the legal representatives of *C*, and the suit could be continued against firm *M* as having been properly filed on the date of its original institution. B MOTILAL JASRAJ *v.* CHANDMAL HINDUMAL, 25 Bom. L. R. 1081; (1924) A. I. R. (B.) 155 1055

——— **O. XXXI, r. 2**—*Suit against temple—Trustees, whether necessary parties.*

Under O. XXXI, r. 2 of the Civil Procedure Code all the trustees of a temple are necessary parties to a suit against the temple even where there is a *karar* authorising one of several trustees to represent the temple in suit. M ADIRAJU ARASU KANNIKE BALLALA *v.* PATTU, (1922) A. I. R. (M.) 405 942

——— **O. XXXII, r. 4**—*Appointment of officer of Court as guardian* ad litem—*Mother and uncle of minor alive—Absence of collusion between Court guardian and plaintiff—Appointment, if proper.*

Civil Procedure Code—1908—contd.

In a suit to enforce a mortgage against the mortgagor and his minor son, the father was *ex parte* and was unwilling to act as guardian for his son in the suit. An *affidavit* was filed by the plaintiff's agent stating that there were "no other principal guardians for the said minor," and a Court guardian was thereupon appointed. The minor was living at the time with his uncle and his mother. But they made no attempt to intervene in the proceedings and never showed any interest. There was no allegation of collusion, between the plaintiff and the Court guardian!

Held, that the minor must be held to have been properly represented in the proceedings and that it was not open to him on attaining majority to have the decree set aside as not binding upon him. M DEVI PRASAD *v.* JAGANNADHARAJU, 46 M. L. J. 12; (1924) M. W. N. 125; 33 M. L. T. 243; (1924) A. I. R. (M.) 281 464

——— **O. XXXII, r. 4**—*Suit against minor—Guardian* ad litem, *appointment of—Consent of guardian, form of.*

Order XXXII, r. 4 of the Civil Procedure Code requires that no person shall be appointed guardian *ad litem* for a minor defendant without his consent. But there is nothing in the rule which requires that that consent should be expressed in writing; it may be inferred from the circumstances of the case. M YEZZU MALLAYYA *v.* TALLURI PUNNAMMA; 46 M. L. J. 291; 19 L. W. 410 628

——— **O. XXXIII, rr. 1, 9**—*Dispaupering of plaintiff*—Ad interim *maintenance—Accumulation—Sufficient means.*

In a suit *in forma pauperis* by a widow for recovery of possession of property belonging to her late husband, where the Court-fees required was Rs. 3,000, she was granted an *ad interim* maintenance allowance of Rs. 200 a month. In pursuance of this order she received Rs. 2,100 on account of arrears of the aforesaid maintenance and then the allowance of Rs. 200 month after month. On a certain date, when the widow had received in all Rs. 5,538 in this manner, an application was made to the Court that she should be dispaupered under O. XXXIII, r. 9, of the Civil Procedure Code as she had now sufficient means to pay the Court-fees. There was nothing to show that on that date the widow had with her Rs. 3,000 to pay the Court-fees. The sums previously paid to her, she alleged, had been spent by her to pay off debts incurred on account of her maintenance. The widow was living with a relation of herself and eminent Counsel had appeared on her behalf in Court:

Held, (1) that the monthly allowance allowed to the widow was not a sufficient means to enable her to pay the Court-fees as, under the management, she could never at any one time have the requisite amount unless the arrears of her maintenance allowance accumulated to that extent;

(2) that the fact that eminent Counsel had appeared for her was in itself immaterial, in the absence of anything to show that she had incurred expense on account of them, nor was the

fact that she was living with a relative material, in the absence of anything to show that he was financing her either in supporting her or in defraying the cost of the litigation;

(3) that the widow had the right to pay off debts incurred on account of her maintenance and was not bound to accumulate her monthly allowance to make up the Court-fees in the absence of any such condition being imposed upon her;

(4) that, therefore, in the circumstances of the case, the means of the widow were not such so as to justify the withdrawal of the order allowing her to sue *in forma pauperis*. Pat. SAVITRI THAKURAIN *v.* SECRETARY OF STATE FOR INDIA, 4 P. L. T. 538; 2 Pat. 879; (1924) A. I. R. (Pat.) 27 611

——— O. XXXIII, rr. 2, 5, O. XLIV, r. 1—*Limitation Act (IX of 1908), s. 12—Pauper appeal—Limitation—Time spent in obtaining copies, whether can be excluded—Verification of petition—Verification by separate affidavit, validity of.*

The provisions of section 12 of the Limitation Act are applicable to pauper appeals.

Moti Begam v. *Satara Begam*, 33 P. R. 1895, followed.

A petitioner for leave to appeal as a pauper did not verify the contents of the petition at the foot of the petition, but did so by a separate affidavit in which the statements contained in the several paragraphs of the petition were verified on solemn affirmation:

Held, that the affidavit must be treated as part of the petition and the petition must, therefore, be regarded as having been duly verified. L ASHRAF ALI *v.* RAMESHWAR NATH, (1923) A. I. R. (L.) 684 908

——— O. XXXIV, r. 6—*Mortgage suit—Personal decree passed erroneously—Failure to object, effect of.*

Where a Court in execution of a decree for sale passed in a mortgage-suit erroneously passes a personal decree under O. XXXIV, r. 6 of the Civil Procedure Code, and the judgment-debtor neither objects to the decree nor appeals against it, he or anyone who stands in his shoes, cannot subsequently go behind the decree and challenge it. A. TEJA *v.* TIKA RAM, 21 A. L. J. 754; 46 A. 32 37

——— O. XXXIV, r. 7—*Redemption, suit for—Usufructuary mortgage—Decree, form of—Accounts.*

Under O. XXXIV, r. 7, of the Code of Civil Procedure it is open to the Court either to order that an account shall be taken of what will be due to the defendant for the principal and interest due on the mortgage, and for his costs of the suit, if any, or to declare the amount due at the date of such order; but in either case the Court should proceed to ascertain the amount which would be found due on the date which is to be fixed for payment and specify what the consequence of the payment of that amount or the non-payment thereof would be. If it merely directs that an account should be taken of what

would be due to the mortgagee for the principal and interest due on the mortgage, its order would be nothing more than an interlocutory order, to be followed by the making up of such an account, till which the preparation of the preliminary decree should be postponed. O MOHKAM SINGH *v.* THAKUR CHANDRA, 10 O. L. J. 374; (1924) A. I. R. (O.) 140 346

——— O. XXXIX, r. 1—*Suit, dismissal of, for default—Injunction, whether can be granted—Jurisdiction.*

A Court has no jurisdiction to grant a temporary injunction relating to a suit which has been dismissed for default, but for the restoration of which an application is pending. O RAM SARUP *v.* EMPEROR, 25 Cr. L. J. 350 238

——— O. XXXIX, r. 6, O. XLI, r. 6—*Attachment in execution—Suit for declaration—Dismissal—Appeal—Stay of sale—Injunction.*

Where the suit of a person for declaration of title to property attached in execution of a decree between third parties is dismissed and he prefers an appeal, he cannot ask for stay of sale under O. XLI, r. 6 of the Civil Procedure Code as that provision is applicable only where the appeal is pending against the decree which is to be executed. Such a person can, however, take action under O. XXXIX of the Code and pray for a temporary injunction. L. MOLAR *v.* KANAHAYA LAL, 4 L. L. J. 188; (1922) A. I. R. (L.) 58 116

——— O. XL, r. 1—*Receiver, appointment or removal of—Discretion, mode of exercising—"Just and convenient," meaning of—Receiver, who should be appointed.*

The appointment as well as the removal of a Receiver is a matter which rests in the sound discretion of the Court. In exercising its discretion, the Court should proceed with caution and be governed by a view of the whole circumstances of the case. A Receiver should not be appointed in supersession of a *bona fide* possessor of the property in controversy, unless there is some substantial ground for interference.

The words "just and convenient" in O. XL, r. 1 of the Civil Procedure Code, mean that the Court should appoint a Receiver for the protection of the property or the prevention of injury according to legal principles, and not that the Court can make such appointment because it thinks convenient to do so. They confer no arbitrary and non-regulated discretion on the Court.

The Receiver appointed in an action should as a general rule be a person wholly disinterested in the subject-matter. But it is competent to the Court upon the consent of the parties, and in a proper case, without such consent, to appoint as Receiver a person who is mixed up in the subject-matter of the litigation if it is satisfied that the appointment will be attended with benefit to the estate. C BHUPENDRA NATH MUKERJEE *v.* MONOHAR MUKHERJEE, 28 C. W. N. 86 783

——— O. XLI, r. 1—*Appeal—Decrees, separate—Appeal, second—Decree in one appeal, copy of, not filed, effect of*—Res judicata,

Civil Procedure Code—1908—contd.

Plaintiff sued to recover a certain share in two houses from defendant No. 15 and her alience defendant No. 2. The suits were decreed by the Trial Court and separate appeals were preferred by defendant No. 1 and defendant No. 2, which were accepted by one judgment written in the appeal preferred by defendant No. 1. Separate decrees were, however, drawn up. Plaintiff preferred a second appeal and only filed copies of the judgment and decree in the appeal of defendant No. 1 along with his Memorandum of Appeal:

Held, (1) that the copy of the decree of the lower Appellate Court in the appeal preferred by defendant No. 2 not having been filed along with the Memorandum of Appeal, there was no appeal against that decree and the decree had consequently become final;

(2) that the matter in dispute having become *res judicata* between plaintiff and defendant No. 2 who claimed under defendant No. 1, plaintiff's appeal against defendant No. 1 could not proceed. L MUHAMMAD DIN *v.* ZEB-UN-NISSA, 3 L. 215] (1922) A. I. R. (L.) 390 541

——— **O. XLI, r. 1**—*Memorandum of appeal, contents of—Plea dealing with several issues, propriety of.*

Each plea in a memorandum of appeal should raise a specific issue. A composite plea dealing with several issues is open to serious objection, and a memorandum of appeal containing such a plea is liable to be returned for amendment. O BANKE LAL *v.* KANHAIYA LAL, 9 O. L. J. 637 839

——— **O. XLI, r. 6**—Stay of sale. *See* CIVIL PROCEDURE CODE, 1908, O. XXXIX, r. 6 116

——— **O. XLI, r. 22**—*Mortgage—Redemption suit—Accounts, method of—Appeal—Respondent whether can object to method agreed to by him—Estoppel.*

Plaintiff mortgaged with possession certain properties by two deeds of mortgage. Subsequently he executed three deeds of further charge one of which contained a provision for compound interest. In a suit for redemption the First Court disallowed compound interest and in the accounting which followed adopted the mode suggested by the plaintiff. In appeal the decision of the First Court was modified and compound interest was allowed. The plaintiff-respondent thereupon contended that a different method of accounting should be adopted:

Held, Per *Kanhaiya Lal, J. C*, and *Ashworth, A. J. C.* (*Daniels, A. J. C.* dissenting.):—(1) that as soon as the Appellate Court set aside the decision of the First Court, in favour of a decision to award compound interest, the decision of the lower Court as to the method of accounting became adverse to the respondent and he could rely on O. XLI, r. 22, Civil Procedure Code, and claim to have the method of accounting adopted by the lower Court set aside;

(2) that whether the respondent could or could not claim a reversal of the method of accounting adopted by the lower Court, it was

Civil Procedure Code—1908—concld.

open to the Appellate Court to reverse the method as soon as it upset the decision of the Trial Court as to the nature of the interest to be allowed.

There can be no estoppel in a matter of right accounting or true construction. A covenant by which a mortgagor binds himself to pay the mortgage-money out of his own pocket is a covenant of a non-essential nature and cannot be pleaded in bar of a set-off. O SARSUTI PRASAD *v.* EHTISHAM ALI, 25 O. C. 349] (1923) A. I. R. (O.) 123 310

——— **O. XLI, r. 27**—*Oaths Act (X of 1873), s. 5—Appellant willing to take oath—Additional evidence—Failure to record reasons—Irregularity—Proceedings, whether vitiated.*

A suit to recover a debt was dismissed in the Trial Court. On appeal the first Appellate Court after hearing arguments, called upon the Counsel for both parties to produce their clients on a certain day if possible so as "to enable it to confront one with the other and to put questions to them upon the facts material to the case." The plaintiff came to the Court but not the other party and the Court asked him if he could state by the Quran if his case was true. The appellant said that he could do so. After this, the appellant eventually got a decree. The defendant appealed to the High Court:

Held, (1) that if the answer to the question put by the first Appellate Court was to be taken as additional evidence then the proceedings were irregular under O. XLI, r. 27, Civil Procedure Code, as the Court had failed to record reasons for the admission of the evidence;

(2) that if the answer was not to be regarded as additional evidence in view of the fact that the appellant was not actually called upon to take his oath upon the Quran, then the position was even worse for it was impossible to say that the answer given could have had no effect on the mind of the Judge;

(3) that, therefore, it could not be said that the irregularity was not such as to vitiate the proceedings. C AFSARKHAN *v.* SHABU MONDAL, (1922) A. I. R. (C.) 148 556

——— **O. XLI, r. 27**—*Commissioner to revise report of previous Commissioner—Additional evidence when can be admitted.*

Where an Appellate Court is unable to decide an appeal on the record as it stands, it is justified in passing an order for the production of additional evidence under r. 27 of O. XLI of the Civil Procedure Code.

Where mistakes and omissions are discovered in the report of a Commissioner appointed to examine accounts, an Appellate Court has power to direct another commissioner to examine the accounts and to remedy the mistakes and omissions of the previous Commissioner. Such an order does not amount to the production of additional evidence under r. 27 of O. XLI of the Civil Procedure Code. L RAM PIARI *v.* SULTAN BAKHSH, 3 L. 382; (1923) A. I. R. (L.) 115 207

——— **O. XLI, r. 33**. *See* LIMITATION ACT, 1908, SCH. I, ART. 182 357

Claim proceeding—*Notice to judgment-debtor, absence of*—*Judgment-debtor, whether bound by order.*

Where a judgment-debtor has no notice of any claim made by a third person to property attached in execution of the decree, he is not adversely affected by any order passed on the claim. A JETHU MISIR *v.* GODAWARI DUTT, 20 A. L. J. 619 (1922) A. I. R. (A.) 411 107

Co-mortgagor, redemption by. *See* LIMITATION ACT, 1908, SCH. I, ARTS. 144, 148 113

Companies Act (VII of 1913), ss. 186, 234—*Contract Act (IX of 1872), s. 43*—*Company in liquidation*—*Compromise between Liquidator and contributory, whether binding on Company*—*Procedure*—*Debt due to Company by firm*—*One partner contributory*—*Debt whether can be recovered summarily.*

A compromise between the Liquidator of a Company in liquidation and a contributory of the Company is not binding upon the Company until it is sanctioned by an extraordinary resolution of the Company, as provided by section 234 of the Companies Act.

When a debt is due to a Company by a firm one of the partners in which is settled as a contributory of the Company, the Liquidator of the Company can call upon the contributory under section 180 of the Companies Act to liquidate the whole debt. The principle contained in section 43 of the Contract Act is applicable to such a case. L LIQUIDATOR, UNION BANK OF INDIA *v.* GOBIND SINGH, 4 L. 239; (1924) A. I. R. (L.) 148 338

——— s. 282—*False declaration*—*Company promoters, duties and liabilities of.*

Accused sent a prospectus and a memorandum and articles of association of a proposed Company to the Registrar, Joint Stock Companies, and from those documents it appeared that five persons had consented to become Directors of the Company and had undertaken to take up a certain number of shares. Three of them carried out the undertaking but the remaining two did nothing towards fulfilling it. The accused then filed a declaration with the Registrar stating that every Director had paid to the Company the sum necessary to be paid on the number of shares agreed to be taken by them.

Held, that the accused was guilty of an offence under section 282 of the Companies Act, and it was no defence to urge that in law the two Directors who had failed to carry out their undertaking had ceased to be Directors and that, therefore, the declaration filed by the accused could not refer to them.

It is of the utmost importance that in a country like India, where every body hopes that there will be a very great extension of industrial prosperity, and that industrial prosperity probably conducted along the lines of Limited Companies, that the persons who embark on Company flotation, and who assume offices of responsibility, should understand that they have got to carry out their duties not only carefully but honestly. A S. M. BOSE *v.* EMPEROR, 22 A. L. J. 83; 46 A. 218; 25 Cr. L. J. 474 826

Construction of decree. *See* SPECIFIC RELIEF ACT, 1877, S. 41 776

Construction of deed—*Adoption*—*Recital that adopted son shall be owner of property, effect of*—*Hindu Law*—*Adoption*—*Execution of deed, whether sufficient.*

In 1912 one *B* executed what purported to be an adoption deed which recited that *B* had adopted the defendant in 1898. The deed went on to say that the defendant was the full owner of *B*'s moveable and immoveable property. It was found that as a matter of fact defendant had never been adopted by *B*;

Held, that the recital in the deed that defendant was the owner of *B*'s property merely expressed *B*'s idea of the result which followed from defendant's antecedent adoption and did not operate to convey *B*'s property to the defendant.

Even in communities where an orphan adoption is recognised as valid, such an adoption cannot be effected by the mere execution of a deed. B SHIDAPPA *v.* SANTAWA, (1923) A. I. R. (B.) 302 477

——— *Lease*—*Boundary, description of*—*Reference to map*—*Inaccuracy*—*False description.*

As soon as there is an adequate and sufficient definition, with convenient certainty, of what is intended to pass by a deed, any subsequent erroneous addition will not vitiate it.

Leases of contiguous portions of a *mahal* were granted to the plaintiff and defendant and in each lease the boundary line was described as shown in the settlement map. In the map a *gopath* was depicted where the boundary line was shown. On the spot the *gopath* was further away towards the plaintiff's portion from the boundary line:

Held, that the mistake in the map with regard to the position of the *gopath* was merely a false description and the parties were bound by the boundary line as shown in the map. C DARAPALI SADAGAR *v.* NAJIR AHMED, 50 C. 394; (1923) A. I. R. (C.) 669 1030

——— *Sale of house property*—*Courtyard, common, user of*—*Intention of parties*—*Nuisance*—*Injunction, when to be granted.*

Defendant was the owner of four houses out of which he sold three to the plaintiff. The sale-deed contained the following clause:—"There is an open *chowk* belonging to these three houses and in front of the door of my other house. All may use the said *chowk* according to the limits of their respective houses, and the inmates of all the four houses have the right of egress and ingress through the main Khadki door:

Held, that the clause relating to the *chowk* did not mean that the *chowk* was to be in the exclusive ownerships and possession of the plaintiff, that it was intended to be used by the occupants of all four houses, but that no particular owner was to be entitled to use the *chowk* more than would be reasonable according to the proportion of the whole property which he actually occupied.

A Court ought not to grant an injunction on the ground of nuisance, unless the particular nuisance complained of is proved. B SHA BULAKHIDAS *v.* SHAH GANPATRAM, (1923) A. I. R. (B.) 281 412

Construction of document—Sale or mortgage. *See* EVIDENCE ACT, 1872, s. 92, applicability of 342

——— Sale or mortgage. *See* TRANSFER OF PROPERTY ACT, 1882, s. 58 (*a*) (*c*) 572

——— *Agreement to pay pension—Direction to executors to comply with terms of agreement, effect of—Contract, whether created.*

A Hindu widow who was holding an impartible estate for life under the Will of her husband appointed the plaintiff manager of the estate under an agreement which provided that on resigning his post the plaintiff would get a certain monthly pension for life. The agreement wound up with the words "The heirs and representatives of me, the executant, and the holders and administrators of the estate should fully comply with the terms of this deed":

Held, that the concluding words of the agreement were a mere recommendation and did not amount to a contract binding either on the executor or administrator of the executant or on the owner or administrator of the estate to pay the pension. **P C** KESHO PRASAD SINGH *v.* SIV SARAN LAL, 30 M. L. T. 501; 15 L. W. 589; 26 C. W. N. 689; (1922) A. I. R. (P. C.) 226 54

——— *Lease—Description by boundaries—Erroneous statement as to area, effect of—Landlord and tenant—Dispute about boundaries of demised land—Tenant whether may rely on landlord's transaction with third party.*

Where a deed contains an adequate and sufficient definition of the property which it was intended to pass, any erroneous statement in it as to the dimensions or quantity of the property will not vitiate the description.

When the operative part of a lease does not give the area of the land demised but gives the boundaries only, although in the schedule attached to the document the area of the demised land is mentioned by guess, there is one description of the land demised and only one and that is the description by the boundaries.

In an ordinary action between a landlord and the tenant, it is not open to the latter to rely upon a subsequent transaction between his lessor and a third party and raise a defence which would have the effect of imperilling the identity of the boundaries of the demised land which it was his clear duty to preserve. **Pat** LINTON MOLESWORTH & Co. *v.* JAGGANNATH SUPAKARI; 1 P. L. R. 377; (1924) A. I. R. (Pat.) 226 403

——— *Lease of jungle land by Government—Clearing land for cultivation, meaning of—Non-compliance with condition—Forfeiture.*

Government granted a lease of a tract of jungle land to the plaintiff. One of the clauses of the lease provided that one-eighth of the entire area leased must be cleared and in a fit state for cultivation at the end of the fifth year, and that at any time thereafter an officer of Government might enter on the land and cause it to be measured for the purpose of ascertaining whether the condition had been fulfilled. In the event of failure to comply with the condition the lessee was liable to the forfeiture of all rights in the land under the lease. After the expiry of the period of five years an officer of Government proceeded to the spot and after an inspection of the land but without taking measurements, made a report that the condition had not been fulfilled. The lease was thereupon determined:

Construction of document—contd.

Held, (1) that the obligation in the lease to clear the land and to put it into a fit state for cultivation, extended to the extraction of the stumps of trees as well as to the cutting down of the timber;

(2) that the lease did not impose an obligation on the Government to take measurements, there was a right to do so but no duty;

(3) that the forfeiture was not invalid merely for the reason that the officer who made the report did not take measurements, especially in the absence of positive evidence showing that the condition had been complied with. **P C** NABA KUMAR DAS *v.* RUDRA NARAYAN JANA, (1923) A. I. R. (P. C.) 95; (1923) M. W. N. 622; 45 M. L. J. 438; 33 M. L. T. 309; 28 C. W. N. 589 141

——— *Settlement deed—Gift to person and his male heirs—Estate conferred—Maintenance clause, effect of—Estate unknown to law, whether can be created.*

A Parsi widow executed a deed of settlement by which she settled certain properties upon trustees for her benefit for her life, then for her son, Rustomji, for his life and then for Rustomji's sons and their male heirs absolutely and in equal proportions as tenants-in-common. One of the clauses of the deed was as follows:

"Provided . . . that from and after the decease of the said Rustomji if the sons or son shall be Rustomji or the heirs male of any of them shall be under the age of eighteen years then it shall be lawful for the trustees . . during every such minority to receive the rents . . of the . . hereditaments and premises . . or *the share* or shares therein respectively to which such infant son or sons or his or *their male heirs shall be so entitled as aforesaid* and to pay and apply the same or . . . part thereof . . for . . . . the maintenance and education of the person aforesaid for the time under the age of eighteen years":

Held, (1) that the words "and their male heirs," did not import any limitation on the estate given to the sons of Rustomji;

(2) that the maintenance clause did not in any way curtail the estate given to the sons of Rustomji;

(3) that, therefore, the estate given to the sons of Rustomji under the deed was absolute and not limited.

A gift to a man and his male heirs is an attempt to create an estate unknown to Indian law, and such a gift must be construed as conferring an absolute estate on the donee.

Estates tail or in tail male are unknown to Indian Law.

Novel estates unknown to the law of India can no more be introduced into Bombay by Parsi settlors than they can be by Englishmen or Hindus. **B** DADABHOY FRAMJEE CAMA *v.* GOWASJI DORABJI PANDAY, 47 B. 349: 24 Bom. L. R. 1111; (1923) A. I. R. (B.) 177 83

——— *Transfer of under-proprietary rights—Perpetual lease or sale—Pre-emption.*

Construction of document—concld.

An under-proprietor transferred his under-proprietary rights in a village by a document described as a deed of perpetual lease. Under the terms of the deed the lessee was given heritable and transferable rights. The rent was fixed at Rs. 53 per annum, out of which Rs. 52 were payable to the superior proprietor. The premium paid by the lessee was Rs. 5,000. Provision was made for the recovery of Re. 1 reserved for himself by the lessor but the lessee was in no case to be ejected from the property. There was nothing to show that the parties had really agreed upon a sale or that the agreement as to the payment of Re. 1 per annum to the lessor was fictitious:

Held, that the transfer was a lease and not a sale so as to give rise to a right of pre-emption. O RAMNARAIN SINGH *v.* RAM SUKH, 9 O. & A. L. R. 625; 10 O. L. J. 399 79

Contempt of Court—*Apology, whether sufficient satisfaction—Repetition.*

The publication of an apology is not necessarily a sufficient satisfaction for a contempt of Court which has been committed.

An apology does not remedy the evil caused by publication of the objectionable matter, and while it may, to some extent, be a reparation on the part of the offender, it becomes little more than an idle form when the publication is due to a repetition of negligence which has been condoned in the past. B EMPEROR *v.* MARMADUKE PICKTHALL, (1923) A. I. R. (B.) 242; 25 Cr. L. J. 388 436

Contract, repudiation of. *See* SPECIFIC RELIEF ACT, 1877, ss. 12, 22 275

———, *for sale of sovereigns, legality of.*

A contract for the sale of sovereigns at market price is legal. O BANKE LAL *v.* KANHAIYA LAL, 9 O. L. J. 637 839

Contract Act (IX of 1872), s. 16—*Unconscionable bargain, what is.*

A bargain is unconscionable within the meaning of section 16 of the Contract Act, when it is such that no man in his senses and not under delusion would make on the one hand and no honest and fair man would accept on the other. N GANPATRAO *v.* LAXMICHAND, 6 N. L. J. 239; (1924) A. I. R. (N.) 1 640

——— **s. 16, ill. (c)**—*Undue influence—Burden of proof—Creditor and debtor, relationship of.*

The burden of proving that the rate of interest stipulated for in a mortgage-deed was agreed to by the mortgagor under undue influence lies on the mortgagor or his representatives, and the burden is not shifted on to the mortgagee by proof of the fact that at the time of the execution of the mortgage-deed the mortgagor was indebted to the mortgagee in a small sum. O RAZA HUSAIN KNAN *v.* GANESH PRASAD, 10 O. L. J. 300; (1924) A. I. R. (O.) 118 383

——— **s. 22**—*Compromise—Mistake of fact—Substantial injustice.*

A compromise arrived at by the parties to a suit under a mistake of fact by one of them cannot be set aside unless serious and substantial injustice is shown to result therefrom. P C JAMNABAI *v.* FAZALBHOY HEPTOOLA, (1923) A. I. R. (P. C.) 184; 18 L. W. 437; 46 M. L. J. 160; 26 Bom. L. R. 189 355

Contract Act—contd.

——— **s. 23**. *See* TRANSFER OF PROPERTY ACT, 1882, s. 6 (*a*) 109

——— **s. 23**—*Agreement to supply funds for litigation in return for share in property, whether opposed to public policy.*

A fair agreement to supply funds to carry on a suit in consideration of having a share of the property in dispute, if recovered, ought not to be regarded as being *per se* opposed to public policy. Agreements of this character must, however, be carefully scrutinised and should not be tolerated if their motive is improper or if the immediate object is merely to promote gambling in litigation. S BEGRAJ *v.* ALISHER, (1923) A. I. R. (S.) 50; 16 S. L. R. 278 897

——— **s. 23**—*Public policy, agreement opposed to—Champertous agreement, validity of—Test—Compensation.*

While the specific English Law of maintenance and champerty has not been introduced into India and while fair agreements to supply funds to carry on litigation in consideration of having a share of the property if recovered should not be regarded as *per se* opposed to public policy, yet such agreements should be carefully watched, and if extortionate and unconscionable, or made not with the *bona fide* object of assisting, for a reasonable recompense, a claim believed to be just, but for the purpose of gambling in litigation or of injuring or oppressing others by encouraging unrighteous suits, should be held contrary to public policy, and not enforced. At the same time, reasonable compensation for the expenses properly incurred by the financier and for work done may be awarded.

One of the tests to be applied in determining whether such a contract ought or ought not to be enforced is the comparison between the liability which the financier incurs under the contract and the amount of the award which he is to obtain in the event of the defendant's success. R UPE GYI *v.* MAUNG THEIN SHIN, 1 R. 565; (1924) A. I. R. (R.) 48; 2 Bur. L. J. 177 372

——— **s. 23**—*Stifling prosecution of non-compoundable offence—Pro-note executed by accused—Debt otherwise due—Consideration, whether unlawful.*

Defendant who was indebted to the plaintiff passed a *hundi* to the latter which was dishonoured. The plaintiff, who believed the *hundi* not to be genuine, instituted a prosecution against the defendant for forgery. Pending prosecution the parties came to terms and the defendant executed a pro-note, on the plaintiff promising to withdraw the prosecution:

Held, that the stifling of a criminal prosecution for a non-compoundable offence was the object of the execution of the pro-note and that the fact that the debt was otherwise due was no answer to the consideration being void. O BHOLA NATH *v.* RASOOL BAKSH, 9 O. & A. L. R. 631; 26 O. C. 378 78

Contract Act—contd.

——— s. 23—*Two documents—One transaction—One document illegal—Illegality whether affects both documents.*

If two documents are part and parcel of one single transaction and one of them is tainted with illegality, the other is also tainted with the same illegality and is void. N. KASHIRAM *v.* BARKYA, 7 N. L. J. 13 46

——— s. 37. *See* VENDOR AND PURCHASER 378

——— s. 43. *See* COMPANIES ACT, 1913, SS. 186, 234 338

——— s. 43—*Joint tenants—Liability, nature of—Heirs, position of.*

As the liability of joint tenants is both joint and several, in view of the provisions of section 43 of the Contract Act, a suit for rent can be maintained against any or some of the joint tenants, the original contracting parties. Similarly, (assuming the liability of the heirs of each tenant to be a joint one), the whole rent can be recovered from *all* the heirs of any one of the original joint tenants, and there is no reason why on the death of all original joint tenants, the liability to pay the rent should devolve upon *all* their heirs (taken together) jointly:

Quaere.—Whether upon the death of the only tenant or one or more original joint tenants, a suit for rent can be maintained against some only of his or their heirs. C MOHENDRANATH BOSE *v.* ABINASH CHANDRA BOSE, 27 C. W. N. 521; (1923) A. I. R. (C.) 615 364

——— s. 51—*Contract for sale of immoveable property—Purchaser, when bound to tender purchase-money.*

The strict law as to tender is not applicable to a suit for specific performance.

Tribhuvandas Varjivandas v. *Balmukundas Kishoredas*, 67 Ind. Cas. 865; (1923) A. I. R (B.) 15; 24 Bom. L. R, 434, relied on.

A purchaser is not bound to tender the purchase-money unless the vendor is ready and willing to perform his part of the promise. S BEGRAJ *v.* ALISHER, (1923) A. I. R. (S.) 50; 16 S. L. R. 278 897

——— ss. 51, 52—*Performance of contract—Reciprocal promise, breach of—Liability of party in default—Railway agreeing to give delivery after weighment—Failure to weigh, effect of.*

Plaintiff consigned a certain quantity of coal to the defendant Company for carriage to a certain station. On arrival at destination the consignee suspected that there was a considerable shortage in the quantity of coal consigned and he refused to take delivery without weighment. The defendant Company agreed to do this, but failed to carry out the agreement. The consignee refused to take delivery, and the plaintiff thereupon sued the defendant Company for the price of the coal:

Held, that although the defendant Company was not ordinarily bound to give delivery after weighment, they had agreed to do so in this case and having failed to carry out their agreement they were liable to the plaintiff irrespective of the terms of any Risk Note that the plaintiff may have signed. Pat EAST INDIAN RAILWAY COMPANY *v.* NADIA COAL COMPANY, 1 P. L. R. 336; (1924) A. I. R. (Pat.) 39 280

——— s. 61—*Mortgage—Appropriation of surplus profits—Construction of deed of further charge—Covenant to redeem along with earlier deeds, effect of—Covenant to pay interest out of pocket, effect of.*

Per *Kanhaiya Lal, J. C.*—Where there are successive mortgages, the later ones qualifying or restricting the terms and conditions entered in the preceding ones, the rights of the parties must be governed, so far as may be, by the covenants as they ultimately stand.

A covenant in a deed of mortgage of further charge postponing the payment of earlier deeds till the last deed is paid does not prevent the payment of the latter, after it falls due, before the earlier deeds are paid.

Per *Ashworth, A. J. C.*—Where mortgaged property is made subject to a further charge, surplus profits in the hands of the mortgagee should, in the absence of any express agreement to the contrary, be used to liquidate the interest on the further charge in preference to liquidating other deeds which have no connection with the property.

Notwithstanding anything contained in section 61 of the Contract Act, in the absence of appropriation, payments of surpluses should be appropriated to interest before they are appropriated to principal on any particular debt.

In many cases where it is provided that a deed of further charge shall be paid up along with an earlier deed the meaning is nothing more than that it shall not be paid up before. O SARSUTI PRASAD *v.* EHTISHAM ALI, 25 O. C. 349; (1923) A. I. R. (O.) 123 310

——— s. 69—*"Interested," meaning of—Person benefiting by payment, duty of.*

Where a proprietor in good faith pending litigation makes necessary payments for the preservation of the estate in dispute, and the estate is afterwards adjudged to his opponent, he is entitled to be recouped what he has so paid by the person who benefits ultimately by the payment, if he has failed through no fault of his own to reimburse himself out of the rents.

The word "interested" in section 69 of the Contract Act ought not to be construed narrowly as meaning a person with a real interest. If *bona fide* one believes that he has an interest in property and not only as a pretext for having a claim against those who are bound to make the payment, there is no reason why the law should not compel the person ultimately benefiting by the payment to return the money to the payer. Pat DULHIN SONA KUER *v.* BIBI ALE FATIMA 157

——— ss. 69, 70—*Tenure, sale of—Payment of rent-decrees by purchaser—Amount, whether can be recovered from tenant.*

The purchaser of a tenure purchases the property with the incumbrance of rent due from

the original tenant with respect to the tenure in question at the date of his purchase, the rent being the first charge on the property. He must be deemed to have knowledge of the prior incumbrances and the existence of an incumbrance must have affected the price which he offered at the auction-sale. The liability to pay the rent for a period previous to the purchase is, therefore, that of the purchaser, and in discharging the rent charges or in paying off rent-decrees, he simply discharges his own liability and not that of the original tenant, and has no right to recover the payments made by him from the original tenant. Sections 69 and 70 of the Contract Act have no applicability to such a case. **Pat** RANG LAL SAHU *v.* KALI SHANKAR SAHAI, (1923) Pat. 353; 2 Pat. 890; (1924) A. I. R. (Pat.) 235 73

——— s. 74—*Penalty—Mortgage-deed—Covenant to pay enhanced interest whether penal—Compound interest—Construction of deed—Interest, enhanced, on default—Date from which enhanced rate payable.*

Where a mortgage-deed provides for the payment of an enhanced rate of interest in case of default, the parties must, in the absence of a specific provision to the contrary, be deemed to have intended that the enhanced rate would be chargeable from the date of default and not from the date of the deed.

Under section 74 of the Contract Act a stipulation for increased interest from the date of default may be a stipulation by way of penalty, but the circumstances of each case must be taken into consideration, for determining whether a particular covenant for payment of enhanced interest is excessive or unconscionable. If the covenant imposes a penalty which can be regarded as a reasonable compensation for the default there is no reason for granting any relief in mitigation of it.

An agreement to pay interest at an enhanced rate for the breach of a contract may not be extravagant or unconscionable, if the original rate of interest was fixed low in order to enable the debtor to pay interest regularly at the stipulated time.

A covenant to pay compound interest is not by itself penal. O KANDHI *v.* HUSSAIN BIBI, (1923) A. I. R. (O.) 158; 26 O. C. 352; 10 O. L. J. 611 768

——— s. 74—*Penalty — Mortgage — Interest—Rate to be reduced on punctual payment.*

In order to avoid the consequences laid down in section 74 of the Contract Act all that a mortgagee need do is to reserve the higher rate as payable under the mortgage and to provide for its reduction in case of punctual payments. L FITZ-HOLMES *v.* BANK OF UPPER INDIA, (1923) A. I. R. (L.) 548; 4 L. 258; 5 L. L. J. 438 523

——— ss. 73 Expl., 190—*Principal and agent—Factor for sale of goods abroad—Sub-agent, whether can be appointed—Implementing of contracts, whether permissible—Lien of agent on moneys of principal for expenses incurred.*

Plaintiffs made forward contracts to supply a certain quantity of wolfram to defendants which the latter arranged to sell in England through their agents, the latter in their turn contracting to sell in their own name. Plaintiffs failed to supply the full quantity agreed to be supplied by them, and the defendants' agents in England being pressed by their purchasers carried out the contracts by supplying wolfram received from other sources and charged the defendants for the cost thereof. In a suit by the plaintiffs to recover from the defendants the price of wolfram supplied the latter claimed to deduct for the moneys in their hands the expenses properly incurred by them in carrying out the contracts in England through their agents:

Held, (1) that the defendants were the factors as well as the agents of the plaintiffs;

(2) that under section 190 of the Contract Act, the defendants had authority to employ sub-agents in England to sell the ore;

(3) that plaintiffs having failed to supply the full quantity of the ore, the defendants and their sub-agents were entitled to implement the contracts entered into by them in England, provided that they acted reasonably and prudently and in mitigation of damages;

(4) that the defendants were entitled to retain moneys of the plaintiffs which were in their hands for expenses properly incurred in implementing the contracts.

The explanation to section 73 of the Contract Act shows that the implementing of contracts is recognised by the Act and that it is a part of the law in the case of unfulfilled contracts. L B LEIDOAK SYNDICATE *v.* FINLAY FLEMING & CO., 11 L. B. R. 326; (1923) A. I. R. (R.) 84 920

——— ss. 78, 114—*Contract for sale of motor car—Instalments — Property, when passes—Intention of parties—Warranty, implied, breach of—Damages.*

A seller of a motor car impliedly contracts to sell a car that is reasonably fit for use as a motor car.

Jones v. *Just*, (1868) 3 Q. B. D. 197; 9 B. & S. 141; 37 L. J. Q. B. 89; 18 L. T. 208; 16 W. R. 643, distinguished.

Priest v. *Last*, (1903) 2 K. B. 148; 72 L. J. K. B. 657; 89 L. T. 33; 51 W. R. 678; 19 T. L. R. 527, relied on.

A contract for the sale of a motor car on instalments contained the conditions that the buyer would pay instalments punctually; that after delivery of the car the seller had a right to enter upon the premises where the car was and inspect the car; that the purchaser was not to dispose of the car before the full price was paid; that the purchaser was to insure the car and assign the policy to the seller; that in default of observance by the buyer of any of the conditions aforesaid the seller had the right to determine the contract and to seize and take possession of the car:

Held, (1) that the intention of the parties as expressed in the conditions was that property in the car should not pass until full price had been paid, and that that intention must prevail in spite of section 78 of the Contract Act;

Contract Act—concld.

Brij Coomaree v. *Saiamandar Fire Insurance Company*, 32 C. 816, dissented from.

(2) that there was an implied warranty that the car was fit for use as a motor car;

(3) that the buyer was entitled to recover damages on proof of breach of the implied warranty. B HURBUT JOHN AMIES *v.* JAL P. VIRJI, 25 Bom. L. R. 778; (1924) A. I. R. (B.) 41 150

——— s. 151—*Partnership—Partner, money borrowed by—Firm, whether liable—Trading firm, waht is—Buying and selling of goods.*

Any partner in a trading firm has an implied authority to borrow money for the purposes of the business on the credit of the firm, and no duty is cast on the person advancing the money to make any enquiries, and the other partners are liable though the borrowing partner may misappropriate the money.

A firm would be a trading firm within the meaning of the above rule if its business consists in buying and selling. A partnership for the purpose of buying and selling copper and brass utensils is of a commercial nature, and every partner in such a firm has implied authority to borrow money on behalf of the firm for the business of the firm.

In the case of a partnership, however, where the business of the firm does not include the buying and selling of goods, no partner can borrow money or pledge the partnership property so as to bind his co-partners. B SAREMAL PUNAMCHAND *v.* KAPURCHAND RUNAMCHAND, 25 Bom. L. R. 1093; 48 B. 176 548

——— ss. 239, 253—*Income Tax Act (VII of 1918), s. 12 (1)—Super Tax Act (XIX of 1920), s. 3—Agreement to become partners, effect of—Rules determining partners' mutual relations, when apply—Sole owner of business taking wife as partner—Agreement fixing wife's rights and liabilities—Business whether a firm.*

A, the sole owner of a business, admitted his wife *S* as a partner in the business by means of an agreement which provided that he shall pay her one anna in the rupee out of income of the commission but that nothing therein contained shall in any way limit, restrict or interfere with his right to forego the whole or any part of the commission or to admit other people as partners and that *S* shall have the right to take one or more partners on the death of *A*;

Held, (1) that the document was sufficient to constitute a partnership between the two executants;

(2) that by virtue of the agreement the business was constituted a firm within the meaning of section 12 (1) of the Income Tax Act, read with section 3 of the Super Tax Act.

Per *Shah, A. C, J.*—When the parties agree to become partners it is not necessary to state in terms that they agree to combine property, labour or skill.

Per *Crump, J.*—The rules laid down in section 253 of the Contract Act have no application when there is a contract to the contrary. B *In re* AMBALAI SARABHAI, 25 Bom. L. R. 1225; (1924) A. I. R. (B.) 182 699

Conversion—*Property whether passes—Judgment for value of property converted, effect of—Set-off—Insolvency—Proof of claim in insolvency, effect of.*

Plaintiff, who was the owner of a ring of the value of Rs. 1,000, lent it to the first defendant. Plaintiff was liable to first defendant on a pronote for Rs. 2,500 and first defendant was liable to plaintiff in a sum of Rs. 2,072-8-0 in respect of another transaction. Plaintiff presented an insolvency petition against first defendant alleging that the latter was indebted to him in all in a sum of Rs. 3,072-8-0 including the value of the ring which first defendant was stated to have refused to return and that after giving credit for Rs. 2,500 payable by the plaintiff there was a sum of Rs. 572-8-0 due by first defendant. Three days after the presentation of the insolvency petition, first defendant pledged the ring with second defendant who took it without any notice of the plaintiff's claim. First defendant was, on plaintiff's petition, adjudicated an insolvent and in the bankruptcy proceedings plaintiff's proof for the debt of Rs. 572-8-0 was admitted. Subsequently plaintiff discovered that the ring was in possession of the second defendant, and sued the latter for its recovery;

Held, (1) that the adjudication of the first defendant as an insolvent must be looked upon as a judgment for the conversion of the ring by failure to deliver it up on demand;

(2) that the title to the ring, however, remained with the plaintiff and did not pass to first defendant;

(3) that the plaintiff by alleging that the first defendant owed him Rs. 1,000 as a liquidated amount and setting about half that amount against a debt due from him to the insolvent and then using the balance as a liquidated claim to support his insolvency petition had definitely elected to abandon all right to the ring in favour of the first defendant and limiting his remedy to proof in insolvency proceedings;

(4) that even if first defendant had no title to the ring on the date of the pledge in favour of second defendant he got one on the date of adjudication on the principle of feeding the estoppel or forwarding the title;

(5) that the plaintiff had no title to the ring and the *bona fide* pledge in favour of the second defendant was good and valid.

Whitehorn v. *Davison*, (1911) 1 K. B. 463; 80 L. J. K. B. 425; 104 L. T. 234 and *In re Debtor, Ex parte Petitioning Creditor*, (1907) 97 L. T. 140; 14 Manson 198; 23 T. L. R. 618, relied on.

Per *Schwabe, C. J.*—It is only in respect of liquidated demands that insolvency petitions can be presented by creditors. There is no principle on which a debtor can turn himself into a creditor for the purpose of presenting an insolvency petition by setting off the value of the property unlawfully detained or converted by his creditor against a liquidated claim by the creditor against him and so leave a balance due to him in respect of the dealings between them.

A judgment in conversion does not pass the property to the defendant unless and until it is satisfied.

Conversion—concld.

Nor does mere proof in bankruptcy amount to satisfaction so as to pass the property; and part satisfaction by execution or by receipt of dividend in bankruptcy has no higher legal effect;

But a plaintiff can after judgment elect to look only to his chance of obtaining satisfaction by execution or by proof in bankruptcy and give up his claim to the property. M SINNAM CHETTY *v.* ALAGIRI AIYER, 18 L. W. 545; 45 M. L. J. 516; 46 M. 852 580

Co-owners—*One co-owner dealing with property as sole owner—Registration of deed of alienation—Notice to other co-sharers.*

It is not necessary for one joint owner of property to constantly examine the registers with a view to satisfying himself that his co-owner is not holding himself out as the sole proprietor of the joint property.

The mere fact of the registration of a document by which one co-owner purports to deal with joint property as sole proprietor cannot be held to give the other co-owner notice of the former's dealing with the property. L ISHAR DAS *v.* FAZAL ILAHI, (1923) A. I. R. (L.) 522 516

Co-plaintiffs—*Separate Counsel.*

Per *Marten, J.*—Ordinarily co-plaintiffs cannot sever at the trial and must appear by the same Solicitors and Counsel.

The same person cannot be made a plaintiff and a defendant in one proceeding. B DADABHOY FRAMJEE CAMA *v.* COWASJI DORABJI PANDAY, 24 Bom. L. R. 1111; (1923) A. I. R. (B.) 177; 47 B. 349 83

Costs—*Costs awarded jointly against co-plaintiffs—Suit for contribution, whether maintainable.*

A suit for contribution lies in respect of costs awarded jointly against co-plaintiff and paid by some of them. O SIDH GOPAL *v.* BIHARI LAL, 26 O. C. 196; (1924) A. I. R. (O.) 48 749

——, *rule as to.*

Ordinarily costs should abide the result. L MUHAMMAD ASLAM *v.* JODH SINGH, (1923) A. I. R. (L.) 513 416

Court-fee—*Mortgage-suit—Interest pendente lite, award of—Appeal—Court-fee payable.*

Plaintiffs instituted a suit to enforce a mortgage and paid Court-fees on the principal sum plus interest at the bond rate up to the date of the suit. They also claimed interest *pendente lite* and future interest up to the date of realisation. Their suit was dismissed. They appealed and paid the same Court-fees on the memorandum of appeal as they had paid on the plaint. The Appellate Court decreed the suit and to the sum claimed in the plaint added a sum by way of interest at the bond rate from the date of suit up to the date of its decree. In second appeal:

Held, that the plaintiffs were bound to pay additional Court-fees on the amount of interest *pendente lite* awarded by the lower Appellate Court. Pat JAMUNA RAI *v.* RAMTAHALL RAUT, (1922) A. I. R. (Pat.) 387; 1 Pat. 19; 3 P. L. T. 790 1039

Court Fees Act (VII of 1870), s. 7 (v) (e), (x) (a)—*Suit for specific performance of contract of sale and for possession, nature of—Valuation—Court-fees payable.*

A suit to enforce specific performance of a contract to sell immoveable property by directing execution of a proper sale-deed in favour of the plaintiff on his paying the price into Court and for recovery of possession is a suit for specific performance falling under section 7 clause (*x*) (*a*) of the Court-Fees Act and not one for possession falling under clause *v* (*e*) of the said section, and Court-fee in such a suit is, therefore, payable on the amount of the consideration.

A suit for specific performance is, in its essence, different from a suit for possession and the mere fact that possession is also claimed in such a suit does not render it any the less a suit for specific performance. M SUNDARA RAMANUJAM NAIDU *v.* SIVALINGAM PILLAI, 18 L. W. 333; 45 M. L. J. 431; (1924) A. I. R. (M.) 360; 47 M. 150 542

——— s. 7 (v) (a), (d)—*Suit by ryot against another ryot for possession of land, valuation of—Court-fee payable—Procedure—Civil Procedure Code (Act V of 1908), O. VII, r. 10—Order directing return of plaint when to be made.*

Sub-clause (*a*) of clause (v) of section 7 of the Court-Fees Act applies only to a suit for a definite fractional share of an estate and not to a suit for a piece of land which forms a plot defined by metes and bounds and is included in an estate.

A suit by one *ryot* against another *ryot* for possession of a plot of land forming part of a *Zemindari* estate is governed by sub-clause (*d*) of clause (v) of section 7 of the Court-Fees Act.

A *Paimaish* Register is not the Collector's Register referred to in sub-clause (*a*) of clause (v) of section 7 of the Court-Fees Act.

Godavarthy Sundaramma v. *Godavarthy Mangamma*, 47 Ind. Cas. 543; 8 L. W. 88; 34 M. L. J. 558 *Chandan* v. *Bishen Singh*, 11 Ind. Cas. 816; 33 A. 630; 8 A. L. J. 798, followed.

Where a Court finds that a suit valued under clause (*a*) falls under clause (*d*) of section 7 (v) of the Court-Fees Act, it should call upon the plaintiff to state what the market value of the land is and after determining the market value should direct the plaintiff to pay the proper Court-fee on that valuation, and if he fails to make the payment within the time fixed, the Court must reject the plaint but if he makes the payment and if it is found that the valuation of the suit goes beyond the Court's jurisdiction, the Court should return the plaint for presentation to the proper Court. M KANDASWAMY GOUNDAN *v.* SUBBAI GOUNDAN, 46 M. L. J. 345; 34 M. L. T. 92; (1924) M. W. N. 338 781

——— s. 7 (ix)—*Mortgage suit—Interest, future—Appeal—Court-fee payable.*

When a mortgage suit is dismissed the plaintiff is entitled to value his appeal at the sum claimed in the plaint in respect of the principal and interest up to the date of filing the plaint and is not bound to value the future interest which he may claim from the date of the suit up to the date of realization, or to pay any Court-fee thereon. But if any

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future interest is determined by the Trial Court and is entered in the decree then the plaintiff, on appeal by the defendant, is bound to pay additional Court-fee on the sum of interest so added in the decree as having accrued from the date of the suit up to the date of the preparation of the decree in the lower Court. Again, if the plaintiff filing an appeal on the valuation stated by him in the lower Court, obtains a decree in the Appellate Court for a sum higher than that actually claimed by him in the lower Court, he is bound to pay Court-fee on such additional sum, and when future interest is added in the decree of the Appellate Court, he would not be able to execute his decree unless he pays Court-fee on the future interest. Pat KALI PRASAD SINGH *v.* MATHURA PRASAD SINGH (1923) A. I. R. (Pat.) 28; 1 P. L. R. 16; 3 P. L. T. 813 **1054**

——— **s. 7 (x) (a)**—*Suits Valuation Act (VII of 1887), ss. 8, 11—Specific performance of contract, suit for—Valuation for Court-fee and jurisdiction—Appeal—Objection to valuation, when can be urged.*

Under section 7 (x) (*a*) of the Court Fees Act a suit for the specific performance of a contract of sale must be valued for the purposes of Court-fee at the amount of the consideration and the valuation for the purposes of jurisdiction will be the same under section 8 of the Suits Valuation Act.

A plea as to the want of jurisdiction of the Trial Court based on the ground of undervaluation of the suit cannot, under section 11 of the Suits Valuation Act, be urged during arguments in an Appellate Court unless it has been raised in the grounds of appeal. O ASHFAQ HUSSAIN *v.* BUNYAD HUSSIAN, (1923) A. I. R. (O.) 252; 9. O. & A. L. R. 415 **874**

——— **s. 13, D. Sch. III**—*Hindu joint family—Father and sons—Death of father—Letters of Administration—Court-fees.*

No Court-fees are payable in respect of an application for the grant of Letters of Administration to the family property made by sons on the death of the father in a Hindu joint family consisting of the father and sons. B KESHAVLAL PUNJALAL *v.* COLLECTOR OF AHMEDABAD, 25 Bom. L. R. 1240; 48 B. 75, (1924) A. I. R. (B.) 228 **749**

——— **s. 19, cl. (xx), Sch. II, Art. 1**—*Application for refund of money deposited in Court—Court-fee, payment of.*

An application to the High Court, for the refund of money deposited by the applicant for the preparation of a paper-book in an appeal, should, under the provisions of Art. 1, Schedule II to the Court-Fees Act, bear a Court-fee of Rs. 2. Such an application does not come within the purview of section 19 (*xx*) of that Act, and is, therefore, not exempt from the payment of Court-fees. C HARIDASI DEBI *v.* GOPESHWAR PYNE, 27 C. W. N. 646; (1923) A. I. R. (C.) 599 **619**

Criminal Procedure Code (Act V of 1898), as amended by Criminal Procedure Code Amendment Act (VIII of 1923), ss. 4 (j), 266, 305, 307—*Judge of Judicial Commissioner's Court sitting in Sessions—Disagreement with Jury—Power to refer to High Court—Jurisdiction.*

Criminal Procedure Code—contd.

A Judge of the Court of the Judicial Commissioner of Sind sitting in Sessions has under section 307 of the Criminal Procedure Code no power to differ from the verdict of a Jury and refer a case to the Court sitting in its High Court jurisdiction.

The words "except in sections 376 and 307" in section 266, Criminal Procedure Code, do not extend the powers of a Judge of the Court of the Judicial Commissioner of Sind to refer. On the contrary the provisions of section 305, Criminal Procedure Code, direct the Trial Judge, except under special circumstances, to give effect to the verdict of the Jury. S EMPEROR *v.* MITHOO, 25 Cr. L. J. 428 **604**

——— **ss. 15, 268, 537**—*Sessions trial—Assessors, number of, less than that required by law, effect of—Irregularity or illegality.*

Where a Sessions Judge tries a case with the aid of assessors, it is the Judge plus the assessors who constitute the Court, not the Judge alone; and where, therefore, a Sessions Judge tries a case with the aid of a number of assessors less than that fixed by law there is no trial at all, and the defect cannot be cured by section 537 of the Criminal Procedure Code. N JAIRAM KUNBI *v.* EMPEROR, 25 Cr. L. J. 459 **811**

——— **s. 107**, *proceedings under—Attachment of property, whether can be directed:*

No order of attachment of property can be passed in a proceeding under section 107 of the Criminal Procedure Code. O RAM SARUP *v.* EMPEROR, 25 Cr. L. J. 350 **238**

——— **s. 107**, *proceedings under—Indefinite information—Magistrate, duty of.*

In the case of proceedings under section 107 of the Criminal Procedure Code the Magistrate must show that he had information entitling him to act under the section.

Where proceedings drawn up by a Magistrate, against one party to a dispute concerning some property, under section 107 of the Criminal Procedure Code, recite simply that he has received a report from the Police that that party is likely to commit a breach of the peace or do a wrongful act which may occasion a breach of the peace, inasmuch as it is using threats of violence to the other party, the information is too vague and indefinite to justify action and the proceedings must be set aside. Pat NAND KISHORE NATH SAHI DEO *v.* EMPEROR, (1922) A. I. R. (Pat.) 209; 25 Cr. L. J. 369; 5 P. L. T. 353; 2 P. L. R. 159 Cr. **417**

——— **ss. 107, 117, 545**—*Security to keep the peace—Procedure—Costs, order as to, legality of.*

A proceeding under section 107 of the Criminal Procedure Code must be conducted in the manner prescribed for conducting trials and recording evidence in summons cases.

Section 545 of the Criminal Procedure Code cannot apply to a case under section 107 of the Code, inasmuch as no fine can be imposed in such a case. An order, therefore, directing an accused person under section 107 of the Criminal Procedure Code, to pay costs to the complainant is *ultra vires*. A SHEO PRASAB SINGH *v.* MAHANGOO NONIA, 25 Cr. L. J. 476 **828**

Criminal Procedure Code—contd.

——— ss. 107, 436, 438—*Security proceedings—Further enquiry—District Magistrate, power of—Procedure.*

Proceedings under section 107 of the Criminal Procedure Code are not included within the provisions of section 436 of the Code, and a District Magistrate has, therefore, no jurisdiction to direct further enquiry in such a case. The proper procedure is for the District Magistrate to report the result of his examination of the record to the High Court, which can pass appropriate orders in the case. A ROSHAN SINGH *v.* EMPEROR, 22 A. L. J. 129; 46 A. 235; 25 Cr. L. J. 467 819

——— ss. 107, 514, 515—*Bond to keep the peace, nature of—Private party, status of—Forfeiture of bond, without notice, effect of.*

A bond under section 107 of the Criminal Procedure Code is not given to any particular person but to the Court, a private party, therefore, is not entitled to appeal against an order refusing to forfeit it, though it is open to the District Magistrate to take action in revision.

An order directing the forfeiture of a bond without notice to the party whose bond is forfeited, amounts to a failure of justice, even though an order of forfeiture would have been passed if that person had had an opportunity of being heard. O SARJU *v.* JAI RAJ KUAR, 9 O. & A. L. R. 118; 25 Cr. L. J. 445 733

——— s. 109—*Proceedings under section 109—Escape from Police custody—Offence—Penal Code (Act XLV of 1860), ss. 224, 225B.*

A person escaping from Police custody while proceedings under section 109, Criminal Procedure Code, have been taken against him commits an offence under section 225B and not section 224 of the Indian Penal Code. S EMPEROR *v.* KHANU KORI, 25 Cr. L. J. 462 814

——— s. 110—*Security to be of good behaviour—Habitual thieves—Evidence of suspicion, admissibility of—General repute.*

In a proceeding under section 110 of the Criminal Procedure Code, evidence that the accused have been suspected of theft in a large number of cases is not evidence on the basis of which they can be bound over, yet when evidence of general repute has been given, the fact that the accused have been suspected in a large number of cases may be admissible as corroboration.

When thefts are committed and the perpetrators are not known, the persons on whom suspicion naturally falls are those persons who have the reputation of being habitual thieves. Conversely the fact that the accused have never been suspected in any case might tend to weaken the evidence of general repute. A GUDRI KHATIK *v.* EMPEROR, (1923) A. I. R. (A.) 595; 25 Cr. L. J. 486 886

——— s. 110—*Substantive offence not proved—Proceedings under s. 110, whether proper.*

Where a man has been arrested on a substantive charge (*e. g.*, of dacoity) but released for the reason that that charge cannot be sustained, the prosecution under section 110 of the Code of Criminal Procedure on the same evidence on which the charge for the substantive offence was founded or on evidence which arises as a natural sequal to the charge of the substantive offence, is not desirable. O SITAL DIN *v.* EMPEROR, 25 Cr. L. J. 366 302

——— ss 128, 132, 297—*Unlawful assembly, dispersing of—Police Officer in charge of patrol boat, power of.*

The power to disperse an unlawful assembly by force is not given by the Code of Criminal Procedure to any Police Officer below the rank of an officer in charge of a Police Station. The powers of a Police Officer in charge of a patrol boat are no higher than those of an officer in charge of an outpost, and such an officer has no power to act under Chapter IX of the Code of Criminal Procedure and cannot, therefore, purport to act under that Chapter within the meaning of section 132 of the Code. G MAHOMED YUNUS *v.* EMPEROR, (1923) A. I. R. (C.) 517; 50 C. 318; 25 Cr. L. J. 467 819

——— s. 144, *scope of—Immediate action, when justified—Expression of opinion in miscellaneous proceedings—Main case, effect on—Transfer, grounds for.*

The gravamen of the provisions of section 144, Criminal Procedure Code, consists in providing speedy remedy in cases of emergency and a Magistrate is justified in passing an *ex parte* order under sub-section (2) of the section immediately on receiving a Police report if he is satisfied that immediate action is necessary. An aggrieved party can move the Court for a rescission or alteration of the separate order under sub-section (4).

The mere fact that a Court has expressed a *prima facie* opinion in a miscellaneous proceeding on a matter which is also in issue in the main case does not show that it has prejudged the main case itself.

In the course of a trial under sections 147 and 323, Indian Penal Code, after a charge had been framed against the accused, the Magistrate received a Police report and passed an order under section 144 of the Criminal Procedure Code. The accused applied for a transfer of the case on the ground that by passing the aforesaid order the Magistrate had formed his conclusions with regard to the case against the accused:

Held, that inasmuch as the Magistrate had jurisdiction to entertain the report he was justified in taking action under section 144 of the Criminal Procedure Code and that the expression of his opinion in that matter was not a sufficient ground for transfer of the case. O JANG BAHADUR *v.* EMPEROR, 25 Cr. L. J. 433 721

——— ss. 144, 147, *procedure under—Inquiry—Order passed after ex parte enquiry, legality of.*

Petitioners complained to a Magistrate that the opposite party was about to close a road over which the petitioners had a right of easement and that there was immediate danger of a breach of the peace. Their application purported to be under sections 144 and 147 of the Criminal Procedure Code and invited the Magistrate to take action. The Magistrate instead of calling for written statements of the parties and hearing evidence or holding any enquiry at all went over to the office of the opposite party and after

Criminal Procedure Code—contd.

obtaining some information passed an order declaring that the road belonged to the opposite party and they could deal with it in any manner they pleased;

Held, that the procedure adopted by the Magistrate was wholly unwarranted by law and his order was consequently illegal and must be set aside. Pat NARENDRA NATH *v.* EAST INDIAN RAILWAY COMPANY, 25 Cr. L. J. 455; 5 P. L. T. 419 807

——— s. 145, *proceedings under—Moveable property.*

Proceedings under section 145 of the Criminal Procedure Code cannot be instituted with respect to moveables. O HIRA LAL *v.* EMPEROR, 25 Cr. L. J. 440 723

——— s. 145, *proceeding under—Notice—Finality of proceeding—Magistrate, duty of.*

A proceeding under section 145 of the Criminal Procedure Code is binding on the whole world. Under clause (3) of the section the order initiating the proceeding is to be published by a copy of it being affixed to some conspicuous place at or near the subject-matter of the dispute. This provision is intended to give notice to all persons interested in the subject-matter of the dispute to come forward and be made parties to the proceeding. Therefore, when the proceeding is over, the question of possession is, so far as the Magistrate is concerned, set at rest once for all, and thereafter he should maintain the order by taking action under sections 107 and 144 of the Code, as the case may be, against persons interfering with the possession of the party declared to be in possession, whether or not they were parties to the proceeding under section 145 of the Code. Pat RAGHUNANDAN *v.* KISHIN MOHAN SINGH, (1922) A. I. R. (Pat.) 210; 25 Cr. L. J. 541 1005

——— s. 145, *proceedings under—Revision.*

Ordinarily, no revision lies in respect of proceedings under Chapter XII of the Code of Criminal Procedure except where the order is wholly *ultra vires* and without jurisdiction. O HIRA LAL *v.* EMPEROR, 25 Cr. L. J. 440 728

——— s. 147—*Jurisdiction—Preliminary order—Addition of applicants—Revision.*

Unless there are special circumstances giving rise to an apprehension of the breach of the peace, there is no jurisdiction to make an order under section 147, Criminal Procedure Code.

The bringing of new applicants on record after the preliminary order in proceedings under section 147, Criminal Procedure Code, is passed, is undesirable but it is a mere irregularity which does not vitiate the proceedings.

It is not usual for a High Court to interfere in revision with the discretion of the Magistrate who has passed an order under section 147, Criminal Procedure Code, unless it is made without jurisdiction or if the Magistrate has not followed the procedure which has been laid down. N PARASHRAM *v.* GOPAL RAMCHANDRA, 25 Cr. L. J. 353 289

——— s. 148—*Local inspection, object of.*

The object of local inspection is to understand and appreciate the typography of the land in dispute in order to aid the Magistrate in appreciating the evidence offered in Court; but the local inspection cannot take the place of legal evidence, much less the result thereof can be used as a basis for the decision. Pat RAM RATAN KUAR *v.* TARAK NATH BHATTACHARJI, (1922) A. I. R. (Pat.) 249; 25 Cr. L. J. 412 492

——— s. 154—*First Information Report—Presumption of correctness—Prosecution, whether bound.*

The prosecution is bound by practice to produce in Court the First Information Report made to the Police but it is not bound to refrain from leading evidence that the report is not accurate. To hold that the prosecution is tied down tightly to the words of the First Information Report would recognise the recording officer as possessing an authority which in no way belongs to him and would be most dangerous. L RAJA *v.* EMPEROR, 25 Cr. L. J. 465 817

——— s. 154—*First Information Report, what is.*

The First Information Report is the technical description of a report under section 154 of the Criminal Procedure Code, giving first information of a cognizable offence. It is usually made by the complainant or by somebody on his behalf. The description is inapplicable to a statement made by the accused. A SUBEDAR *v.* EMPEROR, (1924) A. I. R. (A.) 207; 25 Cr. L. J. 490 880

——— ss. 154, 162—*Statement to Police Officer wrongly signed—Admissibility in evidence.*

Statements to a Police Officer in the course of an investigation are not rendered admissible in evidence under section 154, Criminal Procedure Code, by the mere fact that they were signed by the person in contravention of the provisions of section 168, Criminal Procedure Code. M *In re* NARAYANA MENON, 25 Cr. L. J. 401 481

——— s. 172—*Statements in Police diaries, use of.*

Statements embodied in Police diaries can be used in favour of an accused person but not against him. L RAJINDAR SINGH *v.* EMPEROR, (1923) A. I. R. (L.) 516; 25 Cr. L. J. 409 489

——— s. 177—*Penal Code (Act XLV of 1860), s. 406—Offence of criminal misappropriation—Place of trial.*

An offence under section 406, Indian Penal Code, can be tried only at the place where the money was received and misappropriated by the accused. C A. K. MAITRA *v.* KAMINI MOHAN BOSE, 25 Cr. L. J. 377 425

——— ss. 179, 181 (2)—*Criminal breach of trust—Jurisdiction to try offence—Loss, whether "consequence" of offence.*

The jurisdiction of a Court to try an offence of criminal misappropriation or criminal breach of trust is governed by section 181 (2) and not by section 179 of the Criminal Procedure Code.

Though loss to the complainant is the normal result of criminal misappropriation or criminal breach of trust, it is not an ingredient of those offences and cannot, therefore, be described as a "consequence", within the meaning of section 179 of the Criminal Procedure Code.

Accused was employed by a Lyallpur firm to sell goods at Karachi. The contract of employment was entered into at Lyallpur and the accused was bound to remit money and send his accounts to Lyallpur. He failed to account for some of the items received by him at Karachi and a complaint under section 408 of the Penal Code was preferred against him at Lyallpur:

Held, that the misappropriation, if any, had taken place at Karachi, and the Lyallpur Courts had no jurisdiction to try the accused. **L** MAHTAB DIN *v.* EMPEROR, 25 Cr. L. J. 410 490

——— **s. 183**—*Offence committed during journey—Place of trial.*

When an offence is committed whilst the offender is in the course of performing a journey and he is arrested and taken to the destination, a Court having jurisdiction at the latter place can try the offence, though it was committed outside its jurisdiction. **S** EMPEROR *v.* MOULABUX, 25 Cr. L. J. 439 727

——— **s. 195**—*Sanction to prosecute—Parties on bad terms—Sanction, grant of.*

Where it is found, after a consideration of the evidence that a charge of an offence against an accused person is false, the accused should be allowed to prosecute his accuser for having brought a false charge. The fact that parties are on bad terms is not a reason for refusing sanction for prosecution. **L** HARI CHAND *v.* AYA RAM, 4 L. L. J. 321; (1922) A. I. R. (L) 403; 25 Cr. L. J. 386 484

——— **ss. 195, 439**—*Sanction to prosecute—Revision—Interference by High Court, when justified.*

Where an application for sanction to prosecute has been dealt with by two Courts, the High Court can only interfere, if at all, in the exercise of its revisional jurisdiction under section 439 of the Criminal Procedure Code, and then only to prevent a gross and palpable failure of justice. **A** JOTI PRASAD *v.* DURGA PRASAD, 25 Cr. L. J. 434 806

——— **s. 195**—*Sanction to prosecute, whether should be granted to debtor against creditor.*

It is not expedient that a sanction to prosecute should be granted to a debtor to use against his creditor. **L** BIKRAM SINGH *v.* NIHAL CHAND, 25 Cr. L. J. 594 1008

——— **ss. 195, 476**—*Proceedings under s. 195, whether judicial—S. 476, application of.*

Proceedings under section 195 of the Criminal Procedure Code are judicial proceedings for the purposes of section 476 of the Code. **A** BIKARAMA PRASAD *v.* EMPEROR, (1922) A. I. R. (A.) 292; 25 Cr. L. J. 387 435

——— **s. 193**——*Order of Government sanctioning prosecution—Form of order.*

No special mode is laid down in the Criminal Procedure Code whereby under section 196 the order or sanction of Government to prosecute for certain offences is to be conveyed to the officer who puts the law in motion. It need not contain the charge of the offence. All that the Court has to see is, whether the complaint was made by the order or under the authority of Government. **M** *In re* NARAYANA MENON, 25 Cr. L. J. 401 481

——— **ss. 204, 369**—*Order directing summons to issue—Magistrate, power of, to rescind order.*

An order under section 204 of the Criminal Procedure Code, directing the issue of a summons, is not a judgment to which the provisions of section 369 would be applicable. A Magistrate, therefore, has jurisdiction to rescind such an order, and direct the holding of an inquiry under section 202 of the Code. **C** LALIT MOHAN *v.* NONI LAL SARKAR, 27 C. W. N. 651; (1923) A. I. R. (C) 662; 39 C. L. J. 329; 25 Cr. L. J. 454 816

——— **ss. 215, 423, 439**—*Commitment made under s. 423, whether can be quashed—Revision.*

Section 215 of the Criminal Procedure Code has no application to an order of commitment passed by a Sessions Judge under section 423 of the Code, in dealing with the appeal of an accused person.

Such an order of commitment can, however, be dealt with by the High Court in the exercise of its powers of revision. **L B** EMPEROR *v.* NGA THET SHE, 11 L. B. R. 375; (1922) A. I. R. (L. B.) 40; 25 Cr. L. J. 518 982

——— **ss. 223, 342**—*Examination of accused, absence of—Procedure.*

Where it is found that the provisions of section 342 of the Criminal Procedure Code have not been complied with the proper course for the Appellate Court to follow is to set aside the conviction and to remit the case to the Trial Court in order that the provisions of section 342 may be followed and the matter disposed of according to law. **C** KASHI PRAMANIK *v.* DAMU PRAMANIK, 27 C. W. N. 28; 25 Cr. L. J. 524 988

——— **ss. 234, 239**—*Joinder of charges—Offences of different kinds committed on different days—Joint trial—Illegality.*

A misjoinder of charges constitutes an illegality invalidating the entire trial.

Sections 234 and 239 of the Criminal Procedure Code cannot be combined.

Nitya Gopal **v.** *Jiban Krishna Bagchi*, 20 Ind. Cas. 412; 40 C. 318; 14 Cr. L. J. 428, *Emperor* **v.** *Mata Prasad*, 30 A. 351; A. W. N. (1908) 152; 5 A. L. J. 400; 8 Cr. L. J. 4, relied on.

Several accused persons were tried at one trial for offences under sections 147 and 325 of the Penal Code alleged to have been committed on one day and for offences under sections 147, 323 and 342 of the Penal Code alleged to have been committed on the next day:

Held, that the joint trial was illegal as the offences for which the accused were tried were neither of the same kind nor committed in the same transaction. **A** PUTTOO LAL *v.* EMPEROR, 21 A. L. J. 820; 9 O. & A. L. R. 1047; 46 A. 54; 25 Cr. L. J. 466 818

——— **s. 235**—*Penal Code (Act XLV of 1860), ss. 218, 403, 409, 477A—Joinder of charges—Offences committed in the same transaction.*

The accused, a Sub-Inspector of Police, took charge of certain property belonging to a deceased person. He subsequently returned the greater portion of it to his heir, but misappropriated certain items, and destroyed and altered certain

Criminal Procedure Code—contd:

portions of the diaries and lists in order to show that those items had never been received. He was charged with and tried at one trial for offences under sections 218, 403, 409 and 477A of the Penal Code:

Held, that all the charges related to acts which were so connected together as to form one transaction and the joinder of charges was, therefore, permissible under section 235 of the Criminal Procedure Code. C BILASH CHANDRA *v.* EMPEROR, 27 C. W. N. 626; (1923) A. I. R. (C.) 647; 25 Cr. L. J. 243 231

——— ss. 237, 238, 423—*Conviction of murder—Appeal—Appellate Court, whether can alter conviction to offence against property.*

Where a person has been charged with and convicted of the offence of murder it is not open to the High Court, on appeal, to alter the conviction under section 302 of the Penal Code to a conviction under one of the sections dealing with offences against property. L WALLU *v.* EMPEROR, 4 L. 373; 6 L. L. J. 59; (1924) A. I. R. (L.) 109; 25 Cr. L. J. 385 433

——— s. 239—*Penal Code (Act XLV of 1860), ss. 147, 366, 376—Abduction and rape—Different accused—Joint trial—Prejudice—Force used in abduction—Separate sentences.*

Where a girl is abducted by several persons and raped by one of them, the offence of rape constitutes a separate transaction from that of abduction and the person guilty of rape cannot be tried jointly with others who have taken no part in this offence.

Where, however, a joint trial is held, a retrial is not necessary when the accused has not been prejudiced and does not wish to be retried.

Separate sentences under sections 147 and 366 of the Penal Code are not justified, if the force used to take away the girl was a necessary ingredient for the completion of the offence under section 366 of the Code. L KHIZAR *v.* EMPEROR, 4 L. L. J. 322; (1922) A. I. R. (L.) 410; 25 Cr. L. J. 533 997

——— s. 247—*Summons Case—Absence of complainant, effect of—Acquittal—Order of Magistrate, whether necessary.*

Section 247 of the Criminal Procedure Code gives the Magistrate a discretion to acquit the accused in the absence of the complainant, but the absence of the complainant in a summons case cannot result in the acquittal of the accused without the Magistrate passing any order in the exercise of that discretion. C SHERMULL *v.* CORPORATION OF CALCUTTA, (1923) A. I. R. (C.) 725; 25 Cr. L. J. 492 892

——— ss. 247, 435, 436—*Dismissal of summons case for default—Acquittal—Second complaint on same facts—Jurisdiction.*

Where a complaint under section 447, Penal Code, is dismissed for default of appearance of the complainant, the order must be taken to have been passed under section 247, Criminal Procedure Code, though the latter section is neither mentioned nor is the order in terms of that section.

Criminal Procedure Code—contd;

Such an order as the above is tantamount to an acquittal and the District Magistrate has no jurisdiction either under section 435, or under any other section of the Code to set it aside.

The powers of a District Magistrate directing further enquiry into any complaint are limited to the cases mentioned under section 436 of the Code and an order passed under section 247 of the Code does not fall within the purview of that section. O BINDRA *v.* BHAGWANTA, 25 Cr. L. J. 359 295

——— ss. 257, 537—*Rejection of application for summoning witnesses as being immaterial—Failure to record reasons—Illegality—Irregularity.*

Section 257 of the Criminal Procedure Code is neither imperative nor exhaustive. It is a sufficient compliance with sub-section (2) of section 257 if a Magistrate in rejecting an application for summoning the defence witnesses states the facts which lead him to the conclusion that the application was for the purposes detailed in the section, namely, vexation, delay or defeating the ends of justice, although the Magistrate has not expressly recorded his reasons for his refusal in the words of the section, and in any case such a failure does not amount to an illegality vitiating the trial but is merely an irregularity curable by section 537, Criminal Procedure Code. M *In re*, NARAYANA MENON, 25 Cr. L. J. 401. 481

——— ss. 259, 437—*Absence of complainant—Discharge of accused—Further enquiry, order directing—Notice to accused, whether necessary.*

Accused was discharged under section 259 of the Criminal Procedure Code owing to the absence of complainant. The District Magistrate set aside the order of discharge under section 437 of the Code without giving notice to the accused:

Held, that the accused should have been given an opportunity to show why the order should not be set aside. L MAHENDRA NATH *v.* MILKHI RAM, (1923) A. I. R. (L.) 689; 25 Cr. L. J. 523 987

——— s. 260—*Penal Code (Act XLV of 1860), s. 144, allegation of offence under—Summary trial, legality of.*

Where a complaint discloses or alleges the commission by the accused or by any of them of an offence under section 144 of the Criminal Procedure Code, the case cannot be tried summarily. C CHANDRA MOHAN DAS *v.* EMPEROR, 27 C. W. N. 148; 25 Cr. L. J. 528 892

——— ss. 297, 299, 304, 353, 537—*Examination of witnesses—Procedure—Deposition, previous, read out—Illegality.*

In a criminal trial it is entirely illegal to read out to the witnesses their depositions made on a previous occasion, to put a few additional questions and then to tender them for cross-examination, and the illegality is not cured by the provisions of section 537 of the Criminal Procedure Code. L LYME *v.* EMPEROR, 4 L. 382; (1924) A. I. R. (L.) 17; 25 Cr. L. J. 377 425

——— s. 310, *applicability of—Penal Code (Act XLV of 1860), s. 75—Previous conviction, evidence of, when to be given.*

Criminal Procedure Code—contd.

Section 310 of the Criminal Procedure Code lays down a special form of trial of the issue of liability to enhanced punishment in consequence of a previous conviction, but the section is expressly made applicable to trials before the Court of Session only, and does not apply to trials before Magistrates.

On 21st June accused was charged before a Magistrate with having committed offences punishable under sections 380 and 457 of the Penal Code. On 18th July witnesses were examined to prove a previous conviction of the accused, and a charge was framed that he was liable to enhanced punishment under section 75 of the Penal Code in consequence of the previous conviction:

Held, that there was no illegality or irregularity in the procedure adopted by the Magistrate. C DEHRI SONAR *v.* EMPEROR, 50 C. 367; (1923) A. I. R. (C.) 707; 25 Cr. L. J. 527 991

——— s. 337, *scope of—Accomplice, whether competent witness.*

Section 337 of the Code of Criminal Procedure empowers certain Courts of Justice, *viz.*, Magistrates exercising certain powers or specially empowered *ad hoc* by an order of sanction, to pass a judicial order, the effect of which is that a "person supposed to have been directly or indirectly concerned, in, or privy to, the offence under inquiry" who chooses to accept the pardon tendered by the said order, can give his evidence "as a witness in the case," with the knowledge and assurance that the order will operate as a bar to his own subsequent prosecution or trial for the offence in respect of which the pardon was tendered, or for any other offence of which he appears to have been guilty in connection with the same matter.

There is no provision of Indian Statute Law, nor is there any principle of natural justice, which makes an accomplice, as such an incompetent witness at the trial of another person in respect of the offence in the commission of which he was an accomplice. A EMPEROR *v.* HAR PRASAD, 21 A. L. J. 42; (1923) A. I. R. (A.) 91; 45 A. 226; 25 Cr. L. J. 497 961

——— ss. 337, 494—*Tender of pardon—Discharge, order of, absence of—Evidence, whether admissible.*

A pardon was tendered to an accused person by the Local Government, who was examined as an approver but no formal order of discharge was passed in respect of him. On the other hand his name did not appear among those of the accused actually challaned, and it was expressly stated in the *challan* that no proceedings were being taken against him:

Held, that as the Magistrate was not exercising jurisdiction over him, he did not come within the definition of an accused person and was, therefore, a competent witness in the case. L DARYA SINGH *v.* EMPEROR, (1923) A. I. R. (L.) 666; 25 Cr. L. J. 520 984

——— s. 342—*Examination of accused, absence of, effect of—Re-trial.*

Criminal Procedure Code—contd.

The record of a case contained the following note:—

"Examination of the accused after the cross-examination of the prosecution witnesses and before he is called on for his defence.—

Pleads:—Not guilty."

Held, that this was not a substantial compliance with the provisions of section 342 of the Criminal Procedure Code, and a re-trial from the point at which the accused should have been examined under the section was necessary. C SAILENDRA CHANDRA SINGH *v.* EMPEROR, 38 C. L. J. 175; (1924) A. I. R. (C.) 153; 25 Cr. L. J. 460 812

——— s. 342—*Examination of accused—Court, power of—Cross-examination, whether permissible.*

Section 342 of the Criminal Procedure Code allows a Court at any stage of an enquiry or trial to put such question to the accused as the Court considers necessary, but the object of putting such questions is to enable the accused to explain any circumstances appearing in the evidence against him, and the Court has no power under this section to cross-examine an accused person in order to extract a confession from him. L BARHATI *v.* EMPEROR, (1923) A. I. R. (L.) 539; 25 Cr. L. J. 426 602

——— s. 342—*Examination of accused, object and mode of—Duty of Court—General question, whether sufficient.*

The object of the procedure laid down in section 342 of the Criminal Procedure Code, is to enable the accused to explain each and every circumstance appearing in evidence against him. A Judge or Magistrate should note every point which he thinks he will have to put into the scale against the accused and then question him on each point, otherwise it will be impossible for the accused to know what is in the Court's mind and he cannot reasonably be expected to be able to explain it.

It is not a sufficient compliance with the provisions of section 342 of the Criminal Procedure Code to put a general question to the accused, such as: "What have you to say regarding the statement of the complainant's witnesses?" R MAUNG HMAN *v.* EMPEROR, 2 Bur. L. J. 238; 1 R. 689; (1924) A. I. R. (R.) 172; 25 Cr. L. J. 487 887

——— s. 342(1)—*Examination of accused—Omission—Illegality—Examination, how to be made—Written statement filed by accused—Examination, whether unnecessary:*

Section 342 (1) of the Criminal Procedure Code contemplates that the accused should be examined after all the witnesses for the prosecution are examined and cross-examined, and before he is called on for his defence.

The provisions of section 342 (1), Criminal Procedure Code, being mandatory, an omission to question the accused generally on the case as required by the latter part of the section, is not a mere irregularity, but it is an illegality which vitiates the whole trial. However, if the Magistrate discharges the accused without framing a charge, the non-examination of the accused would not vitiate the proceedings.

In examining the accused under section 342 of the Criminal Procedure Code it is incum-

Criminal Procedure Code—contd.

bent upon the Magistrate, not to put him the general question "You have heard the prosecution witnesses against you, say what you have to say," but to communicate to him by appropriate questions everything that is alleged against him in the evidence for the prosecution to its full extent, with a view to ascertain from him what explanation or defence in law or in fact he wishes to put forward in respect thereof.

Written statements filed by the accused do not take the place of evidence, nor of such examination of the accused as is contemplated by section 342 of the Code of Criminal Procedure. N UDHAO *v.* EMPEROR, 25 Cr. L. J. 417 593

——— s. 344—*Calcutta Municipal Act (III of 1899), s. 631—Complaint within three months—Adjournment—Revival after three months, effect of*

On a complaint charging the accused with selling adulterated *ghee* under the Calcutta Municipal Act the accused were summoned and the case was then adjourned for six weeks, as the Food Inspector who had filed the complaint was on leave. No further order was passed in the case and nearly three years afterwards the proceedings were revived on the application of the Food Inspector and fresh summonses were issued to the accused. It was found that it was the practice in the case of such prosecutions to stay proceedings for lengthy periods:

Held, (1) that the order passed by the Magistrate directing the issue of fresh summonses was passed in a pending case of which the Magistrate had taken cognisance on the original complaint and the provisions of section 631 of the Calcutta Municipal Act had not, therefore, been contravened;

(2) that the procedure adopted by the Magistrate could not be approved and that he should have observed the provisions of section 344 of the Criminal Procedure Code as to adjournments more strictly. C SHERMILL *v.* CORPORATION OF CALCUTTA, (1923) A. I. R. (C.) 725; 25 Cr. L. J. 492 892

——— ss. 407 (2), 438, 439—*Appeal heard by Magistrate—Revision—Reference by Sessions Judge—Procedure.*

Where an appeal from an order of a Second or Third Class Magistrate is heard by a First Class Magistrate, an application in revision against the order of the Appellate Court ought to be made to the Sessions Judge, asking him to make a reference to the High Court and should not be made direct to the High Court. C ABDUL MATLAB *v.* NANDA LAL, 50 C. 423; (1923) A. I. R. (C.) 674; 25 Cr. L. J. 526 990

——— s. 428, *scope of—Word "necessary," meaning of—Section if confined to prosecution evidence or absence of evidence on formal point—Re-trial or taking fresh evidence.*

The word "necessary" in section 428, Criminal Procedure Code, does not import that it should be impossible to pronounce judgment without additional evidence.

Section 428, Criminal Procedure Code, which enables an Appellate Court to call for additional evidence is not rendered inapplicable merely because it is not the Court but the accused that considers such evidence to be necessary. Neither is the section confined in its operation to cases of absence of evidence on some formal point such as a sanction, nor only to evidence for the prosecution.

Jeremiah v. *Vas*, 12 Ind. Cas. 961; 36 M. 457 at pp. 458, 461; (1911) 2 M. W. N. 576; 10 M. L. T. 506; 22 M. L. J. 73; 12 Cr. L. J. 585, *Varadajulu Naidu* v. *Emperor*, 51 Ind. Cas. 343; 42 M. 885; 20 Cr. L. J. 455; 37 M. L. J. 81; (1919) M. W. N. 669, Referred Trials Nos. 22 and 26 of 1923; Referred Trial No. 123 of 1922; and Criminal Appeal No. 1673 of 1922, followed.

Where all the necessary evidence is not before the Appellate Court, whether the proper course in any particular case is to order a re-trial or merely direct further evidence to be taken under section 428, Criminal Procedure Code, is a matter of discretion of the Court, apart from what the accused or the prosecution may desire.

Where the evidence not taken by the First Court on accused's behalf is so extensive or so directly bearing on the main issues in the case, the Appellate Court may order a re-trial; but where such evidence on a broad view of the case is comparatively unimportant or would have been of no assistance to the defence, the Court would merely direct additional evidence to be taken.

Where the accused strongly protests against additional evidence to be taken, he cannot be allowed merely to use the irregularity in procedure of the First Court in not taking all the evidence, in order to obtain a re-trial of the case.

Per *Wallace, J.*—There is little difference in effect between rejecting an application to summon a witness because his evidence, even though believed, would not affect the Judge's judgment in the case, and rejecting it because the application is vexatious. Whether an application deserves the epithet "vexatious" or not is a matter for the Judge to decide, and if he decides that the evidence of a witness to be summoned is not going to be of any use in the matter of helping him to decide the case, he in effect, if not in words, is deciding that the application is vexatious.

If the Magistrate is not satisfied that the evidence of a witness is material, he will be justified in law in dismissing the application as put in for the purpose of vexation or delay. M *In re* NARAYANA MENON, 25 Cr. L. J. 401 481

——— ss. 435, 438—*Revision—Powers of District Magistrate.*

Under section 435 of the Criminal Procedure Code, a District Magistrate is empowered either to reject the application in revision or to take action under section 438 of the Code. His power under the latter section is limited to report for orders to the High Court the result of an examination of the proceedings made under section 435 of the Code. He cannot set aside the order of the Magistrate himself. O HIRA LAL *v.* EMPEROR, 25 Cr. L. J. 440 728

——— s. 439—*Revision—Finding of fact, whether can be interfered with.*

Ordinarily findings of fact are accepted by a Revisional Court as binding upon it, but it has

Criminal Procedure Code—contd.

the power to look into the evidence for itself and see if these findings can be justified by what appears upon the record.

A Revisional Court does not decide the balance of credibility between two conflicting sets of witnesses or two conflicting issues of fact, but it may be compelled to dissent from a finding of fact which is either perverse or has been arrived at contrary to well-established principles of law. A UMED SINGH *v.* EMPEROR, 21 A.L. J. 765; 25 Cr. L. J. 327; 46 A. 64 183

——— s. 439—*Revision—High Court, power of, to scrutinise evidence.*

It is not the practice of the High Court to go behind a finding of fact in revision, but there is no provision of law which debars it from going into the evidence in revision if it is of opinion that it is necessary to do so in the interests of justice.

When dealing with a case on revision the High Court has power to scrutinise the evidence with a view to find out whether the convictions of those of the accused who did not appeal from the order of the Trial Magistrate are justified. L ALLAH DITTA *v.* EMPEROR, 25 Cr. L. J. 435 723

——— ss. 439, 494—*Withdrawal of case—Consent of Court—Discretion—Revision—High Court, interference by—Cognisable case—Prosecutor, private, position of.*

Section 494 of the Criminal Procedure Code does not expressly require the Court to give any reasons for consenting to a withdrawal nor is there any provision which compels the Court to write a reasoned judgment establishing the propriety of the order.

Umesh Chandra Roy v. *Satis Chandra Roy*, 41 Ind. Cas. 998; 26 C. L. J. 208; 18 Cr. L. J. 886; 22 C. W. N 69, *Rajani Kanta Shaha* v. *Idris Thakur*, 64 Ind. Cas. 280; 48 C. 1105; 25 C. W. N. 615; 34 C. L. J. 51; 22 Cr. L. J. 760, *Jagat Chandra Roy* v. *Kalimuddi Sardar*, 71 Ind. Cas. 693; 26 C. W. N. 880; 24 Cr. L. J. 229, dissented from.

Where a discretion has been exercised by a Court of competent jurisdiction which is not on the face of it arbitrary, the practice of the High Court is that as a Revisional Court it will neither enquire into the reasons for, nor interfere with, the exercise of the discretion. The power of interference in revision with orders of acquittal should be most sparingly exercised and only in cases where it is urgently demanded in the interests of public justice.

Faujdar Thakur v. *Kasi Choudhuri*, 27 Ind. Cas. 186; 42 C. 612; 19 C. W. N. 184; 21 C. L. J. 531; 16 Cr. L. J. 122, relied on.

In cognisable cases the Crown is the prosecutor and the custodian of the public peace and if it decides to let an offender go no other aggrieved party can be heard to object on the ground that he has not taken his full toll of private vengeance. Pat GULLI BHAGAT *v.* NARAIN SINGH, 2 Pat. 708; 25 Cr. L. J. 446 724

——— ss. 439, 526, 528—*Letters Patent (Ran.), cls. 28, 36—Transfer of case—Order of District Magistrate dismissing application—Revision, whether lies.*

Criminal Procedure Code—contd.

The High Court has no power either under section 439 of the Criminal Procedure Code or under the Letters Patent to revise an order of the District Magistrate dismissing an application for the transfer of a case made under section 528 of the Code. R ASHU *v.* MAUNG PO KHAN, 2 Bur. L. J. 236; 1 R. 632; (1924) A. I. R. (R.) 100; 25 Cr. L. J. 485 885

——— s. 476, *proceeding under—Notice, whether necessary.*

In a proceeding under section 476 of the Criminal Procedure Code, notice to the accused is not absolutely necessary, but the High Court looks with disfavour upon an order passed under that section without such notice, and it is highly desirable, though not essential, that such notice should be given. A IMAM ALI *v.* EMPEROR, 25 Cr. L. J. 488 888

——— s. 478, *proceeding under—Magistrate, duty of—Charge, absence of—Inquiry, summary, effect of—Commitment, legality of—Trial, whether liable to be set aside.*

An Assistant Collector while purporting to act under section 478 of the Criminal Procedure Code framed no charge at all, made an inquiry of a perfunctory nature and committed the accused to the Court of Session on a charge of forgery. There was practically no record on which the commitment was based. The accused was tried and convicted by the Sessions Judge:

Held, that there having been no proper proceeding before the Committing Magistrate the trial was irregular and must be set aside. A BASHA NAND v. EMPEROR, (1923) A. I. R. (A.) 610; 25 Cr. L. J. 483 883

——— s. 488—*Muhammadan husband—Second marriage—Maintenance claimed by first wife—Offer to provide separate residence, effect of—Refusal to live with husband.*

The mere fact that a Muhammadan husband marries a second wife is no ground for his first wife to refuse to live with him and to claim separate maintenance. But she cannot be said to refuse to live with her husband within the meaning of sub-sections (3) and (4) of section 488 of the Criminal Procedure Code, merely because she refuses to accept his offer to provide separate residence for her. N SUKRULLA FAKIR *v.* FATMA, 25 Cr. L. J. 453 805

——— s. 488—*Offspring of* Sambandham—*Maintenance.*

The offspring of a *sambandham* are entitled to maintenance from their mother and not from their father provided the mother has sufficient means to maintain them. But if the mother is not in a position to maintain them without an allowance from the father, the latter is liable to pay the allowance.

The expression "unable to maintain" in section 488 of the Criminal Procedure Code is not confined to physical inability but includes also pecuniary inability. M *In re* BHARATA AYYAR, 19 L. W. 275; 46 M. L. J. 324; (1924) M. W. N. 305; 34 M. L. T. 167; 25 Cr. L. J. 370 418

——— s. 526—*Transfer of case—Complainant, whether can apply.*

Criminal Procedure Code—concld.

Quaere—Whether a complainant can apply for the transfer of a case under section 526 of the Criminal Procedure Code? **Pat** NAND KISHORE MISRA *v.* KALKA MISRA, 25 Cr. L. J. 458; (1924) (Pat.) 196 **810**

——— s. 540—*Court-witness—Discretion—Power of Court.*

It is not improper for a Court to call a Court-witness under section 540, Criminal Procedure Code, after the case for prosecution and defence has been closed.

Although a Court has to exercise proper discretion in calling Court-witnesses, the terms of section 540 are extremely wide and the Court may at any stage of any inquiry, trial or other proceedings summon any person as a Court-witness if his evidence appears to it essential to the just decision of the case. **M** *In re* P. C. PERUMAL, 19 L. W. 272; 46 M. L. J. 325; (1924) M. W. N. 303; 34 M. L. T. 165; 25 Cr. L. J. 354 **290**

Criminal Procedure Code (Act XVIII of 1923), s. 195—*Criminal Procedure Code (Act V of 1898), s. 195 (6)—Sanction to prosecute—Sanction proceedings under amending Act—Petition to set aside order revoking sanction—Appeal under old Act—Interpretation of Statutes—Procedure Law, alteration of—Retrospective effect—Appeal, right of, if affected.*

A High Court cannot entertain sanction proceedings under the Criminal Procedure Code, as amended by Act XVIII of 1923. Therefore, a petition to set aside an order (passed under the old Act of 1898) revoking an order for sanction to prosecute does not lie to a High Court.

Section 195 (6) of the Criminal Procedure Code, 1898, did not give a right of appeal.

The amendment of section 195 of the Criminal Procedure Code, 1898, by Act XVIII of 1923, has effected only an alteration in procedure.

Per *Odgers, J.*—A new procedure affects bygone transactions and alterations in procedure are always retrospective.

Gardner v. *Lucas*, (1878) 3 A. C. 582 at p. 603, relied upon.

Where the right of appeal is given by law a suitor cannot be deprived of that right, in a pending action, by an alteration of the law. **M** NATARAJA PILLAI *v.* RANGASWAMI PILLAI, 46 M. L. J. 274; 19 L. W. 358; 25 Cr. L. J. 361; 47 M. 384 **297**

Criminal prosecution—*Witnesses, costs of—Complainant, whether can be compelled to pay costs.*

All criminal prosecutions are at the instance of the Crown, and the Crown is really the prosecutor in a criminal case and all costs ought to be paid by the Crown for summoning witnesses for the prosecution.

It is open to a Magistrate to consider whether or not the deposition of a witness is material for the prosecution in a case, and if he is of opinion that the witness sought to be summoned is not a material witness and the application for summoning the witness is frivolous and vaxatious, he might refuse to summon him. But once he thinks that the witness ought to be summoned, he cannot compel the complainant to pay his travelling allowance from his own pocket, as all costs for the prosecution must be paid by the Crown. **Pat** NAND KISHORE MISRA *v.* KALKA MISRA, 25 Cr. L. J. 458; (1924) Pat. 196 **810**

Criminal trial—*Charge of offence committed at particular time and place—Conviction in respect of offence committed at different time and place, legality of.*

Where an accused person is charged with having beaten the complainant at a particular place at a particular time and the prosecution evidence fails to establish that charge, he cannot on that evidence be convicted of having beaten the complainant at a different place on a different occasion. **L** JALAL-UD-DIN *v.* EMPEROR, 25 Cr. L. J. 471 **823**

——— *Conviction under repealed Act—Offence punishable under repealing Act as well—Conviction, legality of.*

The fact that a conviction is recorded under an Act which has been repealed is not vital and does not vitiate the conviction, if the offence is punishable under the repealing Act as well. **O.** EMPEROR *v.* SARJU PRASAD, 10 O. L. J. 208; 9 O. & A. L. R. 867; (1924) A. I. R. (O.) 32; 25 Cr. L. J. 336 **192**

———Transfer of case, ground for. *See* CRIMINAL PROCEDURE CODE, 1898, s. 144 **721**

Custom—*Adoption, proof of—Execution of deed, coupled with long course of treatment.*

According to the Customary Law of the Punjab a sonless proprietor has the power to appoint one of his kinsmen to succeed him as his heir, but the appointment, in order to be valid, must be made in some unequivocal and customary manner and the execution of a deed coupled with a long course of treatment is one of the modes of manifesting such an appointment. **L** BAJ SINGH *v.* PARTAP SINGH, (1923) A. I. R. (L.) 497 **473**

——— *Alienation by widow—Just debt, what is—Sale to pay off mortgage—Necessity.*

A just debt is one which is really due, and has been contracted for a purpose other than immoral or forbidden by law or opposed to public policy, and can be recovered from the person or property of the debtor generally. *Sardari Mal* v. *Khan Bahadur Khan*, 11 P. R. 1899, *Devi Ditta* v. *Saudagar Singh*, 65 P. R. 1900, P. L. R. 1900 p. 322, followed.

A sale of the equity of redemption of a property by a Hindu widow to pay off the principal and interest due under the mortgage cannot be regarded as an alienation for necessity or for the payment of a just debt where it is found that the mortgage money was not recoverable from the other property of the mortgagor. **L** BODH RAJ *v.* RAJA SINGH, (1923) A. I. R. (L.) 668 **906**

——— *Alienation—Necessity—Antecedent debts—Waiver of right to object—Presumption—Waiver, whether binding on son.*

It is unnecessary for an alience from a male proprietor paying off debts actually due by the alienor to third persons to enquire into the nature of those debts.

Devi Ditta v. *Saudagar Singh*, 65 P. R. 1900; P. L. R. 1900, p. 322. followed.

The fact that a reversioner of the alienor takes over the alienation on payment of full consideration to the original alience amounts to a waiver of his own claim to sue to challenge the alienation and is presumptive evidence that the alienation was not bad for want of necessity.

But the waiver does not bind the son of the reversioner. L BASANTI *v.* CHANDA SINGH, (1923) A. I. R. (L.) 502 475

——— *Self-acquired property—Agreement to sell by husband—Receipt of part consideration—Death of husband—Mortgage by widow in lieu of advance, whether binding on reversioners.*

Where a male proprietor agrees to sell his self-acquired property and receives a portion of the sale consideration in advance, but dies before the sale is effected, and his widow mortgages the property to the vendee in lieu of the advance made by him to the deceased, the mortgage cannot be treated as an alienation by the widow of her husband's property in lieu of a debt voluntarily incurred by the husband; it is an alienation in discharge of an obligation which is binding on the estate of the husband, and cannot, therefore, be questioned by the reversioners of the husband, the deceased having full powers to deal with his self-acquired property in any manner he pleased. L AZAD KHAN *v.* NASIB GUL, (1923) A. I. R. (L.) 553 535

——— *Gift—Reversion—Self-acquired property.*

Under the Punjab Customary Law there is a wide distinction between succession to ancestral property and succession to self-acquired property and the principle of reversion to the heirs of the donor is limited to property over which he had not unrestricted power of disposition. L SHEKA KHATUN *v.* MUHAMMAD ALI SHAH, (1923) A. I. R. (L.) 550 538

——— *Pre-emption—Co-sharer—Hindu widow, position of—Association of stranger in suit, effect of.*

The widow of a co-parcener in a joint Hindu family is only entitled to maintenance and has no interest in the joint family property which would confer upon her status of a co-sharer.

A plaintiff who has in himself a right to claim pre-emption may lose that right by joining in a suit along with a person who is a stranger to the property and has no such right. A UDIT NARAIN LAL *v.* RAM LACHHMAN RAO, (1923) A. I. R. (A.) 161 933

——— Wajib-ul-arz, *entry in*—Bhai *and* baradarzadah, *meaning of.*

Tho words "*bhai*" and "*baradarzadah*" are general terms and apply in the Urdu language to much more distant relations than in any other language and include all members of the same family. A FAZAL HAQ *v.* AZIZ HASAN, (1923) A. I. R. (A.) 163 940

——— *Rajputs—Proof—Intermarriage — Tailoring profession.*

Where a person claims to be a *Mohal Rajput*, the mere fact that the various members of his family have worked at tailoring cannot itself be regarded as any proof that he is not a *Rajput*, for men of all castes follow the trade. But where the origin of the family is unknown and they are described in the revenue records as *khayyat* (tailors) *Mohal* and there is no proof that whoever first caused the entry to be made had any real title to the use of the term *Mohal* nor is it proved that the family have been intermarrying with *Rajput* families, it is insufficient to establish that the family are *Mohal Rajputs*.

Where a family has been intermarrying with *Rajput* families, it is very strong evidence of its *Rajput* origin. What would satisfy the *Rajputs* of the countryside would be enough to satisfy the Courts. L SECRETARY OF STATE FOR INDIA *v.* GHULAM RASUL KHAN, 4 L. L. J. 79; (1922) A. I. R. (L.) 323 553

——— *Reversioner—Relationship, proof of—Members of same got.*

The mere fact that two persons belong to the same *got* does not necessarily lead to the inference that they are descended from the same common ancestor. L KIRPA *v.* CHINTI, (1923) A. I. R. (L.) 530 518

Deccan Agriculturists' Relief Act (XVII of 1879), s. 10A—*Alienaton of right to hold land for 500 years, nature of—Alienee, possession of, when adverse.*

In 1892 the owners of a certain land executed a document whereby they conveyed to the defendants the right to hold the land for 500 years. Plaintiffs as assignees of the owners sued to recover possession on the ground that the transaction of 1892 was a mortgage:

Held, (1) that the defendants were entitled to such rights as they had acquired by the document of 1892 by adverse possession, namely, the right to hold the land for 500 years as against the plaintiffs;

Adam Umar Sale v. *Bapu Bawaji*, 33 B. 116; 10 Bom. L. R. 1128, applied.

(2) that section 10A of the Deccan Agriculturists' Relief Act did not apply to the transaction, and as the document did not on the face of it purport to be a mortgage, extraneous evidence could not be admitted to establish that it was a mortgage;

Sawantrawa Faklrappa v. *Girlappa Faklrappa*, 21 Ind. Cas. 4; 38 B. 18; 15 Bom. L. R. 778, followed.

(3) that the transaction must be taken to be an alienation by way of a lease for a long term. B CHATURBHAI BALLUBHAI PATEL *v.* MOTIBHAI BAPUJI PATEL, 24 Bom. L. R. 1315; (1923) A. I. R. (B.) 146 952

Decree, amendment of. *See* EXECUTION OF DECREE 167

Defamation—*Privilege, absolute and qualified—Report made to Police—Burden of proof.*

Statements made in the course of judicial proceedings are absolutely privileged, but a report made to the Police does not come within that principle. Such a report, however, though not within the rule of absolute privilege, which covers

Defamation—concld.

judicial proceedings, is *prima facie* privileged, that is to say, the person making it has a right to make it if he honestly believes it, and the person receiving it has a duty to receive it. But qualified privilege provides only a qualified protection and a person charged with defamation who sets up a qualified privilege must prove that he used the privilege honestly, believing the truth of what he said, or in other words, having reasonable grounds for making the statements, and the onus of establishing that lies upon him.

Where the statement is made with reference to something in which the person making the statement was himself involved as a party it is impossible for him to have had an honest belief in its truth if it is shown to be untrue. Therefore, in a case of qualified privilege where the defendant sets up in defence that the allegation is true to his knowledge, the defence of qualified privilege becomes illogical and impossible. A LACHMAN PRASAD *v.* MAJJU, (1923) A. I. R. (A.) 167 913

DEFINITIONS:—

Ad valorem. *See* TARIFF ACT, 1894, S. 10 70
Advance. *See* WORKMAN'S BREACH OF CONTRACT ACT, 1859, SS. 2, 4 448
Agent. *See* PRINCIPAL AND AGENT 266
And their male heirs. *See* CONSTRUCTION OF DOCUMENTS 83
Any. *See* INCOME TAX ACT, 1922, S. 10 772
Any business. *See* INCOME TAX ACT, 1922, S. 10 772
Any such new map. *See* BENGAL ALLUVION AND DILUVION ACT, 1847, SS. 3, 6 707
Armed. *See* ARMS ACT, 1878, S. 19, CLS. (*e*) (*f*) 736
Arms. *See* ARMS ACT, 1878, S. 4 1003
Atmabandhus. *See* HINDU LAW 219

Baradarzadah. *See* CUSTOM 940
Bhai. *See* CUSTOM 940

Circumstances. *See* PRINCIPAL AND AGENT 266
Common gaming house. *See* MADRAS TOWNS NUISANCES ACT, 1889, S. 6 303
Court. *See* PENAL CODE, 1860, SS. 41, 182, 193, 211 189
Decision. *See* CIVIL PROCEDURE CODE, 1908, S. 110 400
Discharged. *See* PROVIDENT FUNDS ACT, 1897, SS. 2, 4 (1) 1025
Duty. *See* TARIFF ACT, 1894, S. 10 70

Each. *See* INCOME TAX ACT, 1922, S. 10 772
Each and every. *See* INCOME TAX ACT, 1922, S. 10 772
Except in ss. 376 and 307 in s. 266, Criminal Procedure Code. *See* CRIMINAL PROCEDURE CODE, 1893, S. 4 (*j*) 604
Ex godown. *See* TARIFF ACT, 1894, S. 10 70
First let in s. 2 (f) (ii), Calcutta Rent Act. *See* CALCUTTA RENT ACT, 1920, S. 2 (*f*) (*ii*) 623
For the purpose of earning profits. *See* INCOME TAX ACT, 1918, S. 9 39
Heir of tenant. *See* OUDH RENT ACT, 1886, SS. 3 (10), 48 120
Interested. *See* CIVIL PROCEDURE CODE, 1908, S. 10 157

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Jagir. *See* BOMBAY REVENUE JURISDICTION ACT, 1876, SS. 4, 12 100
Judgment. *See* LETTERS PATENT (PUNJAB), CL. 10 327
Just and convenient. *See* CIVIL PROCEDURE CODE, 1908, O. XL, R. 1 783
Kirpan *See* ARMS ACT, 1878, SS. 5, 19 (*a*) 230
Male heirs. *See* CONSTRUCTION OF DOCUMENTS 83
Necessary. *See* CRIMINAL PROCEDURE CODE, 1898, S. 428 481
New map. *See* BENGAL ALLUVION AND DILUVION ACT, 1847, SS. 3, 6 707
New Survey. *See* BENGAL ALLUVION AND DILUVION ACT, 1847, SS. 3, 6 707
No other principal guardians for the said minor. *See* CIVIL PROCEDURE CODE, 1908, O. XXXII, R. 4 464
Received. *See* INCOME TAX ACT, 1918, S. 3 (1) 616
Reside. *See* DIVORCE ACT, 1869, S. 2 654
Rules and principles. *See* DIVORCE ACT, 1869, SS 2, 7, 22 654
Saranjam. *See* BOMBAY REVENUE JURISDICTION ACT, 1876, SS. 4, 12 100
Subordinate. *See* CIVIL PROCEDURE CODE, 1908, SS. 22, 23 408
Tariff value. *See* TARIFF ACT, 1894, S. 10 70
Tenant. *See* OUDH RENT ACT, 1886, SS. 3 (10), 48 100
Tenure holders. *See* BENGAL TENANCY ACT, 1885, S. 5 (5) 261
The said trust property. *See* CONSTRUCTION OF DOCUMENTS 83
Thenceforward revert to Vatan. *See* BOMBAY HEREDITARY OFFICES ACT, 1874, SS. 9, 11, 11A 146
Unable to maintain. *See* CRIMINAL PROCEDURE CODE, 1898, S. 488 418
Used for the profit or gain of the owner. *See* BOMBAY PREVENTION OF GAMBLING ACT, 1887, S. 3 995
Vatan. *See* BOMBAY HEREDITARY OFFICES ACT, 1874, SS. 9, 11, 11A 146
Vexatious. *See* CRIMINAL PROCEDURE CODE, 1898, S. 154 481
Wards. *See* PRINCIPAL AND AGENT 266

Deshghat Vatan. *See* HINDU LAW 92

Divorce Act (IV of 1869), ss. 2, 7, 22—*Indian Councils Act* (24 & 25 *Vic. c.* 67), *s.* 22—*Power to divorce non-domiciled person—Jurisdiction of Indian Courts—Judicial separation.*

Per *Macleod, C. J.* and *Marten, J.*—(*Crump, J., dissenting*).—Sections 2 and 7 of the Divorce Act do not confer on the Courts in India jurisdiction to grant decrees of divorce between persons who are not domiciled in India.

Per *Marten, J.*—The reference in section 7 of the Divorce Act to the principles on which the English Court gives relief includes the principle on which the foundation of jurisdiction is based.

Per *Marten* and *Crump, JJ.*—The Divorce Act is not *ultra vires* the powers of legislation of the Indian Imperial Legislature, *vide* section 22 of the Indian Councils Act.

Divorce Act—contd.

Per *Crump, J.*—The word "reside" in section 2 of the Divorce Act is used in its plain meaning of residence and not of domicile.

Courts in India have by virtue of sections 2 and 7 of the Divorce Act jurisdiction to grant divorces between persons resident but not domiciled in India provided the other conditions laid down in section 2 are fulfilled.

Section 7 of the Divorce Act is a residuary section intended to provide for any matters which by inadvertence or otherwise are not expressly dealt with in the Act. The expression "rules and principles" which occurs in the section points rather to the rules and principles on which the Court deals with matrimonial causes in requiring a certain degree of evidence and other cognate matters, than to rules on which jurisdiction is founded.

Per *Curiam.*—The jurisdiction to grant decrees of judicial separation rests on residence and the Courts in India have jurisdiction under the Divorce Act to grant decrees of judicial separation in cases in which the parties reside, although they are not domiciled, in India.

The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions. B WILKINSON *v.* WILKINSON, 25 Bom. L. R. 945; (1923) A. I. R. (B.) 321; 47 B. 843 654

——— s. 10—*Divorce proceedings—Petition of divorce—Particulars—Procedure—Costs of defence—Husband, liability of—Court, duty of.*

Where a petition for divorce is filed by the husband, and the wife enters an appearance and denies the allegations against her, she has an absolute right to require her husband to furnish her with funds sufficient to enable her to make a full and satisfactory defence, and to obtain such assistance from Counsel as is reasonable under the circumstances, and the Court should take upon itself the duty of seeing that this is done.

General allegations of misconduct against the wife in a petition for divorce should not be allowed to remain on the record, and if the petitioner is unable to furnish particulars the allegations ought to be struck off. A GARLINGE *v.* GARLINGE, (1922) A. I. R. (A.) 504; 44 A. 745 133

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Easements Act (V of 1882), ss. 7, 17, 27—*Evidence Act (I of 1872), s. 114—Underground channel—Presumption—Easement, infringement of.*

Defendants constructed an underground drain fourteen feet from the outlet of certain springs in respect of which the plaintiffs enjoyed a right of easement and thus diminished the supply of water in the spring:

Held, that from the proximity of the drain to the outlet of the springs the Court was entitled to presume that there was a direct channel between the top of the drain and the outlet and that the construction of the drain, therefore, amounted to an infringement of the plaintiffs' right of easement. B BABAJI RAMLING GURAV *v.* APPA VITHAVJA SUTAR, 25 Bom. L. R. 789; (1924) A. I. R. (B.) 154 131

——— s. 59—*Licensee, whether can claim adversely—Transfer of property—License, whether cancelled.*

A licensee cannot, by enjoying the license for any length of time, acquire rights adverse to the licensor.

Where a licensor transfers the property in respect of which the license has been enjoyed, the license ceases to exist. A BHOJ RAJ *v.* HARDEVA, 20 A. L. J. 608; 44 A. 726; (1923) A. I. R. (A.) 140 140

English decisions, application of. *See* TRANSFER OF PROPERTY ACT, 1882, s. 6 (*a*) 109

Estoppel. *See* CIVIL PROCEDURE CODE, 1908, s. 47 547

——— *See* EVIDENCE ACT, 1872, s. 92 154

——— *Adoption by widow—Representation of authority to adopt by husband—Conduct.*

A Hindu widow, who in adopting a boy to her husband represents that she was authorised by her husband to do so and thereafter by her words and conduct holds out and treats the boy as the lawfully adopted son, is estopped from denying that she had the authority of her husband to adopt or that the adoption was a valid one. M VEDLA VENKATASUBHAMMA *v.* VEDLA VENKAMMA, 33 M. L. T. 191; 46 M. L. J. 521; 19 L. W. 83; (1924) A. I. R. (M.) 308 214

Evidence Act (I of 1872), s. 11—*History and status of connected family—Evidence, admissibility of.*

Where the history and status of a particular family, which is one of a group, is in question, evidence may be adduced to elucidate the history and status of connected families in the same group, and such evidence is admissible under section 11 of the Evidence Act. C SARADA PRASANNA ROY *v.* UMA KANTA HAZARI, 37 C. L. J. 433; (1923) A. I. R. (C.) 485; 50 C. 370 450

——— ss. 21 132—*Admission—Statement made by accused as witness in another case, whether admissible against him—"Compelled to answer," meaning of.*

Evidence Act—contd.

The statement of an accused person as witness in a previous case is admissible against him under section 21 of the Evidence Act to prove admissions of relevant facts made by him in that statement.

The question of compulsion under section 132 of the Evidence Act is one of fact. It does not follow that a witness is compelled to answer every question put to him by Counsel; but he may be compelled to do so in particular cases, and in such cases the section would be applicable. On the other hand, compulsion does not involve the necessity of a formal objection to giving the answer and an order made at the time to the witness compeling him to answer. A EMPEROR *v.* BANARSI, 22 A. L. J. 144; 46 A. 254; 25 Cr. L. J. 477 823

——— ss. 23, 27—*Police custody.*

As soon as an accused or suspected person comes into the hands of a Police Officer, he is, in the absence of clear and unmistakeable evidence to the contrary, no longer at liberty and is, therefore, in custody within the meaning of sections 26 and 27 of the Evidence Act. R MAUNG LAY *v.* EMPEROR, 1 R. 609; 25 Cr. L. J. 381; (1924) A. I. R (R.) 173 429

——— s. 27—*Statement to Police by co-accused, admissibility of—Statement, whether evidence of guilt of co-accused.*

A statement made by an approver to the Police at the time of his arrest giving the names of other persons who had joined in the offence can be used as against the latter only under section 27 of the Evidence Act. The use which can legitimately be made of such information is merely this that when direct evidence is given against the accused at the trial, it is open to the defence to check such evidence by asking whether the name of a particular accused was mentioned or not at the time. It becomes evidence which may be used to test the consistency of the approver's story and it is information which leads to the discovery of the accused, but it is no evidence of the guilt of the accused. A SUBEDAR *v.* EMPEROR, (1924) A. I. R. (A.) 207; 25 Cr. L. J. 490 880

——— s. 30—*Confession of co-accused, value of—Corroboration, necessity of—Confession, what amounts to—Motive, whether corroboration.*

Evidence of motive is not a corroboration of any of the incidents of the crime.

Hira Lal v. *Emperor*, 7 Ind. Cas. 1012; 13 O. C. 243; 11 Cr. L. J. 554, relied on.

The statement of an accomplice can be taken into consideration under section 30 of the Evidence Act, only when he admits his own guilt to the same extent to which he implicates others.

The word "confession" in section 30 of the Evidence Act cannot be construed as including a mere inculpatory admission which falls short of being an admission of guilt.

Queen-Empress v. *Jagrup*, 7 A. 646; A. W. N. (1885) 131; 4 Ind. Dec. (N. S.) 799, relied on.

A confession unsupported by other testimony is evidence of the weakest kind against a co-accused. O SHEO AMBAR *v.* EMPEROR, 9 O. & A. L. R. 836; 25 Cr. L. J. 391 439

Evidence Act—contd.

——— s. 32—*Verbal statement—Signs by dying person, admissibility of—Confession by person under influence of opium, value of.*

Where a dying person is unable to speak and can only make signs in answer to questions put to him, the questions and signs taken together might properly be regarded as a "verbal statement" made by a person as to the cause of his death within the meaning of section 32 of the Evidence Act, and are, therefore, admissible in evidence.

Queen-Empress v. *Abdullah*, 7 A. 385; A. W. N. (1885) 78; 4 Ind. Dec. (N. S.) 692 (F. B.), followed.

The confession of an accused should not be rejected *in toto* merely because the accused at the time of making it was under the influence of a dose of opium. C EMPEROR *v.* SADHU CHARAN DAS, 26 C. W. N. 414; 49 C. 600; (1922) A. I. R. (C.) 409; 25 Cr. L. J. 529 893

——— ss. 32 (2), 67—*Execution of document, proof of—Handwriting, proof of—Statement by deceased writer as to execution, admissibility of.*

Section 67 of the Evidence Act does not require any particular kind of proof to establish execution of a document.

Abdool Ali v. *Abdoor Rahman*, 21 W. R. 429, relied on.

Where direct evidence of the handwriting or mark of a person is not available, indirect evidence may be given.

Haria v. *Manakchand*, 27 Ind. Cas. 866; 11 N. L. R. 9, followed.

A statement in a document by the writer that a particular mark is that of the executant is admissible in evidence under section 32 (2) of the Evidence Act, where the writer is dead and it is proved that the document was written by him. N LAHIRI *v.* BALA, 18 N. L. R. 85; (1922) A. I. R. (N.) 227 768

——— s. 35—*Entry in deceased* chaukidar's *register, whether admissible—Proof that entry was made by deceased.*

An entry in the register of a deceased *chaukidar*, not shown to have been made by the deceased, is not admissible in evidence under section 35 of the Evidence Act. A SHEO BALAK *v.* GAYA PRASAD, 20 A. L. J. 601; (1922) A. I. R. (A.) 510 52

——— s. 35—*Mortgage, proof of—Entries in supplementary Revenue Records, value of.*

In the absence of other evidence, entries in supplementary Revenue Records, *viz.*, Revenue Register No. 1 and Revenue Register No. 5 though relevant under section 35 of the Evidence Act are not in themselves sufficient to prove a mortgage. R KO PO MAUNG *v.* MA MEIN GALE, 1 R. 562; (1924) A. I. R. (R.) 135 380

——— s. 43—*Judgment not* inter parties, *when relevant.*

A decree obtained by a co-sharer as to his share of a plot of land as against a third party is not admissible as evidence of title in a subsequent suit by another co-sharer, but it becomes admissible where a partition of the plot of land has been made by the co-shares in consequence

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of that decree. P C NARESH NARAYAN ROY *v.* SECRETARY OF STATE FOR INDIA, (1923) A. I. R. (P. C.) 1; 32 M. L. T. 162; (1923) M. W. N. 511; 50 C. 446; 45 M. L. J 444; 28 C W N. 453 1018

——— ss. 45, 47—*Handwriting, comparison of—Appeal, second—Finding of fact based on comparison of handwriting, legality of.*

Comparison of signatures is one of the modes of proving handwriting and although, where there is no other evidence corroborative of such comparison, such proof would be regarded as hazardous and inconclusive, it cannot be regarded as an error in law to base a conclusion on such proof alone, and a Court of second appeal would have no power to set aside a finding based on such comparison. L BALAK RAM *v.* MUHAMMAD SAID, (1923) A. I. R. (L.) 695, 5 L. L. J. 530 872

——— s. 70—*Admission of execution—Attestation, proof of, whether necessary.*

Where the executant of a deed admits execution of the deed it is not necessary to prove attestation, and the admission need not be made during the suit but may be an admission made antecedent to the institution of the suit. R AUNG REI *v* MA AUNG KRWA PRU, 1 R. 557; (1924) A. I. R. (R.) 139 362

——— s. 78 (2)—*Act published in Gazette, whether authentic.*

The text of an Imperial Act as published in the *Gazette of India* must be taken to be the authorised text of the Act. L GOBIND DAS *v.* RUP KISHORE, 4 L. 367; 6 L. L. J. 25; (1924) A. I. R. (L.) 65 409

——— s. 90—*Document thirty years old—Presumption—Execution—Conduct of parties.*

Where a document which is more than thirty years old is produced apparently from proper custody, the Court may presume its due execution, but it is open to the Court to hold from the circumstances of the case that the document was not acted upon. B MAHADEO RAMCHANDRA *v.* RAGHOJI JIJYAJI, (1923) A. I. R. (B.) 293 472

——— s. 90—*Execution of decree—Delivery of possession—Receipt forty years' old—Presumption.*

Although it is possible that when a receipt evidencing delivery of possession is passed to an auction-purchaser in execution of a decree, physical possession of the land may not have been given to the purchaser, but when such a receipt is produced in evidence after the lapse of more than forty years the Court should presume, in the absence of evidence to the contrary, that possession was delivered to the purchaser. B PANDURANG WASUDEO CHATE *v.* BASAPPA *bin* SHIDAPIA GANIGER, (1923) A. I. R. (B.) 364 479

——— s. 92, *applicability of—Construction of document—Sale or mortgage—Burden of proof—Oral agreement, evidence of, admissibility of.*

Plaintiffs conveyed certain property to defendant No. 1 by what purported to be a sale-deed, but the property remained in the possession of the plaintiffs. Defendant No. 1 subsequently sold the property to defendant No. 2. Plaintiffs attested the deed of sale. Part of the consideration was paid to defendant No. 1 and the balance to the plaintiffs and possession of the property was transferred to defendant No. 2. Some years afterwards the plaintiffs sued to redeem the property on the allegation that the transfers in favour of defendant No. 1 and defendant No. 2 were both mortgages:

Held, (1) that by attesting the sale-deed in favour of defendant No. 2 and transferring possession of the property to him plaintiff became in effect parties to the transfer and the onus lay on them of proving that the transaction was a mortgage and not a sale;

(2) that evidence of an oral agreement that defendant No. 2 had agreed to reconvey the property to the plaintiffs after he had paid himself the principal and interest out of the profits, was inadmissible under the provisions of section 92 of the Evidence Act.

Maung Kyin v. *Ma Shwe La*, 42 Ind. Cas 642; 44 I. A. 230; 20 Bom. L. R. 278; 15 A L. J 825; 33 M. L. J. 648; 3 P L. W. 185; 6 L. W. 777; 22 C. W. N. 257; 23 M. L. T. 36; 27 C. L. J. 175; (1918) M W. N. 300; 45 C. 320; 9 L. B. R. 114; 11 Bur. L. T. 21 (P. C.), distinguished.

The language of section 92 of the Evidence Act in terms applies only as between the parties to an instrument and their representatives-in-interest. Whenever evidence is tendered as to a transaction with a third party it is not governed by the section or by the rule of evidence which it contains, and in such a case the oridnary rules of evidence of equally and good conscience come into play unhampered by statutory restrictions. B TALAKCHAND BHERAJI *v.* ATMARAM, 25 Bom. L. R. 818; (1924) A. I. R. (B.) 58 382

——— s. 92, *applicability of, to parties on same side—Oral evidence to vary terms of document, admissibility of.*

Section 92 of the Evidence Act applies to all parties to a document whether on the one side or the other. It is not open to parties to a document on the same side to prove, as against each other, that a document to which they are parties, though purporting to be a sale in reality a mortgage. L B MAUNG TUN GYAW *v.* MAUNG PO THWE, 11 L. B. R. 351; (1922) A. I. R. (L. B.) 37 123

——— s. 92—*Contract in writing—Oral agreement—Evidence of subsequent conduct, whether admissible.*

Where a contract has been reduced to writing, oral evidence of subsequent conduct can under no circumstances be admitted to prove a contemporaneous oral agreement. L FITZ HOLMES *v.* BANK OF UPPER INDIA, (1923) A. I. R. (L.) 548; 4 L. 258; 5 L. L. J. 438 123

——— s. 92—*Registered agreement—Conduct, evidence of, whether admissible to modify agreement*—Patni Kabuliyat—*Stipulation to deliver certain documents—Failure to enforce stipulation for long period—Estoppel.*

A *patni kabuliyat* contained the following stipulation:—"I shall deliver one set of the

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chita, *khatian jamabandi*, and *sheha*, *thoka* and *jama wasil baki* and other *lawazima* papers of the *patni mehals*, signed by the persons preparing the same and bearing my signature into your *sherishta* after the expiry of two consecutive years at the end of every third year, and obtain receipt for the same, on failure to do so you will take from me Rs. 215 the cost of preparing the papers at the end of every three years, and if I do not pay the same amicably, you will realize the same by having recourse to law and get the said papers prepared by making *mofussil* survey and *tumar* by appointing *amin* at the end of every third year." Under the law some of these documents could not be prepared every third year. For thirty-five years no documents were demanded by the landlord or submitted by the *patnidar*. The present suit was brought by the landlord to recover the sum of Rs. 1,290 for the *patnidar's* default to deliver the documents, the sum having been calculated at the rate of Rs. 215 per annum for six years:

Held, that the landlord having failed to enforce the clause in the *kabuliyat* for thirty-five years was not entitled to maintain the present suit for damages.

Evidence of the subsequent acts and conduct of the parties to a written contract is admissible in evidence to show that certain terms of the contract were never intended to be acted upon from the very beginning. C NARENDRA LAL KHAN *v.* BHOLA NATH BHUYA, 27 C. W. N. 336; (1923) A. I. R. (C.) 417 154

——— s. 92, proviso (1)—*Recital in rent receipt as to period for which rent is paid—Oral evidence whether admissible to contradict recital—Fraud, effect of.*

In a suit for the recovery of rent oral evidence cannot be given to contradict recitals in receipts for rent granted by the plaintiff specifying the period for which the payments were made.

Where, however, it is alleged that the recitals as to the periods for which payments were made are fraudulent, oral evidence is admissible to prove the allegation under proviso (1) to section 92 of the Evidence Act. O BEHARILAL *v.* KALKA, 25 O. C. 282; (1923) A. I. R. (O.) 45 695

——— s. 92, proviso (2)—*Warranty, express—Oral evidence, whether admissible.*

Oral evidence of an express collateral warranty is admissible under proviso (2) to section 92 of the Evidence Act. B HURBURT JOHN AMIES *v.* JAL P. VIRJI, 25 Bom. L. R. 778; (1924) A. I. R. (B) 41 150

——— s. 101—*Construction of document—Agreement by surety—Security deposit, confiscation of—Justification—Burden of proof.*

The plaintiff deposited security money with the defendants, a partnership firm, on behalf of one of the members thereof, the agreement being that if the business suffered any loss, the other partners would be entitled to deduct the share of the loss of that member from the security money. After the partnership

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came to an end the plaintiff sued to recover his deposit. The defendants contended that in order to succeed the plaintiff was bound to prove that there had been no loss in the business:

Held, that upon a correct interpretation of the agreement the burden of proof was on the defendants to show that the business had suffered any loss and in the absence of such proof, the plaintiff was entitled to a decree. L KANSHI RAM *v.* HARO, 4 L. L. J. 214; (1922) A. I. R. (L.) 235 251

——— s. 101—*Suit on unregistered bond—Execution admitted—Full consideration denied—Burden of proof—Question of fact or law—Second appeal.*

In a suit on an unregistered bond, the defendant admitted execution. The receipt of consideration was not denied but it was not admitted in full and it was pleaded finally that whatever debt had been incurred had been repaid. The Trial Court placed the onus of proving absence of consideration on the defendant but the Appellate Court took a contrary view. On second appeal:

Held, (1) that the onus of proving absence of consideration lay on the defendant;

(2) that under the circumstances of the case; the question of the burden of proof was a question of law and could be agitated in second appeal. L GURDIT SINGH *v.* KARAM DAD, 4 L. L. J. 159 246

——— s. 110—Burden of proof. *See* MORTGAGE 903

——— s. 114. *See* EASEMENTS ACT, 1882, ss. 7, 17, 27 131

——— s. 114—*Appeal—Points not mentioned in judgment of Appellate Court—Presumption.*

The presumption is that an Appellate Court deals with the arguments put before it and if the form of the judgment shows that the only points presented before it were those with which it has dealt, the only inference which can be drawn, especially in the absence of an affidavit to the contrary by the Counsel who appeared before it, is that the remaining points were not urged and were definitely abandoned. L HARJI MAL *v.* DEVI DITTA MAL, 4 L. 364; (1924) A. I. R. (L.) 107 398

——— s. 114—*Hindu joint family—Sale of family property—Member not mentioned in sale-deed, whether party—Presumption.*

The mere fact that the name of any particular member of a joint Hindu family is omitted from the sale-deed, by virtue of which the joint property is transferred to a third party, does not show that he was not a party to the transfer. N GANIA *v.* GANGA PRASAD, 6 N. L. J. 269 738

——— s. 114, ill. (b)—*Identification of stolen property—Burmese coins.*

Though Burmese coins cannot be absolutely identified they are sufficiently uncommon at the present day to cast upon an accused person, in whose possession they are found and identified as stolen, the burden of proving that he came by them honestly. R. MAUNG LAY *v.* EMPEROR, 1 R. 609; 25 Cr. L. J. 381; (1924) A. I. R. (R.) 173 429

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——— **ss. 114, ill. (b), 133**—*Approver, statement of—Corroboration—Evidence relating to recovery of stolen articles from possession of accused.*

Evidence relating to the recovery of alleged stolen articles from the possession of an accused person, which is itself suspicious and unsatisfactory, cannot be treated as corroboration of the evidence of an approver involving that accused person in the commission of an offence of dacoity.

The house of a person accused of dacoity was searched in his absence and certain stolen articles were alleged to have been recovered. The accused was given no opportunity of checking the result of the search or giving any explanation as to how the articles came into the house. There was no evidence as to where the respective articles were found, nor as to who produced them:

***Held*, that the evidence as to the search was unsatisfactory and could not be used as corroboration of the approver's statement incriminating the accused. L SAUDAGAR SINGH *v.* EMPEROR, (1923) A. I. R. (L.) 683; 5 L. L. J. 572; 25 Cr. L. J. 495** **895**

——— **s. 115**—*Estoppel— Party signing award in token of assent.*

The signature of a party on an award does not render the award any the more binding on him if it is otherwise invalid. But where a party signs an award in token of acceptance, and his doing so leads the other party to believe that he is not going to contest it, on the strength of which belief the latter allows a pending suit to be dismissed, he is estopped from contesting the validity of the award. N. MANOHARLAL *v.* AMANO, (1924) A. I. R. (N.) 14 **41**

——— **s. 133**—*Approver—Corroboration—Conviction, whether can be based on uncorroborated statement of approver.*

There is no positive legal bar to taking an approver's evidence as a basis for a conviction but unless some reliable corroboration on a material point were super-added to it, it would, in almost all cases, be unsafe to accept it as conclusive. R MAUNG LAY *v.* EMPEROR, 1 R. 609; 25 Cr. L. J. 381; (1924) A. I. R. (R.) 173 **429**

——— **s. 133**—*Approver, whether can corroborate approver.*

There is nothing in section 133 of the Evidence Act to suggest that the statement of one approver cannot be regarded as corroborating that made by another approver. If, however it can be shown that the approvers had ample opportunity of consultation, the corroborative value of their evidence would be greatly diminished. L. DARYA SINGH *v.* EMPEROR, (1923) A. I. R. (L.) 666; 25 Cr. L. J. 520 **984**

Execution of decree—*Attachment and sale of judgment-debtor's property—Burden of proof.*

A decree-holder who is seeking to bring certain property to sale in execution of his decree must establish that the property belongs to his judgment-debtor only and is liable to be sold in execution of his decree. L. ISHAR DAS *v.* FAZAL ILAHI, (1923) A. I. R. (L.) 522 **516**

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——— *Construction of decree, rules of—Execution Court, duty of—Variance between judgment and decree—Amendment—Procedure—Civil Procedure Code (Act V of 1908), s. 152, O. XX, rr. 6, 7.*

A decree speaks for itself and must be executed as it stands, the executing Court being confined between the four corners of the decree.

Bhugobat Singh v. *Ram Adhin Singh*, 22 W. R 330, *Radha Pershad Singh* v. *Torab Ali*, 18 C. 108; 5 Sar. P. C. J. 582; 9 Ind. Dec. (N. S.) 72 and *Udwant Singh* v. *Tokhan Singh*, 28 I. A. 57; 28 C. 353; 3 Bom. L. R. 318; 8 Sar. P. C. J. 14 (P. C.), followed.

But a decree, like any other document, is open to construction, and where a decree is ambiguous it ought to be so construed as to conform with the judgment.

Maharaja of Bhartpur v. *Rani Kanno Dei*, 28 I. A. 35 at p. 42; 23 A. 181; 3 Bom. L. R. 51; 5 C. W. N. 137; 7 Sar. P. C. J. 792 (P. C.), relied on.

There is, however, a limit to what construction can do, and the remedy by construction is only appropriate if the language of the decree is ambiguous. If the language is plain and there is no ambiguity the proper remedy for a variance between the decree and the judgment is to apply for the amendment of the decree.

The operative words of a decree were as follows:—

"It is ordered that this suit be partially decreed, that the plaintiff's right be declared to so much of the disputed lands as falls within the boundary lines of the Revenue Survey Map of 1848 of Mauza Nij Shampur Paharpur comprised in Mahal 218 of the Touzi of the Mohalla Collectorate laid down in the *Amin's* map:"

***Held*, that the meaning of the decree was not that the plaintiff's right was declared to so much of the disputed lands as fell within the boundary lines of the survey map of the village of which the *Amin* had made a map, but that the boundary lines of the Survey map were taken to be those laid down or shown in the *Amin's* map. C KUMAR SHOSHI KANTA *v.* SARAT CHANDRA ROY CHOWDHURY, 35 C. L. J. 339** **167**

——— *Decree against husband—Sale of property belonging jointly to husband and wife—Suit for declaration by wife, maintainability of—Estoppel.*

A suit brought against a Burmese husband on the basis of a pro-note executed by him in respect of money borrowed by him for the benefit of himself and his wife, was decreed, and in execution of the decree a house belonging jointly to the judgment-debtor and his wife was sold. The wife thereupon brought a suit for a declaration that half the house belonged to her:

***Held*, (1) that the decree being against the husband only, his right, title and interest in the house alone were sold and passed to the purchaser;**

(2) that the plaintiff was not estopped from claiming half the house and her suit was, therefore, entitled to succeed. R SAW ALA AUNG *v.* MA MA NYO, 1 R. 555; (1924) A. I. R. (R.) 165 **402**

Execution of decree—concld.

——— *Money-decree—Power of Court to stay execution against person of judgment-debtor on terms—Right of decree-holder to elect his remedies.*

There is no power in a Court to stay execution of a money-decree against the person of the judgment-debtor on terms of his making part payment until the judgment-creditor proceeds in execution and sells the judgment-debtor's immoveable property.

It is for the judgment-creditor to elect his remedies in execution subject to such rules as may govern a particular case. **M.** AFAGAN SAHIB *v.* ABDUL MAJID KHAN, 19 L. W. 164; (1924) M. W. N. 295; (1924) A. I. R. (M.) 512 **764**

——— *Propriety of decree, whether can be questioned.*

The propriety of a decree cannot be questioned in execution. **O** JHANDA SINGH *v.* MUHAMMAD ANWAR KHAN, (1923) A. I. R. (O.) 160 **776**

Ex parte decree, *when to be passed.*

Even if a case is heard *ex parte*, it is the duty of the Court to consider the interest of the absent party and not to pass a decree except on proof by the plaintiff that he is entitled to that decree. **C.** MONMATHA KUMAR ROY *v.* JOSADA LAL PODDER, 28 C. W. N. 300 **551**

Extradition Act (XV of 1903), *applicability of—Berar and Hyderabad State.*

A case of extradition from Berar to Hyderabad State is governed by the Extradition Treaty of 1867 between the Indian Government and the State and not by the Extradition Act. **N** DADDIPRASAD *v.* DISTRICT MAGISTRATE, YEOTMAL, 25 Cr. L. J. 316 **234**

Family settlement—*Form, defective, effect of.*

It has been the policy of Courts of Equity to uphold family settlements even when they are not in legal form. **N.** MANOHARLAL *v.* AMANO, (1924) A. I. R. (N.) 14 **41**

Fraud—*Suit to set aside decree—False evidence, decree based on.*

The fact that a decree is based on false evidence does not amount to fraud vitiating the decree unless the effect of the false evidence was to prevent the other party from putting his case before the Court. **B.** GOKULDAS PITAMBER *v.* ODHAVJI GIGABHAI, 25 Bom. L. R. 893; (1924) A. I. R. (B.) 100 **206**

Gift. *See* CONSTRUCTION OF DOCUMENT **83**

Guardian *de facto*, whether entitled to sell minor's property. *See* TRANSFER OF PROPERTY ACT, 1882, s. 7 **705**

Guardians and Wards Act (VIII of 1890), s. 19 (c)—*Bombay Court of Wards Act (I of 1905), ss 11, 22—Jurisdiction of District Court when ousted—Property of minors in charge of Court of Wards—Mother appointed guardian of persons—Appointment when liable to be cancelled.*

The jurisdiction of the District Court is ousted, under section 19 (*c*) of the Guardians and Wards Act, only when there is a Court of Wards competent to appoint a guardian of the person of a minor.

Guardians and Wards Act—concld.

Where the mother of certain minors was appointed guardian of their persons but as their property had already been taken charge of by the Court of Ward, the Collector applied for the cancellation of her appointment on the ground that she was not well-behaved and took no care of the minors:

Held, (1) that the Court of Wards had not assumed superintendence over the persons of the minors, it was not competent to appoint a guardian of their persons and, therefore, the appointment of the mother could not be cancelled under section 19 (*c*) of the Guardians and Wards Act;

(2) that the application of the Collector should be considered on its merits. **B.** NAGAVA GURLINGAYA *v.* COLLECTOR OF BELGAUM, 25 Bom L. R. 1232; (1924) A. I. R. (B.) 157 **702**

——— **ss. 34, 35, 45**—*Balance due from guardian—Order attaching property of guardian and security, legality of—District Judge, power of.*

A District Judge has no power under section 34 (*d*) of the Guardians and Wards Act, to attach the property of a guardian or of his security for the purpose of realising the balance due from the guardian to the minor's estate. Section 35 of the Act provides the remedy for the realisation of the amount due from the guardian and ample powers are also given to the District Judge under section 45 of the Act. **L** RADHAKISHAN *v.* KHUSHIRAM, (1923) A. I. R. (L.) 506 **478**

Hindu Law—Bandhus, rules relating to **17**

——— *Bombay Presidency—Inheritance—Atmabandhus—Mother's brother's son and mother's sister's son.*

According to the Mitakshara, as interpreted in the Bombay Presidency, mother's brother's son and mother's sister's son, being *atmabandhus* are equally distant and, therefore, are entitled to inherit the property equally. **B.** RAJEPPA RANAPPA KUNDAGOL *v.* GANGAPIA JOTAPPA MANDWE, 24 Bom. L. R. 789; (1922) A. I. R. (B.) 420; 47 B. 48 **29**

——— *Bombay Presidency—Widow succeeding as gotraja sapinda—Adoption, power of.*

In the Bombay Presidency a Hindu widow who succeeds to an estate not her husband's but as a *gotraja sapinda* of the last male holder, and in consequence of the absence of nearer heirs, cannot make a valid adoption so as to defeat the rights of reversioners. **B.** YEKNATH NARAYAN KULKARNI *v.* LAXMIBAI KESHO GOPAL, 24 Bom. L. R. 836; (1922) A. I. R. (B.) 347; 47 B. 37 **117**

——— **Adoption.** *See* CONSTRUCTION OF DOCUMENT **477**

——— **Adoption by widow**—*Adopted son, whether can inherit property of adoptive mother's ancestors.*

Under the Hindu Law an adopted son takes the place of a natural son, and is entitled to inherit the property of his adoptive mother's ancestors.

It may be that where an adoption by a Hindu widow has the effect of divesting any estate vested in a third person, it might not be valid: but

it does not follow that where it has no such effect the adoption is necessarily valid.

Where the daughter-in-law of the last Hindu male holder succeeds him as a *gotraja sapinda*, in the absence of any nearer heir, she cannot make an adoption to her husband so as to affect the devolution of the estate inherited by her as a *gotraja sapinda*. B. DATTATRAYA BHIMRAO SABNIS *v.* GANGABAI GANESHBHAT, 24 Bom. L. R. 69; 46 B. 541; (1922) A. I. R. (B.) 321 17

——— **Alienation**—*Necessity—Antecedent debt—Manager or father, powers of—Father, whether alive or dead, effect of.*

The managing co-parcener of a joint undivided estate cannot alienate or burden the estate *qua* manager except for purposes of necessity.

But if he is the father and the reversioners are the sons he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt.

If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind more than his own interest.

Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached.

There is no rule that this result is affected by the question whether the father, who contracted the debt or burdens the estate, is alive or dead. P. C. BRIJ NARAIN RAI *v.* MANGLA PRASAD RAI, 21 A. L. J. 934; 46 M. L. J. 23; 5 P. L. T 1; 28 C W. N. 253; (1924) M. W. N. 08; 19 L. W 72; 2 P L R. 41; 10 O. & A. L. R. 82; (1924) A. I. R. (P. C.) 50; 33 M. L. T. 457; 46 A. 95; 26 Bom. L. R. 500 689

——— **Custom**—*Primogeniture, rule of*—Deshgat vatan—*Burden of proof—Impartibility—Presumption.*

The question whether a Deshgat is impartible and subject to the rule of primogeniture must be determined in each case, but in the Southern Maratha country, a Deshgat Vatan almost always descends according to the rule of primogeniture.

Timmangavda v. *Rangangavda*, (1878) P. J. 240; *Adrishappa* v. *Gurushiaappa*, 4 B. 494; 7 I. A. 162; 4 Sar. P. C. J. 154; 3 Suth. P. C. J. 757; 4 Ind. Jur. 421; 3 Shome L. R. 206; 7 C. L. R. 1; 2 Ind. Dec. (N. S.) 838 (P. C.), followed.

In the case of an ancient Deshgat Vatan in the Southern Maratha country which has never been divided, lands being given to the Kumar for maintenance and reverting to the eldest branch when their lines of descendants became extinct, the Court is justified in holding that the Vatan is impartible and descends according to the rule of primogeniture.

Per *Crump, J.*—A custom of primogeniture, if clearly proved, supersedes the general Hindu Law of descent.

Sindhojirav v. *Naikojirav*, 10 B. H. C. R. 228, followed.

Such a custom as the above is not, however, an unusual feature of Deshgat Vatans in the Southern Maratha country, but it is for the party who sets up the custom to establish it in each case.

The best evidence of impartibility is that over a long period of years there has been no partition. B. MAHADEVAPPA *v.* KASHIRAO, 25 Bom. L. R. 797; (1923) A. I. R. (B.) 467 92

——— **Dayabhaga** v. **Mitakshara**—*Family migrating from one province to another—Presumption.*

A Hindu family, residing in a particular province of India, is presumed to be governed by the law of the place where it resides. This presumption is rebutted, where the family is shown to have migrated from one province to another.

Where a Hindu family migrates from one province to another, the presumption is that it carries with it the laws and customs as to succession and family relations prevailing in the province from which it came; but this presumption may be rebutted by proof that the family has adopted the law and usages of the place to which it has migrated. The reason is that the Hindu law is not a merely local law, but is essentially personal law, an integral factor of the status of every family which is governed by it. In its new domicil, the family may, by the reflex action of manners and customs prevalent in resident families, consciously or unconsciously, modify its own governing rules; there may thus be an acceptance of a new law, not due to sudden change by choice or agreement, but by the gradual evolution of a family usage. When a new family usage has thus grown up in the course of generations, possibly with the concurrence or acquiescence of families of the same group, it furnishs the governing law of the family.

It is not, however, open to an individual member of a family which has migrated and adopted the law of its new domicil, merely of his own choice to revert to the law which governed the family in its original home. (1) SARADA PRASANNA ROY *v.* UMA KANTA HAZARI, 37 C. L. J. 233; (1923) A. I. R. (C) 485; 50 C. 370 410

——— **Idol**, *gift to, acceptance of*—Shebait, *powers of.*

In determining whether the *shebait* of an idol is empowered to accept, on behalf of an idol a gift coupled with conditions, the test is whether the conditions are for the benefit of the idol C. PRADYUMNA KUMAR *v.* PRAMATHA NATH, 27 C. W. N. 684; (1923) A I R. (C.) 708 833

——— **Joint family**—*Alienation by co-parcener—Suit by co-parcener to challenge alienation—Transaction, whole, whether can be set aside.*

Under the Mitakshara a single member of a joint Hindu family, whose rights have been infringed by a sale of joint family property, can have the entire sale set aside. O DWARA PRASAD *v.* RAM DEI, 10 O. L. J. 360; 10 O. & A. L. R. 194; (1924) A I. R. (O.) 120 329

——— ——— *Alienation by father—After-born son, whether can challenge alienation—Suit by son in existence, effect of—Necessity—Burden of proof—Presumption;*

Hindu Law—contd.

Where a Hindu son brought a suit to challenge an alienation of family property made by his father, but before the suit could be decided another son was born to the alienor:

Held, that the cause of action had not been exhausted before the birth of the second son and the latter was, therefore, entitled to bring a suit to challenge the alienation.

Bhup Kuar v. *Balbir Sahai*, 64 Ind. Cas. 885; 19 A. L. J. 978; 44 A. 190; (1922) A. I. R. (A.) 342, relied on.

Where there has been a transfer of family property by a Hindu father for cash down and the son of the transferor contests the legality of the sale the burden lies on the vendee to prove the valid nature of the consideration.

Where a Hindu father makes a transfer of family property and his minor sons are nominally joined in the transfer the presumption is that the transfer has been made by the father in his capacity as manager of the family. O JANG BAHADUR SINGH *v.* RANJIT SINGH, 10 O. L. J. 353; 10 O. & A. L. R. 189; (1924) A. I. R. (O.) 141 **353**

——— **Joint family**—*Alienation by father—Necessity—Inquiry—Burden of proof.*

A person who takes a mortgage from a Hindu father in consideration of a present advance, as opposed to an antecedent-debt, is bound to establish in a suit brought by a son of the mortgagor to challenge the validity of the alienation, so far as it affects his interests, that the advance was made by him after a reasonable and fair inquiry which satisfied him, as a prudent man, that the money was required for the legal necessities of the family. L RODHA RAM *v.* AMAR CHAND, 4 L. 208; (1924) A. I. R. (L.) 141 **333**

——— *Alienation by father—Necessity—Small portion of consideration not for necessity—Sale, whether can be set aside.*

A sale of family property by a Hindu father cannot be set aside merely because a small portion of the sale consideration is found not to have been advanced for necessity.

Lala Chatranarayan v. *Uda Kanwari*, 1 B. L. R. 201; *Felaram Roy* v. *Bagalanand Banerjee*, 6 Ind. Cas. 207; 14 C. W. N. 895; *Naman Mal* v. *Har Bhagwan*, 66 Ind. Cas. 362; 2 L. 357; (1922) A. I. R. (L.) 317 and *Kannu Chetty* v. *Amirthammal*, 26 Ind. Cas. 418; 1 L. W. 877, relied on.

A sale of family property by a Hindu father merely for the purpose of paying off a mortgage which exists on the property is not justified. L GOKHA RAM *v.* SIAM LAL, 3 L. 426; (1923) A. I. R. (L.) 268 **174**

——— *Antecedent debt, what is—Reasonable enquiry—Necessity—Purchase of ancestral property of near relative—Immoral debts—Connection between oan and immoral act, proof of.*

Per *Drake-Brockman*, *J. C.*, and *Batten*, *A. J. C.*, (*Hallifax*, *A. J. C.*, *dissenting*):—A debt borrowed by a Hindu father on the security of the joint family property does not constitute an antecedent debt so as to bind his sons by a subsequent mortgage effected for the discharge

Hindu Law—contd.

of that debt, and it is open to the sons, when a suit is brought to enforce the latter mortgage, to plead that the earlier one was not justified by legal necessity.

Per *Hallifax*, *A. J. C.*—What is in fact an antecedent or pre-existing debt due by a Hindu, for the satisfaction of which he would be entitled to alienate his sons' shares in the joint family property along with his own, if he had not mortgaged that property as security for the debt at the time he incurred it, does not change its character as an antecedent-debt due by the father for which he is entitled to alienate his sons' shares, merely by reason of his having executed a void mortgage of those shares along with the valid mortgage of his own when he first incurred the debt.

If, however, the first mortgage was executed only as a blind with the knowledge that it was invalid and with the intention of executing another, after the debt had had time to ripen into a deceptive appearance of being an antecedent-debt, it would not be antecedent at all at the time of the execution of the second mortgage.

Arumugham Chetty v. *Muthu Koundan*, 52 Ind. Cas. 525; 42 M. 711; 9 L. W. 565; (1919) M. W. N. 409; 37 M. L. J. 166; 26 M. L. T. 96 (F. B.), relied on.

The doctrine of reasonable satisfaction after due enquiry as to the propriety of an alienation of joint family property by the manager of a joint Hindu family applies as much to the case of an antecedent-debt as to family necessity or pressure on the estate.

Per *Drake-Brockman*, *J. C.*—The duty of the father or other manager of a joint Hindu family is to manage the property of the family for the benefit of the family. He is not entitled to encumber the property for the purpose of acquiring ancestral property belonging to a near relative.

In order to exonerate himself from liability to pay his deceased father's debts on the ground of immorality, a Hindu son must establish a connection between each particular debt and some act of immorality of the father for which the debt was borrowed. N GANPATRAO *v.* LAXMICHAND, 6 N. L. J. 239; (1924) A. I. R. (N.) 1 **640**

——— **Joint family**—*Debt incurred by one member—Liability of other members—Necessity, proof of.*

A member of a joint Hindu family can be made jointly liable for a debt incurred by another member of the family only on proof that the money was borrowed for necessary family purposes. L BALLA *v.* BARU MAL, (1923) A. I. R. (L.) 685 **926**

——— *Debts incurred by father—Pious obligation of sons, whether can be enforced during lifetime of father.*

The interest of a Hindu son in joint family property cannot, by virtue of the pious obligation of a Hindu son to pay his father's debts, be sold in the father's lifetime in execution of a simple money-decree obtained against the father.

There is a difference in this respect between cases in which the property has passed out of the family and cases in which the property has not so passed out. A RAM KISHORE *v.* ABDUL KARIM, (1923) A. I. R. (A.) 173 **509**

—— **Joint family**—*Gift by undivided co-parceners, validity of.*

Under Hindu Law a gift even of his own share in joint family property by an undivided co-parcener is invalid. N MULLA FAIZ ALI *v.* HARKAUR, (1923) A. I. R. (N.) 334 **50**

———— *Impartible estate—Separation, how effected—Income, whether forms part of estate.*

It is competent to a member of a joint family to separate himself from the family by a clear and unequivocal intimation of his intention to sever and this is also true with regard to an impartible estate but as in that case the person separating forfeits his chance of inheriting the whole of the estate by survivorship, it requires strong evilence to establish such separation.

Girja Bai v. *Sadashiv Dhundiraj*, 37 Ind. Cas. 321; 43 C. 1031; 20 C. W. N. 1085; 4 A. L. J. 822; 20 M. L. T. 78; 12 N. L. R. 113; (1916) 2 M. W. N. 65; 18 Bom. L. R. 624; 4 L. W. 114; 24 C. L. J. 207; 31 M. L. J. 455; 43 I. A. 151 (P. C.), *Kawal Nain* v. *Budh Singh*, 40 Ind. Cas. 286; 39 A. 496; 15 A. L. J. 581; 2 P. L. W. 57; 21 C. W. N. 986; 33 M. L. J. 42; 19 Bom. L. R. 642; 26 C. L. J. 101; (1917) M. W. N. 514; 6 L. W. 330; 44 I. A. 159 (P. C.), followed.

The income from an impartible estate, when received, does not form an accretion to the original property but is the absolute property of the owner of the estate. P. C. JAGDAMBA KUMARI *v.* WAZIR NARAIN, (1923) A. I. R. (P. C.) 59; 44 M. L. J. 503; 37 C. L. J. 287; 32 M. L. T. 157; 4 P. L. T. 319; 25 Bom. L. R. 676; 2 Pat. 319; 18 L. W. 555; 28 C. W. N. 98; (1923) M. W. N. 460 **1041**

———— *Mortgage by father—Necessity, absence of—Transfer of Property Act (IV of 1882), s. 68 (c).*

An alienation of family property by a Hindu father which is not supported by family necessity is void *ab initio.*

Gajodhar Bakhsh v. *Gauri Shankar*, 61 Ind. Cas. 205; 8 O. L. J. 81, followed.

Where a mortgage of family property by a Hindu father is declared void, the mortgagee becomes entitled to sue for the mortgage-money under section 68 (*c*) of the Transfer of Property Act and limitation for such a suit begins to run from the date on which the mortgagee is refused, or is ousted from, the possession of the mortgaged property. O UDAIRAJ SINGH *v.* RAM UDIT TEWARI, 10 O. L. J. 376; (1924) A. I. R. (O.) 147 **340**

———— *Partition—Member seizing portion of property, effect of.*

A member of a joint Hindu family, quarrelling with his family, might seize some part of the family property in order to provide himself with a living. In such a case he would not forfeit his right to obtain a formal partition, in which he would get his proper share. O JANGI SINGH *v.* GANGA SINGH, 10 O. L. J. 393; (1924) A. I. R. (O.) 115 **391**

———— **Joint family**—*Partition, partial—Severance in food and business—Properties still joint, nature of.*

When members of a joint Hindu family divide portions of the family property, a state of severance would in all probability result though it depends upon the circumstances in each case and the facts proved, whether the family still remains joint, each member holding his share of the properties divided as his own separate property, and all the members holding the undivided property as members of a joint Hindu family.

A very large portion of the property of a joint family was divided amongst the members in 1889 and from that date they began to live separate and have separate business and enjoyment in respect of their respective properties;

Held, that it was a legitimate presumption to draw that the members of the family intended to live divided after 1889 and continued to own the property still remaining undivided as tenants-in-common. B KASTURIBHAI MANIBHAI *v.* BAI MAHALAXMI, (1923) A. I. R. (B.) 464 **914**

———— *Partition—Property kept joint—Partnership, whether created—Member managing business—Accounts, liability to render.*

Where on a partition of joint family property it is agreed that certain items should continue to remain joint, it cannot be held that the members of the family constitute a partnership with respect to such items.

Where one member of a joint Hindu family manages a family business he is in the position of an agent *qua* the other members, and it is incumbent on him to render an account of the business, and he cannot escape from the liability of rendering accounts simply because he says that he possesses no account-books. L RAM KISHAN *v.* RAUSHAN, (1923) A. I. R. (L.) 551 **532**

———— *Partition—Property left undivided nature of—Money realised by one member after partition—Suit for recovery—Limitation Act (IX of 1908), Sch. I, Art. 127.*

Anything left undivided at a partition of Hindu joint family property ceases to be joint family property and a suit for the recovery of money realised by on member of the family to the exclusion of another is not governed after separation or partition by Art. 127 of the Limitation Act but must be brought within three years from the date of separation or partition. O JAGAT SINGH *v.* ACHHAIBAR SINGH, 26 O. C. 191; (1922) A. I. R. (O.) 15 **697**

———— *Separation—Sale of share in family property.*

A member of a joint Hindu family may purport to alienate his own share in the family property, but by doing so he does not effect separation. O DWARKA PRASAD *v.* RAM DEI, 10 O. L. J. 360; 10 O. & A. L. R. 194; (1924) A. I. R. (O.) 120 **329**

———— *Separation—Tenancy-in-common—Manager, position of.*

When the members of a Hindu joint family express an intention to separate, they are no

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longer members of the joint family in the eye of the law, yet if there has been no partition of the joint family property, the members would continue as tenants-in-common and would be liable for the acts of the member in charge of the property. **B** MOTI CHAND *v.* MANEKCHAND RAMCHAND GOJAR, (1922) A. I. R. (B.) 147 **515**

——— **Joint tenancy**—*Gift by meternal grandfather to grandsons.*

Technical rules of English conveyancing should not be imported into Hindu Law.

Jogeswar Narain v. *Ram Chandra Duit*, 23 C. 670; 23 I. A. 37 at p. 44; 7 Sar. P. C. J. 13; 6 M. L. J. 75; 12 Ind. Dec. (N.S.) 445 (P.C.), followed.

The principle of joint tenancy is unknown to the Hindu Law apart from the Mitakshara doctrine of survivorship.

A *Yaluk* or affectionate gift of property by a maternal grandfather to his grandsons does not constitute the donees joint tenants with right of survivorship. **C** SARADA PRASANNA ROY *v.* UMA KANTA HAZARI, 37 C. L. J. 233; (1923) A. I. R. (C.) 485; 50 C. 370 **450**

——— **Mayukha**—*Succession—Uncle and nephew—Priority.*

According to the Vyavahara Mayukha the only test of preference among the distant Sapindas is the test of propinquity to the propositus so that an uncle being nearer to the propositus will exclude a nephew from succession. **B** HARIBHAI GULAB *v.* MATHURA LALLU, 25 Bom. L. R. 929; 47 B. 940; (1924) A. I. R. (B.) 140 **224**

——— **Partition**—*Intention of parties.*

The true test of partition under Hindu Law is the intention of the members of the family to become separate owners. Consequently, there may be partition, even though there be no actual division by metes and bounds. **C** SARADA PRASANNA ROY *v.* UMA KANTA HAZARI, 37 C. L. J. 233; (1923) A. I. R. (C.) 485; 50 C. 370 **450**

——— **Property** acquired by collateral succession whether joint family property. *See* CIVIL PROCEDURE CODE, 1908, s. 11, Expl. VI, O. VII, r. 4 **1028**

——— ——— *purchased in name of wife—Presumption.*

There is no presumption that property standing in the name of a Hindu woman, even though purchased in her name, belongs to her husband. **A** MAHRANA KUNWAR *v.* DAVID, 21 A. L. J. 737; (1924) A. I. R. (A.) 40; 46 A. 16 **57**

——— **Religious endowment**—*Alienation by manager—Gift in perpetuity, validity of.*

The manager of a temple has no power to make a gift in perpetuity out of temple funds.

An alienation made by the manager of a temple cannot extend beyond his lifetime. **B** RAMACHANDRA *v.* NARAYANRAO, (1923) A. I. R. (B.) 296 **463**

——— ——— *Temple—Muhammadan* pujari, *whether liable to removal.*

When Shudras become Muhammadans it frequently happens that their social relationship with Hindu Shudras remains much as it was. It is more a question of custom than a question of what is laid down by writers on the Hindu Law.

In a small Hindu temple of great antiquity the right to receive offerings and the right to officiate as *pujaris* had for a long time been shared between Hindu and Muhammadan *malis* without objection by the worshippers;

Held, that the Muhammadans could not be deprived of the right merely on the ground that the temple was a Hindu temple. **A** BABA *v.* SUKKHA, (1923) A. I. R. (A.) 165 **918**

——— **Succession**—Bandhus, *rules relating to—Males and females—Rule applicable—Son's daughter's son* v. *sister's daughter—Balambhathi, value of.*

The list of *bandhus* given in the text of the Mitakshara is merely illustrative and not exhaustive; nor does it indicate anything more than this that the *atma bandhus* are to be preferred to the *pitri bandhus* and that the *pitri bandhus* are to be preferred to the *matri bandhus*. Subject to this, propinquity to the propositus is practically the sole test of preference between *bandhus*.

Among *bandhus* of the same class, however, and of the same degree of nearness to the propositus in the same branch, the males are preferred to the females, and it is doubtful whether the preference of the males over the females can be carried further.

It is a recognised way of determining the nearness of relationship to see how far each is removed from the propositus, and in the absence of any other consideration justifying a differential treatment that would be the only means of determining it.

In the case of *bandhus* equally removed from the propositus, however, one in the direct line of descent should be preferred to one in a collateral line.

A son's daughter's son is a preferential heir as being a nearer *bandhu* than a sister's daughter, though they are both equally removed from the propositus.

Though the Balambhatti is useful as aiding the interpretation of the Mitakshara the views propounded therein cannot be accepted without due caution and examination; for instance, the position assigned to the sister's daughter in the Balambhatti cannot be properly accepted. **B** DATTATRAYA BHIMRAO SABNIS *v.* GANGABAI GANESH BHAT, 24 Bom. L. R. 69; 46 B. 541; (1922) A. I. R. (B.) 321 **17**

——— **Widow** — *Alienation—Necessity—Inadequacy of price.*

Where a Hindu widow alienates a portion of her husband's estate for necessity, then unless the difference between the true price of the property alienated and the actual price paid by the alience is particularly inadequate, the sale ought not to be set aside. A reasonable allowance ought to be made for the difference in price in favour of the alienation. **B** CHANBASAIA PUTTAPPA *v.* CHANBASAVA MALLAPPA, 25 Bom. L. R. 1078; (1924) A. I. R. (B.) 170 **336**

Hindu Law—concld.

——— **Widow**—*Surrender—Device to share estate between widow and reversioners, validity of—Estoppel.*

By an arrangement between the widow and reversioners of a deceased Hindu, the latter's estate was divided up between one of the reversioners and a relative of the widow, the plaintiff, another reversioner being compensated by the execution in his favour of a promissory-note to be met out of the income of the estate;

Held, (1) that the arrangement between the reversioners and the widow was not a *bona fide* surrender with the assent of the reversioners to which effect could be given;

(2) that the plaintiff was not estopped from questioning the arrangement. **M** PEDDI VEERAYYA *v.* KOKUMANU TIRUPATIRAYUDU, (1923) M. W. N. 679; (1924) A. I. R. (M) 177 **758**

Inam Register—*Title-deed—Grant of* inam—Devadayam—*"For the support of the mosque"—Public endowment.*

An *inam* statement is only a statement made by a party to the *inam* inquiry and is merely an assertion of his alleged title before a Tribunal which has to decide it. But the Inam Register embodies the result of the finding of the Inam Commissioner based partly on the statements put in by the parties and partly on other evidence and is entitled to greater importance.

Where the Inam Register described an *inam* as Devadayam and the purpose of the *inam* grant was given as for the support of the mosque and there was no other document of title:

Held, that, *prima facie*, the endowment was a public endowment for the mosque. **M** PIR PACHA SAHEB *v.* MOHAMMAD RUHIMUDDIN, 19 L. W. 174; 46 M. L. J. 245; (1924) M. W. N. 217 **777**

Inam rights—*Grant, construction of—Assessment, exemption from—Covenant, whether runs with land—Successor-in-title of grantor, whether liabe.*

The predecessors-in-title of the defendants made a grant in favour of the plaintiffs' father which contained the following clauses:

"1. Exemption of the assessment of the said lands has been made in favour of you and your heirs.

2. In case there is any obstruction in respect of the *inam* and you have occasion to pay the assessment, the said sum of assessment will be paid by us without reference to each other."

The village authorities recovered the assessment from the plaintiffs and the latter sued to recover the sum from the defendants;

Held, that the grantors had made a gift to the grantee not only of their occupancy right in the land, but also of the *inam* rights which they had in connection with the land, and had granted for all time the exemption of assessment of the lands to the grantee and his descendants;

(2) that the grantee's right ran with the land and the *inamdars* for the time being were liable under the covenant;

(3) that the assessment having been recovered from the plaintiffs for the benefit of the defendant the latter were personally liable to re-pay the amount to the plaintiffs. **B** RAMCHANDRA MADHAVRAO *v.* TRIMBAK SHRIDHAR, 25 Bom. L. R. 1074; (1924) A. I. R. (B.) 152 **562**

Income Tax Act (VII of 1918), s. 3 (1)—*Income accruing and received outside British India—Directors and share-holders controlling business from British India—Income whether liable to assessment.*

A Company having its head office in Bellary in the Presidency of Madras carried on a factory in the Territories of the Nizam of Hyderabad, outside British India and the actual business operations of the Company were conducted there. The Directors and share-holders of the Company, who controlled the business, directed the policy examined the accounts and issued the dividend warrants, were in British India. Some money was received at Bellary for the purpose of office expenditure and some money also for the payment of dividend warrants, although the dividend warrants issued to shareholders were expressed to be payable outside British India. The Company was sought to be assessed to income-tax in Madras Presidency on its profits;

Held, that the profits of the Company did not accrue or arise, nor were they received, in British India within the meaning of section 3 (1) of the Income Tax Act of 1918 and the Company was not, therefore, liable to be assessed to income-tax on its profits.

In re Aurangabad Mills, Limited, 64 Ind. Cas. 9; 45 B. 1286; 23 Bom. L. R. 570; *Secretary to the Commissioner* v. *Ramanathan Chetti*, 53 Ind. Cas. 976; 43 M. 75; (1919) M. W. N. 826; 10 L. W. 570; 37 M. L. J. 663; 26 M. L. T. 447; (F. B.), *Sundar Das* v. *Emperor*, 77 Ind. Cas. 616; 3 L. 349; (1923) A. I. R. (L) 14, followed.

Per *Oldfield, J.*—The identity between the share-holders and the Company is immaterial, where the assessment sought to be imposed is of the income of the Company as distinguished from that of the share-holders in their individual capacity. Even the payment of dividends to the share-holders within British India would be nothing more than the distribution of income which had already accrued outside British India and was payable as of right in accordance with the arrangement by the Company to the share-holders only outside British territory. **M** SECRETARY, BOARD OF REVENUE (INCOME-TAX), MADRAS *v.* RIPON PRESS AND SUGAR MILLS CO., LTD., 46 M. L. J. 523; 17 L. W. 584; (1923) M. W. N. 321; 32 M. L. T. 306; (1923) A. I. R. (M.) 574; 46 M. 706 **621**

——— **s. 3 (1)**—*"Received," meaning of—Money received outside British India and transmitted to British India, whether received in British India—Interpretation of Statutes—Fiscal Statute, principles applicable to.*

The subject is not to be taxed without clear words to that effect, and in a case of doubt the Courts should always lean against the construction which imposes a burden on the subject.

Income Tax Act—contd.

If a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.

An equitable construction is not permissible in the case of a taxing Statute where the Court should simply adhere to the words of the Statute.

Partington v. *Attorney-General*, (1869) 4 H. L. 100; 38 L. J. Ex. 205; 21 L. T. 370, relied on.

The word "receive" implies two persons, the person who receives and the person from whom he receives. A person cannot receive a thing from himself.

Where a person after receiving money outside British India brings it into or transmits it to British India, the money thus transmitted cannot be held to be income received in British India within the meaning of section 3 (1) of the Income Tax Act of 1918. L SUNDAR DAS *v.* COLLECTOR OF GUJRAT, 3 L. 349; (1923) A. I. R. (L.) 14 616

——— s. 3 (2) (viii)—*Exchange profits—Assessment to Income tax—Casual profits.*

A Nattukottai Chetty carrying on business in Madras and elsewhere as Banker and moneylender remitted from Madras sums aggregating over four lakhs of rupees to Penang through his banking agents, such sums being invested there in Straits Settlements dollars and ultimately reconverted into rupees and remitted back to Madras. The remittances were made on eight occasions and the re-transfer to Madras on thirteen occasions. Owing to fluctuations of exchange between dollars and Rupees the Chetty made a profit of considerable amount on the transactions, and was assessed to income-tax. These dealings in exchange had become part of the assessee's general Banking business:

Held, that the income, not being receipts arising from business of a casual and non-recurring nature was rightly assessed to Income-Tax.

In considering whether a case comes under section 3 (2) (*viii*) of the Income Tax Act, receipts of a casual and non-recurring nature are only exempted when they are not receipts arising from business. The question to be considered is whether a particular receipt is properly brought into account or omitted in carrying the profits of a business. If the transactions form part of the ordinary business of the assessee, the profits or losses must be brought into account. But if the transactions are outside the scope of the ordinary business of the assessee, they need not be brought into account. The question is one of fact in each case whether the transactions form part of the ordinary business or not. M SECRETARY, BOARD OF REVENUE *v.* ARUNACHELAM CHETTIAR, 18 L. 776; 45 M. L. J. 707; 3 M. L. T. 119; (1924) A. I. R. (M.) 208; 47 M. 197 216

Income Tax Act—concld.

——— s. 9—*Business profits, assessment of—Firm doing dual business—Adjustment of profits and losses—Assessee disputing correctness of assessment—Expenses, deduction of.*

Where the business of a firm assessed to Income Tax is carried on in part by engaging in partnership with other firms and the subsidiary business so engaged in is connected with the main business and is a proper employment of the Assessee's capital and labour, for the purpose of assessment of income-tax, the subsidiary business thus carried on can be treated as part of the main business of the firm and loss incurred therein may be set off against profits made in the main business.

Under section 9 clause 2 (*ix*) of the Income Tax Act, the expenditure incurred in employing accountants and lawyers in disputes between the assessees and the Government as to the amount of excess profits duty payable and in arriving at the taxable income is not strictly "for the purpose of earning profits" and is not a legitimate allowance for deduction in arriving at the taxable income of a later year. M SECRETARY BOARD OF REVENUE *v.* MUNISAMI CHETTY, 18 L. W. 702; 45 M. L. J. 711; 33 M. L. T 122; (1924) A. I. R. (M.) 205 39

——— s. 12 (1). *See* CONTRACT ACT, 1872, ss. 239, 253 669

Income Tax Act (VI of 1922), s. 10—*Assessee doing dual business—Adjustment of profits and losses.*

Under the Income-Tax Act when a person carries on two different trades one individually and the other as a member of an unregistered firm, he is entitled to set off the loss incurred by him in respect of the partnership trade against the profits made by him in his individual trade.

The word "any" in the words "any business" in section 10 of the Act means not "each" but "each and every" M COMMISSIONER OF INCOME-TAX, MADRAS *v.* ARUNACHELLAM CHETTIAR, 46 M. L. J. 68; 19 L. W. 125; (1924) M. W. N. 326; (1924) A. I. R. (M) 474 772

Indian Councils Act, 1861, (24 & 25 Vic (C) 67), s. 22. *See* DIVORCE ACT, 1869, ss. 2, 7, 22 654

Injunction. *See* TRADE MARK 183

Insolvency. *See* CONVERSION 580

——— *Hindu joint family—Co-parcener, interest of, whether passes to Receiver.*

A member of a joint *Mitakshara* family has no interest in the family property which is capable of passing to a Receiver upon insolvency. Pat SANT PRASAD SINGH *v.* SHEODUT SINGH, 2 Pat. 724; (1924) A. I. R. (Pat.) 259 589

——— *Court, duty of—Question of title.*

It is always desirable that a question of paramount title raised in insolvency proceedings should be decided by the Court and not by the Receiver. Pat SANT PRASAD SINGH *v.* SHEODUT SINGH, 2 Pat. 724; (1924) A. I. R. (Pat.) 259 589

Interest, *future—Discretion of Court—Appeal, second—Interference by High Court.*

The award of future interest is discretionary with the Court and where this discretion has been exercised by the lower Appellate Court by disallowing future interest, the High Court will not in-

Interest—concld.

terfere in second appeal. L MUHAMMAD ASLAM v. JODH SINGH, (1923) A. I. R. (L.) 513 416

———, *rate of.*

The rate of interest recoverable from a judgment-debtor is determined not by the purpose for which the money is applied but by the market-rate prevailing at the time. Pat DULHIN SONA KUER v. BIBI ALE FATIMA 157

Interpretation of Statutes. *See* INCOME TAX ACT, 1918, s. 3 (1) 616

——— *Intention of Legislature.*

In interpreting a Statute it is not for the Court to speculate as to the intention of the Legislature if that intention has not been carried into effect by the language used. L GOBIND DAS v. RUPKISHORE, 4 L. 367; 6 L. L. J. 25; (1924) A. I. R. (L.) 65 409

——— *Retrospective effect:*

No Statute must be construed so as to have retrospective operation unless such construction appears very clearly in the terms of the Act or arises by necessary and distinct implication, nor is a Statute to be construed so as to have a greater retrospective operation than its language renders necessary. Even in construing a section which is to a certain extent retrospective, the maxim ought to be borne in mind as applicable whenever the time is reached at which the words of the section cease to be plain.

Unless from the language a contrary effect is clearly intended every Statute which takes away or impairs vested rights must be presumed not to have a retrospective operation. N. LAHINI v. BALA, 18 N. L. R. 85; (1922) A. I. R. (N.) 227 798

Jurisdiction, *meaning of—Existence and exercise of jurisdiction, distinction between.*

Jurisdiction, in relation to the proceedings of a Court means the authority of a Court to decide a particular cause or matter. Where the authority exists, the proceedings are binding on the parties until set aside by some process known to the law. They cannot be set aside or disregarded in a collateral proceeding.

There is a fundamental distinction between existence of jurisdiction and exercise of jurisdiction. Those proceedings only can be declared null and void and, therefore, disregarded which have been conducted by a Court not having an authority to conduct them; but where the complaint is as to the mode in which the jurisdiction has been exercised, the appropriate procedure provdied for the removal of the grievance must be pursued if the complainant is to have any remedy for the injury done or supposed to be done to him. Pat JAGDISHWAR NARAYAN v. MUHAMMAD HAZIQ HUSSAIN, (1924) Pat. 142 851

———, *question of, abandoned in Trial Court, whether can be taken in appeal.*

A question of jurisdiction depending on undisputed facts can be raised in appeal though it was abandoned in the Trial Court. C RAJENDRA NARAIN v. SATISHCHANDRA, 50 C. 948; (1924) A. I. R. (C.) 233 795

Jury trial—*Charge to Jury—Right of private defence, failure to explain, effect of—Misdirection—Charge by angry crowd—Right of private defence, extent of—Penal Code (Act XLV of 1860), s. 100.*

When in explaining section 100 of the Penal Code to the Jury the Sessions Judge failed to explain that an apprehension of grievous hurt would also confer a right on the accused to cause death in the exercise of the right of private defence:

Held, that the omission amounted to a serious misdirection.

When a person is set on by any angry crowd and there is apprehension of death or grievous hurt being caused the only remedy is the drastic one of shooting to kill in the first instance, as anything less is likely to increase the fury of the crowd.

An angry crowd is the more dangerous because persons composing it will commit crimes jointly that they would never commit individually. C MAHOMED YUNUS v. EMPEROR, (1923) A. I. R. (C.) 517; 50 C. 318; 25 Cr. L. J. 467 819

Kabuliyat, construction of. *See* BENGAL TENANCY ACT, 1885, s. 7 854

——— *See* BENGAL TENANCY ACT, 1885, ss. 160, 167 1044

Land Acquisition—*Toka land—Rules of assessment and capitalisation.*

Where Toka lands are being acquired Toka tenants are entitled to some consideration in fixing the rate of assessment on the value and the rate at which it should be capitalised, and they are not to be treated as if on the expiry of the period of their leases they would be rack-rented off their lands. B GOVERNMENT OF BOMBAY v. KHANDERAO RAMCHANDRA TALPADE, 25 Bom. L. R. 794; (1923) A. I. R. (B.) 417 137

Land Acquisition Act (I of 1894), ss. 20, 31—*Apportionment of compensation—Secretary of State, whether party—Parties interested.*

Under section 20 (c) of the Land Acquisition Act, the Secretary of State is only interested in the amount of compensation which the Collector, or the Court, on reference by the Collector, awards. He is not interested as a party in the distribution or apportionment of the compensation. His interest ceases when he has placed at the disposal of the Court the total amount of compensation. Any dispute as to the distribution or apportionment of the amount must be fought out between the parties who claim a share in the compensation. A SANWAL DAS v. SECRETARY OF STATE, 20 A. L. J. 604; (1922) A. I. R. (A.) 438 112

——— **ss. 23, 24**—*Compensation, assessment of—Special value, whether can be taken into account—Agricultural land assessed as buliding site—Trees, value of, whether can be allowed.*

In determining the amount of compensation payable for the compulsory acquisition of land by Government under the Land Acquisition Act the correct principle to apply is to assess the market value of the property not according to its present disposition but as laid out in the most lucrative and advantageous way in which owners could dispose of it. In assessing the market value of land used for agricultural purposes, the Court must

Land Acquistion Act—concld.

take into account its adaptability for building purposes and such other beneficial purposes to which it can be applied.

If, however, the special value exists only for the particular purchaser who has obtained power of compulsory purchase it cannot be taken into consideration in fixing the price. But when the special value exists also for other possible purchasers, the owner is entitled to have this element of value taken into consideration.

The Queen v. *Brown*, (1867) 2 Q. B. 630; 36 L. J. Q. B. 322, *In re Lucas and Chesterfield Gas and Water Board*, (1909) 1 K. B. 16 at pp. 30, 31; 77 L. J. K. B. 1009, 99 L. T. 767; 72 J. P. 437; 6 L. G. R. 1106; 24 T. L. R. 858, *In re Bwllfa and Merthyr Dare Steam Collieries* (1891), *Limited and the Pontypridd Waterworks Company*, (1902) 2 K. B. 135 at p. 141; 71 L. J. K. B. 613; 87 L. T. 291; 50 W. R. 627; 18 T. L. R. 604, *Wernicke* v. *Secretary of State for India*, 2 Ind. Cas. 562; 13 C. W. N 1046 at p. 1049, *Kailas Chandra Mitra* v. *Secretary of State*, 18 Ind. Cas. 638; 17 C. L. J. 34 at p. 35, *Premchand Burral* v. *Collector of Calcutta*, 2 C. 103; 1 Ind. Jur. 267; 1 Ind. Dec. (N. S.) 363, *Collector of Poona* v. *Kashinath Khasgiwala*, 10 B. 585; 5 Ind. Dec. (N. S.) 778, *In the matter of the Lands Acquisition Act X of* 1870; *Munji Khetsey*, 15 B. 279; 8 Ind. Dec. (N. S.) 189 and *Raghunath Rao* v. *Secretary of State for India*, 60 Ind. Cas. 187; 13 L. W. 11; 39 M. L. J. 623; (1920) M. W. N. 759; 28 M. L. T. 397; 44 M. 264, considered and applied.

Where agricultural lands are valued as building sites, the claimants are not entitled to ask that the trees standing on the lands should be separately assessed and valued as fruit bearing trees, since what is awarded is an inclusive price. **M** THAREESARUMA v. DEPUTY COLLECTOR, COCHIN, 45 M. L. J. 339; 18 L. W. 356; (1923) M. W. N. 682; 33 M. L. T. 48 **347**

Landlord and tenant. *See* TRANSFER OF PROPERTY ACT, 1882, S. 115 **910**

——— *Agricultural lease—Tenant, whether entitled to cut trees planted by himself—Transfer of Property Act* (*IV of* 1882), *ss.* 108 (h), 117. Though section 108 (*h*) of the Transfer of Property Act does not, by reason of section 117 of the Act, apply to agricultural leases, it lays down a principle which is applicable to such leases in the absence of any special custom to the contrary.

Trees planted by a tenant of agricultural land on the land of the tenancy with the permission of the landlord, may be cut and removed by the tenant during the continuance of his tenancy. **O** CHATUR v. RUKMANGAD SINGH, 25 O. C. 181; (1922) A. I. R. (O.) 249 **592**

——— *Non-transferable occupancy holding transferred by* raiyat—Kabuliyat *executed in favour of transferee*—Raiyat *in occupation—Landlords' right to re-enter—Abandonment or repudiation of landlords' title—Omissin to pay rent, whether denial of title.*

A mere transfer of a holding by a *raiyat* of a non-transferable occupancy holding, apart from any other consideration does not give the landlord a right to re-enter if the tenant, transferor, actually remains in occupation of the land. Therefore, if the *raiyat* executes a *kabuliyat* in favour of the transferee and does not repudiate the relationship of landlord and tenant between himself and the original landlord, and nor does he express his unwillingness to pay rent to the original landlord, the latter is not entitled to recover *khas* possession of the land.

Landlord and tenant—concld.

A mere omission to pay rent is not a denial of landlord's title. **C** MONMATHA KUMAR RAY v. JOSADA LAL PODDER, 28 C. W. N. 300 **551**

——— *Rent—Abatement, uniform and constant—Presumption—Apportionment of abatement.*

A Court is always anxious to find a legal origin for acts when it finds that they have been consistently spread or exercised over a long series of years.

Where it is found that there has been a constant and uniform deduction from the rent of certain holdings on the ground of loss of pasturage, the Court may presume a legal origin for the deduction. In such a case there is nothing illegal on splitting up the holdings for the landlord and the tenant to agree to an apportionment of the deduction to different holdings. **B** KRISHNALAL CHUNILAL v. DHIRAJLAL NAVNITLAL, (1923) A. I. R. (B) 359 **502**

——— *Lease, construction of—Lease for erecting buildings—Presumption—Permission to erect buildings—Estoppel.*

Where a lease granted for the purpose of erecting buildings does not mention any particular term, but the erection of *pucca* buildings is made subject to the permission of the landlord, the inference is that the lease is meant to be of a permanent character and not merely from year to year. But even if such a lease is to be construed as one from year to year it would be converted into a permanent lease where the lessor actually grants permission to the lessee for the erection of *pucca* buildings. **Pat** FORBES v. HANUMAN BHAGAT, 1 P. L. R. 190; 4 P. L. T. 414; 2 Pat. 452; (1924) A. I. R. (Pat) 88 **32**

Legal Practitioners Act (XVIII of 1879), s. 13—*Pleader paying client's money to his relation—Neglect of duty—Grossly improper conduct.*

If a Pleader withdraws his client's money from Court at the instance of a relation of his client and pays the same to that relation without satisfying himself but assuming *bona fide* that he had authority from the client to instruct him to withdraw the money and to receive it, the Pleader is guilty of neglect of duty both towards the Court and his client but he is not guilty of grossly improper conduct in the discharge of his professional duty. **C** EMPEROR v. BHUBNESWAR NAG, 25 Cr. L. J. 325 **181**

——— s. 14—*Legal practitioner taking employment without permission of High Court—Contempt of administration of justice—Misconduct.*

A legal practitioner who accepts employment as a Professor in a College without the permission of the High Court, contravenes the rules framed by the High Court to regulate the conduct of legal practitioners and renders himself liable to the disciplinary jurisdiction of the Court,

Legal Practitioners Act—concld.

It is misconduct on the part of a legal practitioner to publicly declare that he owes no allegiance to British Courts and has no faith in British Justice. That a legal practitioner should publicly seek to bring into contempt the administration of justice with which he is intimately connected, cannot be tolerated. C EMPEROR *v.* BIMALANANDA DAS GUPTA, 38 C. L. J. 353; (1924) A. I. R. (C.) 329; 25 Cr. L. J. 522 **986**

Letters Patent Appeal—*Point not raised before Single Judge, whether can be taken.*

A point not taken before the Judge in Chambers cannot be agitated in an appeal under the Letters Patent against his decision. L RAM SINGH *v.* WARYAM SINGH, 5 L. L. J. 459; (1924) A. I. R. (L.) 251 **585**

Letters Patent (Bom.), cl. 12, *interpretation of—Partition suit—Portion of property outside Court's jurisdiction—Grant of leave—Discretion of High Court.*

Clause 12, Letters Patent (Bom.), contains no territorial limitation as to the situation of immoveable property outside the local limits of the original jurisdiction of the High Court which has power to grant leave in a partition suit if a part of the property is situate within such limits and under the circumstances of the case it is appropriate to do so.

In a suit brought by a person claiming partition of property situate in British India, application made by the defendant asking for leave under clause 12, Letters Patent, to file a counter-claim for partition of the properties outside British India cannot be granted, where the chances of the parties being willing to partition the property, in case the Court passes a partition decree, appear to be remote and the leave if granted would defer the final decision of the points at issue between the parties.

Per *Macleod, C. J.*—Where part of the property in a partition suit is outside British India the Courts would be slow to grant leave, so that the High Court could exercise jurisdiction over such property as undoubtedly difficulties would arise in execution of any decree that might be passed in the suit unless all the parties were agreed that the Courts should exercise jurisdiction and that they would assist in carrying out the terms of the decree that would be passed in the suit. B GOVINDLAL BANSILAL *v.* BANSILAL MOTILAL, 23 Bom. L. R. 1049; 46 B. 249 **934**

Letters Patent (Lah.), cl. 10—*Judgment refusing to entertain appeal—Respondent, whether can appeal.*

A person cannot be said to be aggrieved by a judgment dismissing an appeal preferred against him and is not, therefore, entitled to prefer an appeal against the judgment under the Letters Patent. L GOPAL DAS *v.* ZAINALA BIBI, (1923) A. I. R. (L.) 504 **477**

—— **(Lah.), cl. 10**—*"Judgment," meaning of—Interlocutory judgment—Order refusing stay of execution—Appeal.*

The term "judgment" in section 10 of the Letters Patent (Punjab) includes an interlocutory judgment which decides, so far as the Court pronouncing such judgment is concerned, whether finally or temporarily, any question materially in issue between the parties and directly affecting the subject-matter of the suit.

The order of a Single Judge of the High Court refusing to stay execution of a decree, which is under appeal to the High Court, is a "judgment" within the meaning of the term in clause 10 of the Letters Patent (Punjab) and is appealable. L BADRI DAS JANAKIDAS *v.* MATHANMAL, (1922) A. I. R. (L.) 185 **327**

—— **(Ran.), cls. 28, 36**.—Transfer of case. *See* CRIMINAL PROCEDURE CODE, 1898, SS. 439, 526, 528 **885**

—— **(Ran.) cl. 34**, applicability of. *See* CIVIL PROCEDURE CODE, 1908, S. 98 **385**

Limitation Act (IX of 1908), s. 5—*Appeal filed before Commissioner within time—Cross-objections raising question of proprietary title—Appeal returned for presentation to District Judge—Delay, whether can be excused—Sufficient cause.*

An appeal was filed before the Commissioner from an order of an Assistant Collector in which no question of title was raised. The appeal was within time if it lay to the Commissioner, it was not within time if it lay to the Court of the District Judge. On notice of appeal being served on the respondents they filed cross-objections which raised a question of proprietary title. The Commissioner thereupon returned the appeal and the cross-objections to the parties to be filed before the District Judge, which was done. It was objected that the appeal was barred by time inasmuch as at the time it was presented to the Commissioner the period of limitation for filing it before the District Judge had already expired:

Held, that the appeal having in the first instance been properly filed before the Commissioner, and the latter having been deprived of jurisdiction to hear the appeal by the action of the respondents in filing cross-objections raising a question of proprietary title, this was a fit case for extending the limitation for presenting the appeal to the District Judge under section 5 of the Limitation Act. A BHAGWAN DAS *v.* MOHARBAT SHAH, (1923) A. I. R. (A.) 170 **955**

—— **s. 5**—*Appeal filed in wrong Court—Time spent in wrong Court, whether can be allowed—* Bona fide *mistake.*

Where time has been spent in prosecuting an appeal in a wrong Court owing to a *bona fide* mistake of Counsel as to the jurisdiction of that Court, such as could be made in spite of the exercise of due care and attention, the period so spent may under section 5 of the Limitation Act be excluded in computing the period of limitation for the appeal. But this indulgence will not be granted in a case in which the mistake is such as could have been discovered by the exercise of due care and attention. R TIN TIN MYO *v* MAUNG BA SINGH, 1 R, 584; (1924) A. I. R. (R.) 148 **385**

Limitation Act, 1908—contd.

——— s. 6. *See* CIVIL PROCEDURE CODE, 1908, O. XXX, r. 1 476

——— s. 10, Sch. I, Arts. 166, 181—*Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 90—Execution of decree—Sale, application to set aside—Limitation—Fraud, application based on—Burden of proof—Sale proclamation—Mis-statement of value, whether fraud.*

Article 181 of Schedule I to the Limitation Act applies only to applications for which no period of limitation is provided elsewhere in the Schedule.

All applications for setting aside a sale in execution of a decree under the Civil Procedure Code are governed by Art. 166 of Schedule I to the Limitation Act, even though the ground for setting aside the sale should be fraud or any other reason, and the effect of the Article cannot be evaded by merely stating in the application itself that it is brought under section 47 as well as under O. XXI, r. 90 of the Civil Procedure Code.

Under Art. 166 of Schedule I to the Limitation Act the period of limitation for an application to set aside an execution sale runs from the date of the sale unless the knowledge of his right to apply was fraudulently concealed from the applicant.

A mis-statement by the decree-holder of the value of the property in the sale proclamation does not necessarily constitute fraud. **Pat** RAMDHURI CHOWDHURI *v.* DEONANDAN PRASAD SINGH, 3 P. L. T. 501; (1922) Pat. 269; 4 U. P. L. R. (Pat.) 71; (1922) A. I. R. (Pat.) 507; 1 P. L. R. 18; 2 Pat. 65 957

——— s. 12. *See* CIVIL PROCEDURE CODE, 1908, O. XXXIII, rr. 2, 5 908

——— s. 12—*Extension of time for appeal—Different applications for copies of judgment and decree—Application for copy of one document within time extended by other, validity of.*

Applications for copies of the judgment and the decree must be made before the expiry of the time for filing the appeal so as to obtain extension of time under section 12 of the Limitation Act. There is, however, no obligation on the appellant to file the applications at one and the same time; and applications made at different times will entitle the appellant to take advantage of the time spent to obtain copies of both the judgment and the decree.

If the time requisite for obtaining copy of one of these documents extends the time of limitation, then the application made for obtaining copy of the other document, after the time originally fixed for filing the appeal under the Law of Limitation but before the extension of time allowed by reason of the time required for obtaining copy of one of these documents expires, will entitle the appellant to extension of time required for obtaining copy of the other document. **Pat** JADUNANDAN SAHAY *v.* HANUMAN SAHAY, (1923) Pat. 235; 4 P. L. T. 619; (1924) A. I. R. (Pat.) 113 401

——— s. [illegible] Sch. I, Art 182—*Execution of decree—Stay of execution—Proceeding struck off—Right to revive proceeding—Limitation.*

Limitation Act, 1908—contd.

Where execution of a decree is stayed at the instance of a stranger and a pending execution proceeding is consequently struck off, the right of the decree-holder to continue the proceeding struck off is revived from the date on which the stay order is cancelled or becomes inoperative. **A** MAHAMMAD HADI *v.* DEBI PRASAD, (1923) A. I. R. (A.) 600 871

——— s. 19—*Civil Procedure Code (Act V of 1908), O. VIII, r. 5—Mortgagee constituted executor of mortgagor's Will—Probate application—Reference to existing mortgage, if acknowledgment of liability—Plaint with recital of mortgage and amount due—Admission in written statement as to execution of mortgage—No further reference—Admission or acknowledgment of subsisting liability.*

Where a mortgagor by her Will appointed the mortgagee himself as her executor and the latter in applying for Probate included the mortgage-debt in the schedule of liabilities:

Held, that this amounted to an acknowledgment of liability so as to save the bar of limitation under section 19 in a suit by the successor-in-interest of the mortgagee to enforce the mortgage.

Where a plaint recited the execution of a mortgage by the defendant and stated a particular sum as due for principal and interest, and the defendant while admitting the execution of the mortgage made no reference to the allegation as to the amount due or to any discharge thereof:

Held, (1) that under O. VIII, r. 5, of the Civil Procedure Code the legal effect of the written statement amounted to an implied admission of the existence of the mortgage-debt and the liability thereon at the date of the written statement and that the amount due was that stated in the plaint and that it was immaterial that the admission of liability was not express but was implied under the rules by reason of the absence of any denial in the written statement;

(2) that in any case looking at what was pleaded and what was being denied in the defence, the intention of the defendant was to admit the continuance of the mortgage-debt at the date of the defence and that the written statement was, therefore, an acknowledgment of subsisting liability under section 19 of the Limitation Act.

Per *Schwabe, C. J.*—An admission to prevent the running of time under section 19 of the Limitation Act need not be in the full sense of the word an admission of the existence of liability at the date of the admission if the proper inference to be drawn from the admission which is made is that it was intended to represent the debt as subsisting.

All the facts at the time of the statement, which is claimed to be an admission must be looked at and then decided whether the proper inference to draw is that it was the intention to make an admission of the then existence of the debt.

Per *Kirshnan, J.*—In construing a written statement, it is necessary to refer to the plaint in answer to which it was filed.

Limitation Act, 1908—contd.

It is not a general rule that, whenever, a debt is said to have been incurred at an anterior date and no statement is made that it has been paid off, we must necessarily draw an inference that that debt is admitted to be still subsisting at the date of the acknowledgment.

A mere statement that a debt existed at one time without anything further is not sufficient to enable the Court to say that there is an acknowledgment of a subsisting liability even though the person who makes the statement does not go on to say that the liability has ceased. **M** OFFICIAL ASSIGNEE OF MADRAS *v.* SUBRAMANIA AIYAR. 46 M. L. J. 1; 33 M. L. T. 235; 19 L. W. 331; (1924) A. I. R. (M.) 286 **740**

——— **Sch. I, Art. 44**—*Minors, suit against—Compromise by guardian ad litem—Suit by minor to recover property—Limitation.*

Where a suit is compromised on behalf of a minor by his guardian *ad litem* with the sanction of the Court, a suit by the minor to recover the property affected by the compromise must be brought within three years of his attaining majority. The minor cannot sue to recover the property by ignoring the compromise altogether. **L** THI RAJ *v.* KHEAUSI, 22 P. W. R. 1923 **588**

——— ——— **Arts. 74, 75**——*Instalment bond—Whole sum due on default—Demand, failure to make, effect of—Waiver—Limitation, commencement of.*

Article 75 of Schedule I to the Limitation Act gives an option to the promisee of a note or the obligee of a bond to waive the consequences of a default. Where no option of waiver is given, time begins to run from the date of default.

The Statute of Limitation runs from the time the plaintiff might have brought his action unless he was subject to any disabilities specified in the Statute.

Where an instalment bond provides that if there is a default of payment of any one instalment, interest shall be charged for the entire amount remaining due from the date of default without reference to subsequent instalments and that the aggregate principal and interest shall be paid on demand, on the making of a demand, after default has been made in payment of any one instalment, the whole amount becomes due, and time runs from the date of the demand; but if no demand is made, the option given to the plaintiff is gone, and time begins to run in respect of each instalment as it becomes due. **M** PERIANAN CHETTY *v.* MARIAPPAN ASARI, (1923) M. W. N. 699; (1924) A. I. R. (M.) 310 **48**

——— ——— **Art. 120**—*Hindu joint family—Sale by co-parcener—Declaratory suit—Limitation.*

A suit by a Hindu co-parcener for a declaration that an alienation of family property by another co-parcener is void *ab initio* is governed by Art. 120 of Sch. I to the Limitation Act, and limitation begins to run from the date on which the plaintiff comes to know of the alienation. **O** DWARKA PRASAD *v.* RAM DEI, 10 O. L. J. 363; 10 O. & A. L. R. 199; (1924) A. I. R. (O.) 120 **329**

Limitation Act, 1908—contd.

——— **Sch. I, Arts. 120, 126**—*Sale by Hindu father—Suit to avoid sale by son—Limitation.*

A suit by a Hindu son to get a sale of family property effected by the father annulled is governed by Art. 126 and not by Art. 120 of Schedule I to the Limitation Act. **L** GOKHA RAM *v.* SHAM LAL, 3 L. 426; (1923) A. I. R. (L.) 268 **174**

——— ——— **Art. 127.** *See* HINDU LAW **697**

——— ——— **Art. 134.** *See* MORTGAGE **737**

——— ——— **Art. 141** *applicability of—Adverse possession—Burden of proof.*

Article 141 of Schedule I to the Limitation Act is inapplicable to a case where time had commenced to run against the last full owner, as in such a case it continues to run and is not suspended or in any way affected by the mere circumstance that the owner is succeeded by a female entitled to a woman's qualified estate; after the statutory period has run out, all persons claiming through the owner are barred.

Where, however, defendant's possession commenced while a female was in possession, a reversioner of the last full owner has twelve years from the death of the female to establish his right as heir to the last full owner. In such a case the burden lies on the defendant to prove that he has a better title than the plaintiff. **B** BANDURANG WASUDEO CHATE *v.* BASAPPA *bin* SHIDDAPPA GANIGER, (1923) A. I. R. (B.) 364 **479**

——— ——— **Arts. 142, 144**—*Possession and dispossession—Adverse possession—Burden of proof—Limitation—Partition—Suit to recover excess area.*

Where a plaintiff's case is based on the allegation that he is the owner of the land in dispute, and was in possession of it till he was dispossessed by the defendant, it is incumbent on him, under Art. 142 of Schedule I to the Limitation Act, to prove that he has been in possession of the land within twelve years of the suit. When he comes to prove such possession his paper title would come to his aid with greater or less force according to the circumstances established in evidence. If, on the other hand, the suit comes under Art. 144 of Schedule I to the Limitation Act, it is for the defendant to establish adverse possession as against the plaintiff.

Plaintiff and defendant agreed to divide a certain Survey Number in equal moieties, and after the division each obtained possession of the area allotted to him. More than twelve years after the division it was discovered that defendant was in possession of a larger area than the plaintiff. The latter thereupon brought a suit to recover the excess on the allegation that he had been in possession of it but had been dispossessed from it by the defendant four years prior to the suit;

Held, that it was incumbent on the plaintiff to prove that he had been in possession of the area claimed by him within twelve years of the suit. **B** KASHINATH GYANOBA KIKLE *v.* GANESH SITARAM KULKARNI, (1923) A. I. R. (B.) 361 **506**

——— ——— **Art. 144**—Khazi inam *lands—Adverse possession against office-holder.*

Limitation Act, 1908—contd.

Where *Khoti inam* lands, which are inalienable and impartible, are held adversely to the office-holder for more than twelve years, the person in adverse possession acquires a prescriptive title to the lands as against the holder of the office and his successors.

Per *Hughes, J.*—Where an alienation of lands appertaining to an hereditary office, is good for the lifetime of the alienor, limitation commences to run as against the successor not from the date of alienation but from the date of the alienor's death. It is otherwise when possession is adverse from the start. **M NAJATH ALLI** *v.* **MUJAFAR ALLI**, 45 M. L. J. 791; 18 L. W. 887 **568**

——— **Sch. I, Art. 144**—*Revenue sale, purchaser at—Suit to recover possession—Limitation, commencement of—Adverse possession—Delivery of possession, symbolical, effect of—Burden of proof.*

On the failure of an owner to pay the Government assessment, his estate or interest in the land is determined, and under a sale for arrears of revenue what is sold is not the interest of the defaulting owner but the interest of the Crown, subject to the payment of the Government assessment. Limitation, therefore, for a suit by the purchaser to recover possession only commences to run from the date of the sale.

Surja Kanta v. *Sarat Chandra Roy*, 25 Ind. Cas. 309; 20 C. L. J. 563; 18 C. W. N. 1281; 16 M. L. T. 290; 27 M. L. J. 365; 1 L. W. 807; (1914) M. W. N. 757; 16 Bom. L. R. 925 (P. C.), followed.

A person in adverse possession who occupies the disputed land without payment of rent to the defaulting proprietor, is bound to surrender possession of that land to the revenue sale purchaser when the sale is confirmed, and if the land is not so surrendered, he renders himself liable for mesne profits, as he unlawfully keeps the purchaser out of possession.

Sashikanta Acharyya v. *Sarat Chandra Rai Chaudhuri*, 70 Ind. Cas. 6; 24 C. L. J. 415, followed.

Delivery of symbolical possession does not in any way affect the possession of or give start to a fresh period of limitation against persons who are not parties to the suit or execution proceedings.

Juggobundhu Mukerjee v. *Ram Chunder*, 5 C. 584; 5 C. L. R. 548; 3 Shome L. R. 68; 2 Ind. Dec. (N. S.) 979 and *Jaggobundhu Mitter* v. *Purnanund Gossami*, 16 C. 530; 8 Ind. Dec. (N. S.) 350 (F. B.), followed.

Symbolical possession is sufficient to interrupt adverse possession when the adverse possessor is a party to the execution proceedings in which the symbolical possession is given; as regards persons not so parties, only actual dispossession can interrupt their adverse possession.

Radha Krishna v. *Ram Bahadur*, 43 Ind. Cas. 268; 27 C. L. J. 191; 16 A. L. J. 33; 23 M. L. T. 26; 4 P. L. W. 9; 34 M. L. J. 97; 7 L. W. 149; 22 C. W. N. 330; (1918) M. W. N. 163; 20 Bom. L. R. 502 (P. C.), *Satish Chandra Sarkar* v. *Brojo Gopal Dutta*, 46 Ind. Cas. 104; 22 C. W. N. 807, *Ramjan Mahomed* v. *Chunder Mohan Aditya*, 7 C. L. J. 640, *Doyanidhi Panda* v. *Kelai Panda*, 11 C. L. R. 395, *Narain Das* v. *Lalta Prasad*, 21 A. 269; A. W. N. (1899) 56; 9 Ind. Dec. (N. S.) 880 and *Sudulla Mridha* v. *Joynabunnessa Bibi*, 32 Ind. Cas. 703, followed.

The same principle applies to purchasers at sales for arrears of revenue.

Mozuffer Wahid v. *Abdus Samad*, 6 C. L. R. 539 *Mir Wazir-ud-din* v. *Lala Deoki Nandan*, 6 C. L. J. 472, *Dursan Singh* v. *Bhawani Koer*, 19 Ind. Cas. 974; 17 C. W. N. 984 and *Sahodora Mudali* v. *Sarbosobha Dasi* [*Nabin Chand Boral*], 27 Ind. Cas. 258; 42 C. 638; 20 C. L. J. 494; 19 C. W. N. 103, followed.

A person in adverse possession of land whose title has not yet been perfected cannot be regarded as a defaulting proprietor for the purposes of a revenue sale, and cannot, therefore, be affected by a symbolical delivery of possession of the land to a purchaser at a revenue sale.

Baikuntha Nath v. *Basanta Kumari Dasi*, 34 Ind. Cas. 946; 23 C. L. J. 151; *Aftar Ali* v. *Brojendra Kishore Raj*, 37 Ind. Cas. 252; 24 C.L.J. 60, *Jitendra Kumar Pal* v. *Mohendra Chandra Sarma*, 37 Ind. Cas. 239; 24 C. L. J. 62 and *Mohim Chandra Debi* v. *Pyari Lal Das*, 39 Ind. Cas. 213; 44 C. 412; 25 C. L. J. 99; 21 C. W. N. 537, followed.

In cases governed by Art. 144 of Schedule I to the Limitation Act, if the plaintiff succeeds in proving a clear title, the burden lies on the defendant to prove adverse possession for the statutory period, and possession to be adverse must have all the qualities of adequacy, continuity and exclusiveness. **C JOBEDA KHATUN** *v.* **TULSI CHARAN DAS**, 36 C. L. J. 472; (1923) A. I. R. (C.) 82 **564**

——— **Sch. I, Arts. 144, 148**—*Mortgage—Redemption by co-mortgagor—Suit by co-mortgagor to recover his share—Suit to recover property subject to charge—Limitation.*

Where one of several co-mortgagors redeems a mortgage, the other co-mortgagors can bring a suit for redemption against the redeeming mortgagor within sixty years from the date of the original mortgage.

Ashfaq Ahmad v. *Wazir Ali*, 14 A. 1; A. W. N. (1891) 211; 11 A. 423; 7 Ind. Dec. (N. S.) 373, followed.

The period for the redemption of a charge is twelve years and not sixty years as in the case of a mortgage.

An award directed that plaintiff was entitled to obtain a certain share of property "A" from the defendant on payment of a proportionate share of the mortgage money paid by the defendant for redemption of the property and a certain share of property "B" on payment of a certain sum of money to the defendant. In a suit by the plaintiff to recover the respective shares of the properties from the defendant:

Held, (1) that in respect of his share in property "A" plaintiff had a period of sixty years from the date of the original mortgage within which to bring a suit for its recovery;

(2) that in respect of his share in property "B" defendant had a possessory charge on it for the

sum made payable to him on the award, and the plaintiff had, therefore, twelve years from the date of the award to sue for its recovery. A SURAT SINGH *v.* UMRAO SINGH, 20 A. L. J. 611; (1922) A. I. R. (A.) 410 113

——— **Sch. I, Art. 158**—*Objections to award—Limitation, operation of.*

Under Article 158 of Schedule I to the Limitation Act, time for filing objections to an award runs from the date of filing the award in Court and notice of such filing being given to the parties. R ABDULLA *v.* M. V. R. S. FIRM, 2 Bur. L. J. 229; (1924) A. I. R. (R.) 153 866

——— ——— **Art. 166.** *See* CIVIL PROCEDURE CODE, 1908, s. 47, O. XXI, r. 90 388

——— ——— **Arts. 166, 181**—*Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 90—Application to set aside Court sale on ground of fraud and illegality—Limitation.*

An application under the Code of Civil Procedure to set aside a sale in execution of a decree is governed by Art. 166 and not by Art. 181 of the Limitation Act whether the alleged ground is the commission of an irregulatity or fraud or an illegality and whether the application is really one under O. XXI r. 90 or section 47 of the Civil Procedure Code: M PARAMASIVA THEVAR *v.* PULUKARUPEA THEVAR, 18 L. W. 780; 33 M. L. T. 137; 45 M. L. J. 829; (1924) M. W. N. 271 (1924) A. I. R. (M.) 137 631

——— ——— **Art. 177**—*Limitation and Code of Civil Procedure (Amendment) Act (XXVI of 1920), s. 2—Appeal—Death of respondent—Application to bring legal representatives on record—Limitation.*

The period of six months for an application under the Code of Civil Procedure to have the legal representative of a deceased defendant or of a deceased respondent made a party, as prescribed by Art. 177 of the First Schedule to the Limitation Act has not been reduced to ninety days by anything contained in section 2 of the Limitation and Code of Civil Procedure (Amendment) Act of 1920. L GOBIND DAS *v.* RUPKISHORE, 4 L. 367; 6 L. L. J. 25; (1924) A. I. R. (L.) 65 409

——— ——— **Art. 177**—*Limitation and Code of Civil Procedure (Amendment) Act (XXVI of 1920), s. 2—Appeal—Death of respondent—Substitution, application for—Limitation.*

The period of limitation provided in Art. 177 o Schedule I to the Limitation Act for making an application for the substitution of the legal representatives of a deceased defendant or respondent has by virtue of section 2 of the Limitation and Code of Civil Procedure (Amendment) Act, 1920, been reduced from six months to ninety days. B HUSENUD-DIN NURDIN *v.* DULAKSHIDAS, (1923) A. I. R. (B.) 299 474

——— ——— **Art. 181**, *applicability of—Civil Procedure Code (Act V of 1908), O. XXI, r. 12 (1) (c)—Decree directing payment of mesne profits—Application for ascertainment of mesne profits—Limitation.*

The Limitation Act does not apply to all applications. The applications specifically described in the third division of the First Schedule to the Limitation Act are all applications under the Civil Procedure Code, and Art. 181 of the Schedule must also be similarly limited. Unless an application falls under some specific provision of the Civil Procedure Code, Art. 181 will not apply.

A decree in a suit for possession directed the defendant to give to the plaintiff subsequent mesne profits under O. XX, r. 12 (1) (*c*) of the Civil Procedure Code. More than three years after the date of the decree plaintiff applied for mesne profits to be ascertained under O. XX, r. 12 (1) (*c*):

Held, that the application was not by way of execution but an application to the Court to proceed from the stage of preliminary decree to a final decree and was not governed by Art. 181 or any other Article of Schedule I to the Limitation Act. B THANA ZALAJI SHET MARWADI *v.* HOP DHANA JAWHRJI, (1923) A. I. R. (B.) 268 497

——— **Sch. I, Art. 182**—*Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Decree against some of several defendants—Appeal against others—Execution of decree—Limitation, operation of.*

Where a suit is decreed as against some of several defendants and dismissed as against the rest and the plaintiff prefers an appeal, he is entitled to wait till the decision of the appeal, before proceeding with the execution of the decree he has already obtained, if, in the case of the Appellate Court coming to the conclusion that his appeal had failed, there is a possibility of the suit being entirely dismissed under O. XLI, r. 33 of the Civil Procedure Code. If such a possibility is there, the time for the execution of the decree would run from the date of the decision of the appeal.

Christiana Sens Law v. *Benarsi Prosad Chowdhury*, 22 Ind. Cas. 685; 19 C. W. N. 287 and *Loke Nath Singh* v. *Gaju Singh*, 31 Ind. Cas. 426; 20 C. W. N. 178; 22 C. L. J. 333, followed.

In such a case as the above the Execution Court should see whether the original decree was really one decree, or an incorporation of several decrees and whether the appeal against it imperilled the whole decree or not for the execution of which the application is made. Pat PANCHU BANIA *v.* ANAND THAKUR, 1 P. L. R. 356; 2 Pat. 712; (1924) A. I. R. (P.) 160 357

——— ——— **Art. 182, Expl. 1**—*Decree against several defendants—Insolvency and discharge of some—Execution application against discharged insolvents—Step-in-aid of execution.*

A decree was passed on October 26, 1909, on the basis of a promissory note executed by defendant No. 1. The decretal amount was made recoverable from the defendants Nos. 1 and 2 personally and from the estate of all the defendants' family. Defendants Nos. 1 and 2 were adjudged insolvents on September 6, 1910, and got their discharge on March 20, 1912. Plaintiff made his first application for execution against defendants Nos. 1 and 2 only in 1911 and then again in 1914, also against defendants Nos. 1 and 2 only. In 1917, he applied to have the decree transferred for execution to another Court-

Limitation Act, 1908—concld.

In 1920 he applied for execution against the property of defendants Nos. 2 to 5:

Held, that as the possibility of legal execution as regards defendants Nos. 1 and 2 had come to an end to the knowledge of the plaintiff, his application of 1914 could not be treated as being in accordance with law so as to keep the decree alive as against the other joint debtors. B GHANSHAMDAS BALKRISHNADAS *v.* MOTICHAND HARAKCHAND, 25 Bom. L. R. 1237; (1924) A. I. R. (B.) 180 747

——— **Sch. I, Art. 182 (5) Expl. I**—*Civil Procedure Code* (*Act V of* 1908), *s.* 145—*Execution of decree—Sureties—Application against judgment-debtor, whether saves limitation against surety.*

Where a surety undertakes to satisfy a decree in the event of the judgment-debtor failing to satisfy it, an application for execution of the decree by the arrest of the judgment-debtor operates to save limitation against the surety also either under Explanation I or under clause (5) of Art. 182 of the Schedule I to the Limitation Act. A BADR-UD-DIN *v.* MUHAMMAD HAFIZ, 20 A. L. J. 726; (1922) A. I. R. (A.) 481; 44 A. 743 129

Limitation and Code of Civil Procedure (Amendment) Act (XXVI of 1920), s. 2. *See* LIMITATION ACT, 1908, Sch. I, Art. 177 409

Madras District Municipalities Act (V of 1920), s. 55. *See* PENAL CODE, 1860, ss. 40, 109, 171 730

Madras Local Boards Act (XIV of 1920), s. 221—*Money payable under contract of toll lease—"Other sums," meaning of.*

The amount due under a contract of the lease of toll does not fall under section 221 of the Local Boards Act. The words "other sum" in that section must be read as *ejusdem generis* with what precedes them. M *In re* PUNYA SYMALO, 25 Cr. L. J. 352; 47 M. 381 240

Madras Panchayat Courts Act (II of 1920), s. 78, *rules under—Penal Code* (*Act XLV of* 1860), *s.* 179—*Refusal of accused to plead in Panchayat Court—Offence.*

Under the Madras Panchayat Courts Act as under the Code of Criminal Procedure, the mere refusal on the part of an accused person to plead to a charge before the Panchayat Court, is not an offence under section 179, Indian Penal Code.

Per *Schwabe, C. J.*—An accused person is not bound to answer any question put to him at all and can, if he likes, decline to plead. M *In re* THIRUMALA REDDI, 46 M. L. J. 40; (1924) M. W. N. 141; 19 L. W. 292; 25 Cr. L. J. 374; 47 M. 396 422

Madras Towns Nuisances Act (III of 1889), s. 6—*"Common gaming house," what is.*

A common gaming house is one in which a large number of persons are invited habitually to congregate for the purpose of gaming and it makes no difference that the use of the house and the gaming therein was limited to the subscribers and members of the club and that it was not open to all persons who might be desirous of using the same. M *In re* CHINNIAH, 19 L. W. 219; 46 M. L. J. 309; (1924) M. W. N. 237; 34 M. L. T. 195; 25 Cr. L. J. 367 303

Malicious prosecution—*Damages, suit for—Malice—Good faith, requisites of—Appeal—Damages, quantum of.*

Where in a suit for damages for malicious prosecution the defendant pleads protection by reason of having acted in launching the prosecution on the advice of Counsel, it is necessary for him to prove that all the facts of the case were fairly laid before Counsel and that he acted *bona fide* upon the advice given by that Counsel.

Revenga v. *Mackintosh*, (1824) 2 B. & C. 593; 4 D. & R. 187; 2 L. J. (O. s.) K. B. 137; 107 E. R. 541, relied on.

In considering the question of damages on an appeal from a decree in a suit for damages for malicious prosecution the proper question for the Appellate Court to consider is whether the Trial Court was wrong in awarding the damages it did and not what would have been the amount which the Appellate Court itself would have awarded. M NURSE *v.* RUSTOMJI DORABJI, 69 L. W. 397; 46 M. L. J. 353; (1924) M. W. N. 382 787

Marwat grant, *whether transferable.*

A *marwat* grant though not resumable is not transferable. O SIVA RAM *v.* SALIK, 10 O. L. J. 335; 10 O. & A. L. R. 172; (1924) A. I. R. (O.) 124 352

Mortgage—*Acquisition of portion of mortgaged property—Compensation, appropriation of, towards payment of unsecured debts—Purchaser of equity of redemption, right of.*

Where a portion of a mortgaged property is acquired under the Land Acquisition Act and the compensation money is, under an arrangement arrived at between the mortgagor and the mortgagee, appropriated towards the satisfaction of unsecured debts due from the mortgagor to the mortgagee and not towards a reduction of the mortgage-debt, a subsequent purchaser of the equity of redemption from the mortgagor is bound by the arrangement and cannot debit the amount of the compensation received by the mortgagee from the mortgage-debt. C KUSHTIA, LOAN OFFICE *v.* ANNADA CHARAN CHAKRAVARTY 27 C. W. N. 763; (1923) A. I. R. (C.) 681 26

——— Appropriation of profits. *See* CONTRACT, ACT, 1872, s. 61 310

——— *Mortgage by conditional sale*—Post diem *interest.*

A mortgage by way of conditional sale contained the following covenant:—

It is covenanted that I shall continue to pay interest at the rate of 11 annas per cent. per mensem annually. In case of default in payment of interest, it shall be added to the principal, and I shall pay interest thereon as well at the aforesaid rate. I, or my heirs, or representatives, shall have no objection to it, nor shall I mortgage or sell the property to any other person until the payment of the mortgage-money. In case of breach of promise and expiry of the stipulated period, the mortgagee shall become the absolute owner of the property mortgaged, and, I, or my heirs, or representatives, shall have no objection whatever:

Held, that having regard to the terms of the whole document, its general tenor implied an obligation on the part of the borrower on the

making of default to be liable for the subsequent interest at the rate mentioned in the bond up to the date of payment or suit.

Mathura Das v. *Raja Narindar Bahadur*, 19 A. 39; 23 I. A. 138; 1 C. W. N. 52; 6 M. L. J. 214, 7 Sar. P. C. J. 88; 9 Ind. Dec. (N. S.) 25 (P. C.); *Bindesri Nath* v. *Ganga Saran Sahu*, 20 A. 171; 2 C. W. N. 129, 25 I. A. 9; 7 Sar. P. C. J 273, 9 Ind. Dec. (N. S.) 471 (P. C.) and *Sarala Dasi* v. *Jogendra Narayan Basu*, 25 C. 246; 13 Ind. Dec. (N. S.) 165, relied on.

The question whether under a mortgage by way of conditional sale the mortgagor is or is not liable to pay *post diem* interest must primarily be decided on the terms of the deed. A MAHADEO PRASAD *v.* DHIRAJ SINGH, 20 A. L. J. 752; 44 A. 772; (1923) A. I. R. (A.) 7 122

——— *Plea that transaction was fictitious—Burden of proof—Evidence Act (I of 1872), s. 114 ill. (e)—Bundelkhund Encumbered Estates Act (I of 1903), s. 12, proceedings under—Presumption—Rebuttal.*

Where the execution and registration of a mortgage-deed are admitted but it is alleged that the document was executed merely for show and was entirely fictitious, the burden of proving the fictitious nature of the deed lies on the party making the allegation.

The presumption that proceedings under the Bundelkhund Encumbered Estates Act were regularly taken may be rebutted by proof of facts which show that the proceedings were as a matter of fact irregular. A CHHIDDU *v.* DESRAJ, 21 A. L. J. 793 753

——— *Redemption*—Post diem *interest, rate of—Intention of parties.*

A mortgage-deed fixed the term for redemption at two years and stipulated for a heavy rate of interest. Mention was made of the payment of interest year by year but there was no stipulation that interest would be payable at the contract rate after the due date:

Held, that the parties did not intend that after the due date interest should be paid at the contract rate. O RAZA HUSSAIN KHAN *v.* GANESH PRASAD, 10 O. L. J. 390; (1924) A. I. R. (O.) 118 383

——— *Redemption—Suit by transferee of mortgagor—Term for redemption, validity of, whether can be challenged.*

In a suit for redemption of a mortgage brought by a transferee of the mortgagor it is not open to the latter to raise the plea that the term for redemption fixed in the mortgage-deed is excessive. A RAM SAMUJH *v.* SHEORAJ TEWARI, 20 A. L. J. 607; (1923) A. I. R. (A.) 123 58

——— *Redemption, suit for—Agreement by mortgagor to sell property to mortgagee, whether can be set up by mortgagee.*

There is nothing to prevent a mortgagor from selling the mortgaged property to the mortgagee provided the sale is separate from the actual mortgage itself, that is, is not part and parcel of the mortgage contract,

Kanhayalal Bhikaram v. *Narhar Laxmanshe Vani*, 27 B. 297; 5 Bom. L. R. 140, *Ram Singh* v. *Baij Nath*, 45 Ind. Cas. 353; 17 A. L. J. 117, relied on.

A mortgagee may in answer to a suit for redemption by the mortgagor set up an agreement to sell the mortgaged property, although the agreement has not been carried into effect by the execution of a registered conveyance, and in spite of the fact that limitation for a suit to enforce specific performance of the agreement has expired. R MA PYONE *v.* MA U, 2 Bur. L. J. 233; (1924) A. I. R. (R.) 89 877

——— *Redemption, suit for—Subsisting title—Burden of proof—Evidence Act (I of 1872), s. 110.*

Under section 110 of the Evidence Act possession is *prima facie* evidence of a complete title, and a person who comes into Court claiming to redeem property in the possession of the defendant, must prove a subsisting title as mortgagor at the date of the suit.

Peria Aiya Ambalam v. *Shunmugasundaram*, 22 Ind. Cas. 615; 35 M. 503; 15 M. L. T. 112; 2 M. L. J. 140; 1 L. W. 119; (1914) M. W. N. 117, *Secretary of State for India* v. *Chelikani Rama Rao*, 35 Ind. Cas. 902; 39 M. 617; 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 224; 14 A. L. J. 1114; 20 M. L. T. 135; 4 L. W. 486; 18 Bom. L. R. 1007; 25 C. L. J. 39; 43 I. A. 192 (P. C.), distinguished.

Plaintiff sued to redeem certain property in the possession of the defendant in 1921. The only evidence of the mortgage was contained in a certified copy of the mortgage-deed and an entry in the *khasra abadi* of 1870 that one *L* was then in possession of the property as mortgagee. The original mortgage-deed was not forthcoming and there was nothing to indicate any connection between *L* and the defendant.

Held, that no mortgage having any connection with the defendant having been proved the suit could not be decreed against him. L RALLA RAM *v.* FEROZ DIN, (1923) A. I. R. (L.) 665 903

——— *Several mortgagors—Integrity of mortgage broken—Redemption.*

In the case of a mortgage by several persons, where the mortgagee purchases the equity of redemption in a portion of the mortgaged property, the integrity of the mortgage is broken up and any one of the mortgagors cannot redeem any portion of the mortgaged property besides his own against the wishes of the mortgagee. O JAI GOBIND SINGH *v.* ABHAIRAJ SINGH, 10 O. L. J. 216; 9 O & A L. R. 651; 26 O. C. 308; (1924) A. I. R. (O.) 40 125

——— *Transfer by mortgagee of his rights—Transferee with notice, position of—Suit for redemption—Limitation Act (IX of 1908), Sch. I, Art. 134*

When a transfer is made by a possessory mortgagee of the mortgaged property as if it were his own and the transferee has notice that the transferor has no higher interest than that of a mortgagee he cannot by reason of any misrepresentation which had not the effect of misleading him or by

Mortgage—*concld.*

dint of any collusive misdescription of the interest conveyed acquire higher right than that which the transferor actually possessed within his knowledge or curtail the period of limitation provided for a suit for redemption. O GUMTI MISRA *v.* DEOTA DIN SINGH, 26 O. C. 197; (1924) A. I. R. (O.) 44 737

Muhammadan Law—**Charitable endowments**—*Mutwallishipp—Sajjadanashini—Succession—Females, rights of—Usage.*

Under the Muhammadan Law a woman is disqualified by reason of her sex from the right to act as *mutwalli* of endowed property where the office involves the performance of the duties of a *sajjadanashin* as well, unless there is some local usage or custom to the contrary.

In Muhammadan endowments the *sajjadanishini* and the *mutwallishipp* are different offices. The former is a priestly office involving the performance of spiritual and religious duties, the latter a purely secular one involving the management of the trust property.

A woman is incompetent to be a *sajjadanishin* according to the Muhammadan Law but is not disqualified from performing the duties of a *mutwalli* as such.

The origin of the rule that a woman is not qualified to perform the functions of a *sajjadanishin* is based upon the consideration that it is unseemly for a Muhammadan lady to perform duties which bring her in close and intimate association with the general public of the opposite sex. The disqualification is not confined only to those cases in which the office requires that spiritual instruction should be given by the *sajjadanishin* to his disciples.

No woman is qualified to become a *sajjadanishin* whose office involves the performance of religious and spiritual duties, not only those of *piri muridi* (preceptor and disciple) but those of leading the *fate a* and offering prayers and incense in a place of public worship.

According to the Muhammadan Law the duties of *mutwalli* who has not to perform religious duties or spiritual functions may be discharged by a proxy. But the office of *sajjadanishin* requires peculiar personal qualifications and the duties of this office cannot be discharged by proxy.

Although a minor might succeed by inheritance to the office of *mutwalli*, a substitute being appointed to carry out the duties during his minority, where the succession is not by inheritance, but by appointment or selection, a minor cannot become *mutwalli*.

The devolution of the office of *mutwalli* depends in the first instance upon the provisions of the *wakfnamah*, or trust deed, but in its absence the order of succession must be determined according to the usage of the particular endowment in question. P KANIZ ZOHRA *v* MUJTABA HUSSAIN, (1923) Pat. 241; 4 P. L. T. 613; 2 Pat. 819; (1923) A. I. R. (Pat.) 576 209

——— **Marriage**—*Option of puberty, when to be exercised—Guardian for marriage—Uncle by marriage—Marriage contracted by unauthorised person, legality of.*

Muhammadan Law—*contd.*

The right given to a Muhammadan minor girl to repudiate her marriage on attaining puberty must be exercised as soon as the minor attains the age of puberty.

Bismillah Begam v. *Nur Muhammad*, 63 Ind. Cas. 702; 44 A. 61; 19 A. L. J. 845; 3 U. P. L. R. (A.) 186; (1922) A. I. R. (A.) 155, dissented from.

An uncle by marriage does not fall within the category of those persons who according to Muhammadan Law are entitled to give a minor in marriage.

Under the Muhammadan Law marriage is a civil contract, and such a contract entered into on behalf of a minor by a person who has no authority or right to do so, more especially in the presence of the minor's nearer relatives, must be regarded as void. L GHULAM FATIMA *v.* KHAIRA, (1923) A. I. R. (L.) 674 801

——— **Pre-emption**—*Pre-emptor and vendor equally entitled, rights of—Procedure.*

Where in a suit for pre-emption based on the provisions of the Muhammadan Law, the Court finds that the pre-emptor and the vendee stand in the same degree towards the property sold, the property ought to be divided equally between them. A ZIA-UD-DIN *v.* ABUL HASAN, 45 A. 487; (1923) A. I. R. (A.) 520 27

——— **Shia School**—*Will in favour of heir, validity of.*

The Will of a Muhammadan governed by the Shia Law is valid to the extent of one-third of the property even without the consent of the heirs; if it is a Will of the entire property in favour of an heir, it would not be valid even to the extent of one-third unless the other heirs assent to it. A AMRIT BIBI *v.* MUSTAFA HUSAIN, 21 A. L. J. 750; (1924) A. I. R. (A.) 20; 46 A. 28 66

——— **Succession**—*Several heirs—Possession of one heir—Adverse possession—Finding of fact.*

In each case where several co-heirs succeed to the property of a deceased Muhammadan it has to be found whether an entry by one co-heir is an entry on behalf of himself alone or on behalf of all the heirs and the finding is one of fact. L HASHAM ALI *v.* UMAR HAYAT, 4 L. L. J. 571; (1922) A. I. R. (L.) 193 257

——— **Wakf**—*Dedication when may be inferred—Khankah, nature of*—Sajjadanashin, *succession to—Surplus offerings—Members of family, whether entitled.*

A *khankah* is a monastery or religious institution where *dervishes* and other seekers after truth congregate for religious instruction and devotional exercises.

Origin of *khankahs* described.

On the death of a *sajjadanashin* his eldest son is not entitled as of right to succeed him but the eldest son, if qualified, is the natural successor of his father.

Dedication may be inferred although the word *wakf* is not shown to have been used.

At certain shrines the members of the founder's family other than the *sajjadanashin* are treated as entitled to share in the surplus offerings

Muhammadan Law—concld.

which remain after payment of expenses. **P C** MUHAMMAD HAMID *v.* MAHMUD, 44 M. L. J. 149; (1922) A. I. R. (P.C.) 384; 32 M. L. T. 52; 27 C. W. N. 701; 4 L; 1 51 25 Bom. L. R. 660; 38 C. L. J. 231; 1 P. W. R. 1923 1009

———— **Wakf**—*Mutwalli—Permission to lease—Kazi, place of, whether taken by District Judge—Appeal, whether lies.*

Mutwallis may be authorised to execute leases of *wakf* property, by the District Judge, who, for this purpose, is competent to discharge the functions of a *kazi* under the Muhammadan Law.

Such a proceeding is not a suit but merely a proceeding under section 141 to the Civil Procedure Code. The mere fact, however, that the provisions of the Civil Procedure Code regulate the proceedings does not make the order which may be passed therein appealable. **C** HABIBAR RAHMAN *v.* SAIDANNISSA BIBI, 38 C. L. J. 351; (1924) A. I. R. (C.) 327 907

———————— *Mutwalli—Permission to lease* wakf *property*—Kazi—*District Judge, powers of—Practice of Court.*

A District Judge has jurisdiction, on the application of a *mutwalli* to authorise dealings with *wakf* property in the same way as a *kazi* might have done under the Muhammadan Law.

Where a practice has existed, it is convenient, except in cases of extreme urgency and necessity, to adhere to it, because it is the practice, even though no reason can be assigned for it. **C** HABIBAR RAHMAN *v.* SAIDANNESSA BIBI, 38 C. L. J. 365; 51 C. 331 949

Negotiable Instruments Act (XXVI of 1881), s. 87—*Promissory-note—Alteration of date of execution, whether material alteration.*

The alteration of the date of execution of a promissory-note is a material alteration within the meaning of section 87 of the Negotiable Instruments Act. **L B** KADER NATH SINGH *v.* GARRAD, 11 L. B. R. 382; (1922) A. I. R. (L. B.) 40 761

Notice. *See* CIVIL PROCEDURE CODE, 1908, O. IX, r. 13 91

———— *Registration, effect of.*

Notice cannot in all cases be imputed from the mere fact that a document has been registered. **S** BEGRAJ *v.* ALISHER, (1923) A. I. R. (S.) 50; 16 S. L. R. 278 897

Oaths Act (X of 1873), ss. 4, 14. *See* PENAL CODE, 1860, S. 193 189

———— s. 5. *See* CIVIL PROCEDURE CODE, 1908, O. XLI, r. 27 556

Originating summons—*General questions whether can be asked—Opinion of Counsel, whether relevant—Trustees, position of.*

On an originating summons the Court should not be asked to give its opinion on general questions when specific questions can easily be framed.

The better practice is not to plead opinions of Counsel on an originating summons; in general they are no more relevant on an originating summons than in an ordinary suit.

Originating summons—concld.

On an originating summons trustees should not submit that certain beneficiaries of theirs are barred by limitation or otherwise. That is for the Court to decide. Trustees should not take sides. **B** DADABHOY FRAMJEE CAMA *v.* COWASJI DORABJI PANDAY, 47 B. 349; 24 Bom. L. R. 1111; (1923) A. I. R. (B.) 177 83

Oudh Laws Act (XVIII of 1876), s. 6—*Pre-emption—Sale of interest under pre-emption decree whether liable to pre-emption.*

Where the holder of a decree for pre-emption sells his interest in the decree, the sale is of an interest in immoveable property which though contingent at the date of sale becomes vested when the vendee deposits the pre-emption money into Court. Such a sale is, therefore, liable to pre-emption under section 6 of the Oudh Laws Act. **O** BIKRAM SINGH *v.* SURAJ BAKHSH SINGH, 26 O. C. 295; (1924) A. I. R. (O) 125 618

———— s. 9—*Pre-emption*—Khattas, *separate, in village—Relationship, whether ground for preference.*

Where there are independent *Khattas* in a village and each *khata* is separately assessed to revenue there being no joint right and no joint obligation along with other *khattas*, each *khata* is a *mahal* by itself and co-sharers in other *khattas* have no right of pre-emption under paragraphs 1 and 2 of section 9 of the Oudh Laws Act in respect of property situate in one particular *khatta*. In such a case co-sharers in other *khattas* are members of the village community so far as the right of pre-emption is concerned, and among them no preference is given by paragraph 3 of section 9 of the Oudh Laws Act on account of relationship. **O** RAM ADHIN *v.* GAYA PRASAD, (1923) A. I. R. (O.) 159 771

Oudh Rent Act (XXII of 1886), ss. 3 (10), 48—*Tenant, who is—"Heir of tenant" whether includes heir of successor of tenant.*

The heir of a tenant who succeeds the tenant becomes "tenant" within the definition of the term in section 3 (10) of the Oudh Rent Act. Therefore when the heir of a tenant has succeeded to the tenancy, his heir becomes "the heir of a tenant" within the meaning of section 48 of the Act and is entitled to the protection of that section.

The expression the "heir of a tenant" in section 48 of the Oudh Rent Act does not exclude the heir of the heir of a tenant. The word "heir" is used to denote the sense of representation of the first tenant through his successors in inheritance for the whole term of the tenancy. **O** RAM NARESH SINGH *v.* DALPAT SINGH, 9 O. & A. L. R. 614; 10 O. L. J. 357; (1924) A. I. R. (O.) 142 120

Partition—*Minor not properly represented—Acquiescence after attaining majority—Heirs of minor, whether can object.*

Where a minor was not properly represented in a partition but all the adult members treated the partition as valid and enjoyed or disposed of their shares under the partition deed and the minor after attaining majority continued in possession of her

Partition—contd.

share, her heirs cannot dispute the partition or claim any interest in the shares which fell to the oth r members and were enjoyed by them absolutely and adversely for over twelve years. **M** MADHAVAN NAIR *v.* ABDUR RAHIMAN, (1922) A. I. R. (M.) 404 917

——— *Partial partition, suit for, maintainability of—Principles applicable.*

A suit for partition should include all the lands of the co-tenancy, and if it does not, any party interested may insist that the omitted land or lands be included in the suit.

Exceptions to the general rule that a suit cannot lie for partition of a portion of the family property have been recognised when different portions of the family property are situated in different jurisdictions, and separate suits for separate portions have sometimes been allowed, where different rules of substantive or adjective law prevail in the different Courts. Again, a suit for partial partition has been allowed when the portion excluded is not in the possession of co-parceners and may consequently be deemed not to be really available for partition. A suit for partial partition has also been allowed when the portion excepted is impartible property. In another class of cases, the rule has been relaxed, namely, when the portion excluded is held jointly with strangers who have no interest in the family partition.

The general rule is that all property held in co-tenancy and nothing but property held in co-tenancy should be included in a partition suit. A co-tenant whose title to an undivided share of joint property is admitted or is clear, is entitled to partition as a matter of right; a difficulty in making a division of the subject-matter or a resulting prejudice to some of the co-tenants, is not a sufficient ground for refusing a partition.

The rule that a partition suit should embrace all the joint property is neither arbitrary nor technical; it is founded on sound and weighty reasons. If the rule were not recognised and firmly applied, multiplicity of litigation would be the inevitable result.

Although partial partition by suit is allowed where different portions of the property lie in different jurisdiction, or some portion of the property is at the time incapable of partition or is from its nature impartible or is held jointly with strangers who cannot be joined as parties to a general suit for partition, these exceptions must not be taken to have frittered away the fundamental rule that a partition suit should embrace all the joint property. **C** RAJENDRA KUMAR *v.* BROJENDRA KUMAR, 37 C. L. J. 191; (1923) A. I. R. (C.) 501 790

———, *suit for*—Khotki *lands—Questions between mortgagor and mortgagee—Procedure.*

In partition suits relating to *khotki* lands it is advisable that any questions relating to disputes with regard to particulars between a mortgagor and a mortgagee should be kept out of the suit, or if they are taken up in the course of the trial, very great care should be taken to keep such questions separate as far as possible. **B** BABUSINGH NARAYANJI *v.* SAMBHAJ SHIWAJI (1923) A. I. R. (B.) 204 449

Partition suit—Mesne profits. *See* CIVIL PROCEDURE CODE, 1908, O. VII, r. 2, APPLICABILITY OF 53

——— *Costs, rule as to.*

The general rule is that in partition suits the parties should bear their own costs, except with regard to the institution fee, which should be borne equally. **B** KASTURIBHAI MANIBHAI *v.* BAI MAHALAXMI, (1923) A. I. R. (B.) 464 914

——— *Property situate outside British India—Court, whether can take property into account.*

In a suit for partition of joint property the Court cannot take into consideration joint property belonging to the parties which is situate outside British India. **L** MOTI RAM *v.* KANHYA MAL, 2 L. L. J. 514 780

Partnership suit—*Interest, when can be allowed.*

Interest is not usually allowed in partnership suits except on sums advanced in excess of the capital agreed to be contributed. **L** RAM PIARI *v.* SULTAN BAKHSH, 3 L. 382; (1923) A. I. R. (L.) 115 207

Passing-off action. *See* TRADE MARK 193

Patents and Designs Act (II of 1911), ss. 38, 43—*Invention—Improvement—Registration.*

No registration under section 43 of the Patents and Designs Act is effective, unless the design or configuration sought to be protected, is new and original and not of a pre-existing common type.

A combination of materials would not be entitled to protection under the Patents and Designs Act unless it was a combination of a character which involved the exercise of any special inventive power or had some originality about it.

An invention means any manner of new manufacture and includes an improvement; but every improvement need not be an invention. **A** RAM SAHAI *v.* ANGNOO, (1922) A. I. R. (A.) 496 517

Penal Code (Act XLV of 1830), s. 4—*Extra-territorial jurisdiction, extent of.*

Section 4 of the Penal Code confers certain extra-territorial jurisdiction in respect of acts committed outside British India by certain classes of persons including the Indian subjects of His Majesty: but it does not affect the nature of the act for which they are liable. The act alleged must amount to an offence punishable under the Code. **B** *In re* RAMBHARTHI HIRABHARTHI, 25 Bom. L. R. 772; 47 B. 907; (1924) A. I. R. (B.) 51; 25 Cr. L. J. 333 189

——— **ss. 34, 149, 395**—*Dacoity by force of s. 34 or 149—Charge—Consolidated sentences.*

To constitute the offence of dacoity, it is necessary to prove that five or more persons joined in a robbery. A conviction for dacoity based either on a finding of common object not charged, or on evidence which does not prove the essential ingredients of the offence cannot be sustained. To

justify a conviction for dacoity by the application of section 34 or 149, Penal Code, it is necessary to charge and prove that the unlawful assembly as a whole had the common intention of committing dacoity or that each accused knew that dacoity was likely to be committed in prosecution of the common object of the unlawful assembly.

Where the accused were charged with being members of an unlawful assembly whose common object was to commit mischief and cause hurt, but there was no count in the charge that the common object of the unlawful assembly was to commit dacoity or to cause hurt for the purpose of committing theft, no conviction for dacoity by force of section 34 or 149, Penal Code, can be sustained.

It is not proper to pass consolidated sentences on an accused person for a number of offences. M *In re* P. KOTTOORA THEVAN, 19 L. W. 211 46 M. L. J. 311; (1924) M. W. N. 238; 25 Cr. L. J. 396 444

——— ss. 40, 109, 171, *applicability of—Madras District Municipalities Act (V of 1920), s. 55—Double voting, abetment of—Sanction, whether necessary.*

An abetment of the offence of double voting under section 55 (1) of the Madras District Municipalities Act is an offence under section 109 of the Penal Code read with section 40 thereof and is chargeable and punishable thereunder.

The fact that section 171-D of the Indian Penal Code specifically provides for an abetment of the offence of double voting does not prevent the applicability of section 109 of the Indian Penal Code for abetment of an offence under section 55 (1) of the Madras Act V of 1920 and render it chargeable and punishable only under section 171-D It is open to a complainant to proceed under section 55 of the Madras District Municipalities Act read with section 109 of the Indian Penal Code and in such a case no sanction is necessary under section 196 of the Criminal Procedure Code as amended by Act XXXIX of 1920. M SESHA AIYAR *v.* VENKATASUBBA CHETTY, 19 L. W. 201; (1924) M. W. N. 268; 25 Cr. L. J. 442; (1924) A. I. R. (M.) 487 739

——— s. 75. *See* CRIMINAL PROCEDURE CODE, 1898, s. 310, applicability of 891

——— s. 84—*Unsoundness of mind—Burden of proof.*

The plea of insanity being of the nature of a general exception, an accused person relying on it must establish it. A CHANDU LAL *v.* EMPEROR, 21 A. L. J. 776; 25 Cr. L. J. 348; (1924) A. I. R. (A.) 186 233

——— s. 84—*Unsoundness of mind—Medical and legal points of view—Person conscious of doing wrong, whether of unsound mind.*

The medical and the legal standards of sanity are not identical. From the medical point of view every man at the time when he commits a murder is insane, that is, he is not in a sound, healthy normal condition, but from the legal point of view a man must be held to be sane so long as he is able to distinguish between right and wrong; so long as he knows that the offence he is committing is a wrong thing to do, so long as he has a guilty mind.

A person who is in a highly excited and unbalanced condition, but is nevertheless conscious that what he is doing is wrong and a crime cannot be said to be of unsound mind within the meaning of section 84 of the Penal Code. L SHER SINGH *v.* EMPEROR, (1923) A. I. R. (L.) 508; 25 Cr. L. J. 395 443

——— s. 97—*Right of private defence of property belonging to another—Attempt to commit offence.*

Under section 97 of the Penal Code, the right of private defence of property extends not only to one's own property but also to the property of any other person, and it is not necessary that one of the offences enumerated in the section should have been actually committed, it is enough if there is an attempt to commit any of those offences. A DALGANJAN *v.* EMPEROR, 22 A. L. J. 81; 25 Cr. L. J. 481 881

——— s. 143—*Unlawful assembly—Charge, contents of—Common object, whether must be stated.*

When a charge is framed under section 143 or the connected sections of the Penal Code the common object of the unlawful assembly must be stated in the charge. C KASHI PRAMANIK *v.* DAMU PRAMANIK 27 C. W. N. 28; 25 Cr. L. J. 524 988

——— s. 144, offence under—Summary trial, legality of. *See* CRIMINAL PROCEDURE CODE, 1898, s. 260 992

——— s. 147—*Rioting, ingredients of—Unlawful assembly—Number reduced below five—Conviction, whether can be maintained.*

In order to sustain a conviction under section 147 of the Penal Code it is necessary to find that the person accused of that offence was a member of an unlawful assembly and that he used force or violence in prosecution of the common object of such assembly.

Where out of five men alleged to have formed unlawful assembly and committed a riot, two are acquitted as not having been members of the unlawful assembly, the conviction of the remainder under section 147 of the Penal Code cannot be maintained and each of them can be held responsible only for what he himself did. L ATA MUHAMMAD *v.* EMPEROR, (1923) A. I. R. (L.) 692; 5 L. L. J. 475; 25 Cr. L. J. 494 894

——— ss. 147, 149, *applicability of—Easement, right of—Forceable protection—Injury caused by several persons—Unlawful assembly not proved, effect of.*

No person has a right to prevent by force another person dealing with his own land merely because he has some right of easement or customary right over a portion of that land, of which right he is not at the time in actual enjoyment.

Once a charge of unlawful assembly fails a person cannot be convicted in respect of an injury which is not proved to have been caused by him. O LILA *v.* EMPEROR, 9 O. L. J. 291; 4 U. P. L. R. (O.) 74; (1922) A. I. R. (O.) 328; 25 Cr. L. J. 538 1009

——— ss. 149, 325—*Grievous hurt caused by some members of assembly—Unlawful assembly not established—Responsibility—Offence.*

An old man who was being attacked by the deceased with a stick cried out for help and a large number of persons went to his rescue. Some of them inflicted grievous injuries on the deceased as the result of which he died :

Held, (1) that as there was no unlawful assembly only those persons who had actually inflicted the injuries on the deceased were liable for them;

(2) that as the persons who had actually inflicted the injuries could not be ascertained, there could be no conviction in the case. **Fat** AMBIKA SINGH *v.* EMPEROR, 1 Pat. 212; (1922) A. I. R. (Pat.) 498; 25 Cr. L. J. 431 **607**

——— s. 179. *See* MADRAS PUNCHAYAT COURTS ACT, 1920, S. 78, RULES UNDER **422**

——— s. 193—*Perjury before Native State Court—Offence.*

While perjury before the Court of a Native State by an Indian subject of His Majesty would be as objectionable as perjury before a Court in British India, it is not punishable under section 193 of the Penal Code, where it is committed in a Foreign Court in relation to entirely foreign proceedings.

Though the Oaths Act extends to the territories of Native Princes and States in alliance with His Majesty so far as regards the subjects of His Majesty, a Court in a Native State cannot be treated as a Court within the meaning of sections 4 and 14 of the Act, in relation to proceedings which were held before that Court entirely under the law of that State, and which had nothing to do with any proceeding in British India or under the law in force in British India. **B** *In re* RAMBHARTHI HIRABHARTHI, 25 Bom. L. R. 772; 47 B. 907; (1924) A. I. R. (B.) 51; 25 Cr. L. J. 333 **189**

——— s. 211—*False charge in Native State Court—Offence.*

There is no provision in the Penal Code which constitutes it an offence to lodge a false complaint in a Foreign Court or to give false evidence before such Court where the oath is not administered under the provisions of law in force in British India, but under the law of that State in relation to proceedings before that Court.

The criminal proceeding and false charge within the meaning of section 211 of the Penal Code mean proceedings and charge in British India, where the Penal Code is in force; criminal proceedings taken and a false charge made before a Court in a Native State are not within the scope of the section. **B** *In re* RAMBHARTHI HIRABHARTHI, 25 Bom. L. R. 772; 47 B. 907; (1924) A. I. R. (B.) 51; 25 Cr. L. J. 333 **189**

——— ss. 224, 225B. *See* CRIMINAL PROCEDURE CODE, 1898, S. 109 **814**

——— s. 273, *offence under—Noxious food—Knowledge—Presumption.*

Knowledge that an article of food offered for sale is unfit for consumption cannot be presumed; this, like other ingredients of the offence under section 273 of the Penal Code, must also be proved. **A** MUKUND RAM *v.* EMPEROR, (1922) A. I. R. (A.) 273; 25 Cr. L. J. 537 **1001**

——— s. 300, *Excep. I—Death of wife caused by husband—Strangulation—Grave and sudden provocation—Benefit of doubt.*

Accused who was living on very good terms with his wife killed her suddenly one night by twisting her own hair round her throat. There was no premeditation and no preparation:

Held, that in the absence of any evidence the accused was entitled to the benefit of the doubt as to whether some sudden and grave provocation did not arise which temporarily deprived him of self-control. **L** MALLA *v.* EMPEROR, (1923) A. I. R. (L.) 691; 5 L. L. J. 528; 25 Cr. L. J. 519 **883**

——— s. 302—*Circumstantial evidence—Benefit of doubt—Murder—Poisoning—Possession of food vessels containing poison.*

Where the circumstantial evidence relied on does not exclude the reasonable possibility of some person other than the accused having committed the crime, the accused must be given the benefit of the doubt. When a man dies as the result of arsenic poisoning, the mere fact that food vessels and a grinding stone for the preparation of food produced by the wife of the deceased contained arsenic, does not necessarily exclude the possibility of the poison having been introduced by some outside agency. **L** DAULAT BAI *v.* EMPEROR, (1923) A. I. R. (L.) 537; 25 Cr. L. J. 424 **600**

——— s. 302—*Culpable homicide—Intention or knowledge.*

The offence of culpable homicide presupposes an intention or knowledge of likelihood of causing death. The intention must be directed either deliberately to putting an end to human life or to some act which to the knowledge of the accused is likely to eventuate in the putting an end to human life. The knowledge must have reference to the particular circumstances in which the accused is placed and the intention demanded by the section must stand in some relation to the person who is alive. **N** GANPAT *v.* EMPEROR, 25 Cr. L. J. 356 **292**

——— s. 302—*Murder—Evidence—Accused carrying toka—Blood on toka—Agriculturists.*

Many *zemindars* carry *tokas* which are used for their ordinary work as agriculturists and there is nothing significant in the fact that the accused left his house with a *toka* in his hand shortly after the deceased had gone out and that the latter was subsequently found to have been killed as the result of numerous wounds inflicted on him with a sharp-edged instrument.

A *zemindar* in the use of a *toka* might very easily cut himself and in this way get blood on it. The presence of a little blood on a *toka*, therefore, produced by a person accused of murder is not a very suspicious circumstance. **L** BARHATI *v.* EMPEROR, (1923) A. I. R. (L.) 529; 25 Cr. L. J. 426 **602**

——— ss. 302, 304A—*Death caused by love potion—Intention to cause death, absence of—Offence.*

Where death is caused by the administration to a person of a substance which is believed by

the accused to be a love potion, the accused cannot be convicted of murder, unless it is shown clearly and without possible doubt that the intention of the accused was to cause death. The proper conviction in such a case is one under section 304A of the Penal Code. **Pat** PHULMANI MUNDAIN *v.* EMPEROR, (1924) Pat. 131; 25 Cr. L. J. 449 **801**

——— **s. 304 II**—*Culpable homicide—Attack on old man with* lathi—*Offence.*

Accused attacked a weak old man violently with a *lathi* causing five fractures on different parts of his body as the result of which he died:

Held, that the accused must have known that the injuries caused by him were likely to result, in death and he was, therefore, guilty of an offence under section 304 II of the Penal Code. **L** RAJINDAR SINGH *v.* EMPEROR, (1923) A. I. R. (L.) 516; 25 Cr. L. J. 409 **489**

——— **s. 304 II**—*Injuries on non-vital parts—Death caused by septic poisoning—Offence.*

Accused attacked the deceased and inflicted four injuries on him, none of which was on a vital part, and death resulted because of septic poisoning:

Held, that the act of the accused fell within the definition contained in the second part of section 304 of the Penal Code. **R** NGA PO CHET *v.* EMPEROR, 2 Bur. L. J. 239; 25 Cr. L. J. 489 **889**

——— **ss. 323, 382**—*Theft after preparation for causing hurt—Hurt.*

In order to sustain a conviction under section 382 of the Penal Code, actual theft must have been committed.

Complainant was sleeping on a bed in front of an enclosure containing his cattle and was awakened to find the accused persons round his bed, who threw him to the ground and beat him:

Held, that the accused were guilty of an offence under section 323 but not of one under section 382 of the Penal Code. **L** LAL SINGH *v.* EMPEROR, (1923) A. I. R. (L) 512; 25 Cr. L. J. 386 **434**

—— —— **s. 328**—*Poisoning—Circumstantial evidence—Prosecution, duty of.*

In a case of poisoning, where the only evidence against the accused is circumstantial, it is the duty of the prosecution to eliminate all reasonable possibility that the poison was administered otherwise than by the appellant. **L** RAM GOPAL *v.* EMPEROR, (1923) A. I. R. (L.) 687; 25 Cr. L. J. 517 **981**

——— **s. 366**—*Abduction by near relatives—Sentence.*

Accused who were near paternal relations of a girl over sixteen years of age and were admittedly entitled to her custody as against her mother with whom she was living carried her away forcibly in order to marry her to one of themselves. The mother admitted their superior right to have the custody of the girl but complained that she should have been paid compensation before she was deprived of her daughter's custody:

Held, (1) that the accused were guilty of an offence under section 366 of the Penal Code;

(2) that having regard to the relationship of the accused with the abducted girl and the view which her mother took of the incident, the offence was only a technical one and a nominal sentence would meet the ends of justice. **L** SHER *v.* EMPEROR, 5 L. L. J. 377; (1924) A. I. R. (L) 110; 25 Cr. L. J. 430 **606**

——— **s. 379**—*Theft*—Bona fide *claim—Minor's property held by others—Guardian's duty.*

A removal of property in the assertion of *bona fide* claim of right, though unfounded in law and fact, does not constitute theft. But a mere colourable pretence to obtain or keep possession of property does not avail as a defence.

Though it is the duty of a guardian of a minor's property to get into his own hands all the property of the minor, it is not his duty to take forcible possession of it but to resort to the Law Courts if it is held against him by others. **N** TUKARAM *v.* EMPEROR, 25 Cr. L. J. 237 **237**

——— **s. 401**—*Association for habitually committing theft—Ingredients of offence.*

In order to establish a case under section 401 of the Penal Code, it is not necessary to prove that each individual member of the gang has habitually committed theft or any particular act of theft. Once it is proved that a gang was formed for the purpose of habitually committing theft, all persons who thereafter join the gang in committing one more theft come within the purview of section 401 of the Penal Code. **L** DARYA SINGH *v.* EMPEROR, (1923) A. I. R. (L) 666; 25 Cr. L. J. 520 **984**

——— **ss. 420, 511**—*Cheating—Delivery of property—Attempt, whether possible.*

It cannot be laid down as a proposition that there can never be an attempt to commit the offence described in section 420 of the Penal Code. **N** SAMUEL ILOANAH *v.* EMPEROR, 25 Cr. L. J. 475 **827**

——— **ss. 423, 447**—*Injury to complainant—Intention to annoy or hurt.*

Complainant had a brick kiln for which he got water from the Railway Station close by, which water used to flow through the land of accused *K.* which he had taken on lease. On the termination of the lease *K.* also started a kiln in company with accused *B.* and took the supply of water from the Railway Authorities who did not extend the monopoly hitherto enjoyed by the complainant. Thereupon the present complaint was lodged under sections 426 and 447, Indian Penal Code, on the allegation that the accused had destroyed the water-course through which water used to flow to the complainant's kiln:

Held, that as the Railway were no longer supplying him with water, the stoppage or the removal of the water-course did not injure the complainant in any way and no criminal intention to annoy the complainant or to harm him having been shown it was not a fit case for prosecution on the criminal side. **L** BANARSI DAS *v.* EMPEROR, 53 P. L. R. 1922; 4 L. L. J. 482; (1923) A. I. R. (L.) 92; 25 Cr. L. J. 525 **989**

Penal Code—contd.

——— s. 442—*Walled courtyard, without door, whether building.*

A walled courtyard which is not provided with a door is not a building within the meaning of section 442 of the Penal Code. L BUTA *v.* EMPEROR, 25 Cr. L. J. 457 809

——— ss. 442, 458—*House-breaking—Entry, actual, not effected—Applicability of s. 458—Person who has not himself made preparation, whether guilty of offence.*

Accused having made a hole in the wall of complainant's shop found that their way was blocked by the presence of beams on the other side of the wall and they could not, therefore, enter the shop:

Held, that as there was no entry into the shop within the meaning of section 442 of the Penal Code accused were guilty not of house-breaking but merely of an attempt to commit house-breaking.

Section 458 of the Penal Code applies only to the house-breaker who has actually himself made preparation for causing hurt to any person or for assaulting any person or for wrongfully restraining any person, etc., and not to his com anions who themselves have not made such preparation. L GHULAM *v.* EMPEROR, 4 L. 399; (1923) A. I. R. (L) 509; 25 Cr. L. J. 398 446

——— ss. 463, 464, 465—*Fabricating false document—Forged document, what is—Assertion by creditor in his own book—Offence.*

Every false or fabricated document is not a forged document. There must be acts that constitute the document a false or fabricated one, that is to say, the case must fall within the definition of making a false document in section 464 of the Penal Code, and such false document must also po sess a certain character or tendency, that is to say, the character described in section 463 of the Code.

Complainant purchased a bullock from the accused and promised to pay the price on a certain date. An entry to that effect was made in the *bahi* of the accused and was thumb-marked by the debtor. Subsequently, the accused added a clause on the credit side of the *bahi* to the effect that if the amount was not paid as agreed upon interest at a certain rate would be charged:

Held, that as the addition was merely an assertion by the creditor himself and did not purport to be an agreement by the debtor to pay interest, it did not operate to impose any liability on the debtor, and, therefore, did not amount to a false document within the meaning of section 464 of the Penal Code. L BADAN SINGH *v.* EMPEROR, 3 L. 373; (1923) A. I. R. (L) 111; 25 Cr. L. J. 33 225

——— s. 465—*Forgery—Conviction based solely on evidence of Finger-Print Expert, validity of—Thumb-impression of accused, whether can be taken during trial.*

Ordinarily a man should not be convicted of the offence of forgery solely upon the evidence of a Finger-Print Expert relating to similarity of thumb-impressions.

Penal Code—concld;

The thumb-impression of an accused person should not be taken during his trial for purposes of comparison. L JASSU RAM *v.* EMPEROR, 4 L. 246; (1923) A. I. R. (L.) 612; 25 Cr. L. J. 375 423

——— ss. 466, 468—*Forgery and using as genuine a forged document, convictions for, legality of—Two offences.*

If a man commits two offences he can be convicted of them both, more especially when they are separate transactions and the commission of one does not necessarily involve the commission of the other.

There is nothing to prevent a forger from being convicted both of forgery and of using as genuine the forged document. N GAJANAN SAKHARAM *v.* EMPEROR, 25 Cr. L. J. 473 825

——— ss. 499, Excep. 10, 500—*Defamation—Excommunication—Warning to caste-fellows not to deal with person excommunicated—Offence.*

Complainant had been put out of caste for having taken water from the hands of a certain person, and the accused warned certain other members of the caste that if they took water from the hands of the complainant they would also be liable to be put out of caste:

Held, that the action of the accused was covered by the tenth Exception to section 499 of the Penal Code and did not amount to defamation. A UMED SINGH *v.* EMPEROR, 22 A. L. J. 79; 25 Cr. L. J. 372 824

——— s. 500—*Defamation—Proof—Prosecution, duty of—Public good.*

In a criminal case an accused person is not to be judged by how he pleads and fails to plead in the proceeding. Much injustice may be done by applying to criminal proceedings the precise and pedantic requirements of Civil Procedure. In dealing with defamation, the Penal Code has introduced a series of provisions, adopted partly from the old Common Law, in the nature of defences but it has not altered the fundamental principle of the Criminal Law, that the complainant or prosecution must prove the accused to be guilty, or, in other words, the absence of such facts as happen to bring the case within either of the defences or exceptions laid down in the section.

A complainant in a case of a defamation is bound to prove that the statement complained of is false and that if it is true it is not for the public good.

What is for the public good is a question of fact in each case.

Where a person has been outcasted a statement made to the brotherhood that he has been outcasted is made for the public good A UMED SINGH *v.* EMPEROR, 21 A. L. J. 765; 25 Cr. L. J. 327; 46 A. 64 183

Pleadings—*Duty of Court—Point not pleaded, whether can be raised.*

Courts should confine themselves to the dispute between the parties and should not go out of their way to raise fancy points which are not raised by the parties themselves. A LACHMAN PRASAD *v.* MAJJU, (1923) A. I. R. (A.) 167 913

Possession and dispossession—*Possession vacated by trespasser, effect of.*

If a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the Statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. There is no one against whom he can bring an action. He cannot make an entry upon himself. There is no positive enactment, nor is there any principle of law, which requires him to do any act, to issue any notice, or to perform any ceremony in order to rehabilitate himself. No new departure is necessary. The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose. **L B** KALI MUTU ASRI *v.* MEERA HUSSEIN, 11 L. B. R. 381; (1923) A. I R. (R.) 23 **905**

Possessory title—*Ejectment suit against person having no title.*

A person who has been in possession of property for over twelve years without a title is entitled to maintain a suit for ejectment of a person who has wrongfully dispossessed him from the property and who has no title to it. **B** ATMARAM *v.* BALAJI RAGHUNATH, 25 Bom. L. R. 1032; (1924) A. I. R. (B.) 178 **307**

Practice—*Appeal—Order appealed against, whether must be produced.*

An appeal lies not from what a Judge says but from what he orders; and that what he orders is to be found in the sealed or signed formal order which is entered in the records of the Court. Apart from urgency or some special ground, no appeal should be determined without the production of the formal order under appeal. **B** DADABHOY FRAMJEE CAMA *v.* COWASJI DORABJI PANDAY, 47 B. 349; 24 Bom. L. R. 1111; (1923) A. I. R. (B.) 177 **83**

———— *Witness, credibility of—Witness believed by Trial Court—Appellate Court, position of.*

Where a Judge, who has seen a witness, and has heard his evidence, comes to the conclusion that the witness is credible, that is to say, a witness who to the best of his recollection intends to tell the truth, it requires circumstances of exceptional character to justify a Court of Appeal in coming to a different conclusion. It is not a question of the weight of evidence but of the attitude and trustworthiness of the witness, and of the effect of his whole demeanour in the witness-box. **P C** MA THAN THAN *v.* MA PWA THAN, (1923) A. I. R. (P. C.) 156; 33 M. L. T. 361; 1 R. 451; 2 Bur. L. J. 260; 46 M. L. J. 334 **63**

Pre-emption—*Custom—Co-sharer in village—Purchaser of plot in defined share of* mahal, *whether co-sharer.*

The purchaser of a plot of land comprised in a definite share in the village which is assessed separately to revenue and which is recorded separately in the *khewat*, is a co-sharer in the village and must be treated as such for the purposes of pre-emption. **A** RAM GOVIND PANDE *v.* PANNA LAL, 21 A. L. J. 763; 46 A. 70 **35**

Pre-emption—contd.

———— *Decree in pre-emption suit—Deposit of pre-emption money—Costs deposited beyond time—Compliance with pre-emption decree—Oudh Laws Act (XVIII of 1876), s. 15.*

A obtained a pre-emption decree with costs subject to payment of pre-emption money, which he deposited duly, but later attached and withdrew out of it the amount awarded to him on account of costs. The Appellate Court increased the amount of pre-emption money ordering the parties to bear their own costs in the suit and gave fresh period to *A*, to deposit the balance of the pre-emption money fixed by it, deducting the amount already deposited. *A* complied with the order within time as regards the balance of pre-emption money but the amount which he had withdrawn on account of his costs was deposited by him after time when the discrepancy was brought to his notice:

Held, that it was sufficient compliance with the decree to entitle *A* to be put in possession of the property. **O** BINDA PRASAD *v.* BANARSI DAS, 10 O. L. J. 206; (1923) A. I. R. (O.) 271 **116**

———— *Decree in pre-emption suit—Period for depositing pre-emption money ending on Sunday—Deposit next day, validity of—Civil Procedure Code (Act V of 1908), O. XXI, r. 14 (b).*

Where the last day of the period allowed by a pre-emption decree for depositing the pre-emption money is a Sunday, a deposit made on the day following is not a compliance with the decree and, under O. XXI, r. 14 (*b*) of the Civil Procedure Code, the suit for pre-emption stands automatically dismissed. **A** FATEH MUHAMMAD CHAUDHURI *v.* SITA CHAUDHRAIN, (1922) A. I. R. (A.) 278 **539**

———— *Essential requisites of suit—Events subsequent to First Court's decree, effect of.*

In order to maintain a suit for pre-emption, the plaintiff pre-emptor must establish that he had a right to pre-empt, (*a*) on the date of the sale, (*b*) at the time when the suit is brought, and (*c*) on the date of the decree of the Trial Court.

Ram Gopal v. *Piari Lal*, 21 A. 441; A. W. N. (1899) 163; 9 Ind. Dec. (N. S.) 988, *Bhagwan Das* v. *Mohan Lal*, 25 A. 421; A. W. N. (1903) 83, *Rohan Singh* v. *Bhao Lal*, 3 Ind. Cas. 42; 31 A. 530; 6 A. L. J. 699, *Shankar Lal* v. *Kirari Mal*, 77 Ind. Cas; 144; (1924) A. I. R (A) 81, followed.

The fact that subsequent to the passing of the decree of the Trial Court the plaintiff-pre-emptor has undergone a change in status, would in no way affect the right he possessed at the time when the decree in his favour ought to have been passed by that Court. **A** BALDEO MISIR *v.* RAMLAGAN SHUKUL, 21 A. L. J. 648; (1924) A. I. R. (A.) 821 45 A. 709 **684**

———— *Pre-emptor associating stranger in claim—Partial pre-emption, whether permissible—Vendee acquiring position equal to pre-emptor during pendency of suit—Title defeasible.*

Where property situate in two *mahals* is sold and a suit for pre-emption is brought by persons some of whom are co-sharers in both *mahals* and the others only in one of them, the suit of the former is liable to be dismissed, as, in res-

Pre-emption—concld.

pect of the property situate in the *mahal* in which they alone are co-sharers they disentitle themselves from pre-empting by associating with them in their claim persons who are strangers to the property, and in respect of the property situate in the other *mahal* they cannot be permitted to enforce their right of pre-emption, as they are bound to take over the whole bargain and not only a portion of it. The suit must, however, succeed so far as the claim of those plaintiffs is concerned who are co-sharers in one *mahal* only, for they are entitled to pre-empt only that portion of the property which is situate in the *mahal* in which they are co-sharers and have sued to enforce that right.

A vendee cannot by acquiring, during the pendency of a pre-emption suit, a defeasible title equal to that of the pre-emptor defeat the suit for pre-emption. **A** SHANKAR LAL *v.* KIRARI MAL, (1924) A. I. R. (A.) 81 **144**

Principal and agent—*Authority to negotiate for sale, scope of—Agent, whether can enter into contract.*

An estate or house agent, authorised to procure a purchaser, has no implied authority to enter into an open contract of sale.

Unless express authority is given to the agent to sell, and for that purpose to enter into a binding contract, the principal reserves his final right to accept or refuse.

When an owner of property employs an estate-agent to procure a purchaser or tenant at a specified price, the agent has no implied authority to conclude a contract for sale. His duty is simply to find a purchaser or tenant and to communicate his offer to the owner.

There is a substantial difference between an authority to sell and an authority to find a purchaser. Authorising a man to sell means an authority to conclude a sale; authorising him to find a purchaser means less than that; it means, to find a man willing to become a purchaser, not to find him and also make him a purchaser. **C** DURGA CHARAN MITRA *v.* RAJENDRA NARAIN, 36 C. L. J. 467; (1923) A. I. R. (C.) 57 **558**

——— *Broker and sub-broker—Scope of sub-broker's authority—Money of third person paid to principal—Principal, whether liable to refund —Knowledge of fraud—Contract Act (IX of 1872), ss. 72, 182, 186, 187, 188, 251.*

Sections 186 and 187 of the Contract Act show that the authority of an agent is to be gathered from either "words" or "circumstances" and is not implied in the mere fact that he is an agent.

The word "agent" does not itself imply full authority to bind the principal in the same way that a partner can bind his co-partners under section 251 of the Contract Act.

An agreement opened with the words "*G* will act as our agent in our share-brokerage business" and then followed provisions which showed that *G.* was appointed to carry on business on the usual terms of sub-brokers:

Held, (1) that the general words in the beginning of the agreement did not enlarge the authority of *G.* so as to enable him to bind his principals as if he were a general agent;

(2) that any business brought by *G.* was subject to the acceptance of his principals, this being the usual condition between brokers and sub-brokers.

Where, by any wrongful or unauthorised act of an agent, the money or property of a third person comes to the hands of the principal, or is applied for his benefit, the principal is liable jointly and severally with the agent to restore the amount or value of such money or property. But this rule is subject to the qualification that the principal must have had knowledge or means of knowledge that the money belonged to a third person.

The Contract Act is not exhaustive of all cases in which a person under the English Law would be taken to have a right of action against another as for money paid to his use.

Ranganaikammal v. *Ramanuja Aiyangar*, 11 Ind. Cas. 570; 35 M. 728 at p. 737; 21 M. L. J. 600; 10 M. L. T. 57; (1911) 2 M. W. N. 285, relied upon.

Though a case may not be one of 'coercion' falling under section 72 of the Contract Act, yet that does not prevent the application of the principle that, where the defendant has received money which in justice and equity belongs to the plaintiff, under circumstances which render a receipt of it, a receipt by the defendant to the use of the plaintiff, the plaintiff is entitled to recover it.

Per *Coyajee, J.*—Under ordinary circumstances a person, be he banker or other, who takes money from his debtor in discharge of a debt is not bound to inquire into the manner in which the person so paying the debt acquired the money with which he pays it. However that money may have been acquired by the person making the payment, the person taking that payment is entitled to retain it in discharge of the debt which is due to him. But if the person receiving the money has reason to believe that the payment is being made in fraud of a third person and that the person making the payment is handing over in discharge of his debt money which he has no right to hand over, then the person taking such payment would not be entitled to retain the money. **B** MORARJI PREMJI GOKULDAS *v.* MULJI RANCHHOD VED & CO., 25 **Bom. L. R.** 1014; 48 B. 20; (1924) A. I. R. (B) 232 **266**

——— *Profit obtained by agent—Liability of agent.*

A person who accepts a profit for himself in a matter in which he is acting as an agent for another is bound to account to his principal for that profit. **O** BANKE LAL *v.* KANHAIYA LAL, 9 O. L. J. 637 **839**

Probate and Administration Act (V of 1881), s. 69—*Adverse claimant to testator—Interest in estate—Probate, opposition of.*

A person denying the title of the testator, to deal with certain property as his own and claiming adversely to him, cannot be said to have such an interest in the estate of the deceased as would

entitle him to come in and oppose the grant of Probate. C MOHADEB KUDU v. BENODE LAL PATRA, (1922) A. I. R. (C.) 181 534

Provident Funds Act (IX of 1897), ss. 2 (4), 4 (1) —*State Railway Open Line Code, Vol. II, Appendix I, r. 30—Compulsory deposit, whether liable to attachment after retirement of depositor —'Discharged,' meaning of.*

The word "discharged" in rule 30 of the Rules contained in the State Railway Open Line Code, Volume II, Appendix I, does not necessarily mean dismissed, and is wide enough to include the case of a servant who has been permitted to retire or take his discharge.

A deposit which is received as a compulsory deposit continues to retain that character so long as it remains in the fund and does not cease to be a compulsory deposit merely on account of the discharge of the depositor from service within the meaning of rule 30 of the Rules contained in the State Railway Open Line Code, Volume II, Appendix I, and, as such deposit, is not liable to attachment under the provisions of section 4 (1) of the Provident Funds Act. C SECRETARY OF STATE FOR INDIA v. RAJ KUMAR, 27 C. W. N. 472; 50 C. 347 1025

Provincial Insolvency Act (V of 1920), ss. 2 (1) (d), 28, 47—*Receiver, suit against—Leave of Court whether necessary—Secured creditor, position of.*

A Receiver in insolvency proceedings is not in the same position as a Receiver in a suit. His position is that of an assignee in bankruptcy, and it is not necessary for a party to obtain the leave of the Court to proceed against a Receiver appointed under the provisions of the Provincial Insolvency Act.

Amrita Lal Ghose v. *Narain Chandra Chakrabarti*, 53 Ind. Cas. 973; 30 C. L. J. 515, relied on.

In insolvency proceedings a secured creditor stands on a different footing from that which is ordinarily occupied by unsecured creditors.

A secured creditor may do one of three things: he may enforce his security and prove for the balance that may be due to him; or he may relinquish his security for the general body of creditors and prove for the whole debt that may be due to him, or he may value his security and receive a dividend for the balance that may be due to him, subject to the right of the Court to redeem the security. He may also ignore the Insolvency Court altogether, in which case he must be content only with his security, and will be debarred from claiming any dividend, if his security should prove to be insufficient. Pat SANT PRASAD SINGH v. SHEODUT SINGH, 2 Pat. 724; (1924) A. I. R. (Pat.) 259 589

——— **ss. 4, 68**, *scope of—Stranger aggrieved by act of Receiver—Remedy—Civil suit, maintainability of—Leave of Court, whether necessary.*

Per *Curiam*:—Section 4 of the Provincial Insolvency Act does not confer exclusive jurisdiction on the Insolvency Court, and it cannot be said that the only remedy open to an aggrieved stranger is to apply to that Court.

Where a person has made no attempt to bring the matter up before the Insolvency Court and

there is no order of that Court which can be pointed out as amounting to a decision within the meaning of sub-clause (2) of section 4 of the Provincial Insolvency Act, he is at perfect liberty to have recourse to the ordinary Civil Courts.

Section 68 of the Provincial Insolvency Act provides a speedy remedy to which recourse can be had if the person aggrieved chooses to seek it. But it is not the only remedy open to him.

If a person applies under section 68 of the Provincial Insolvency Act, he is subject to the time limit prescribed therein, but if he wants to enforce his claim in the Civil Courts in the ordinary way, his rights would be those of an ordinary person.

It is open to a third person whose property has been taken possession of by the Receiver, and who does not claim title through the insolvent to treat the Receiver as a trespasser and maintain his claim in a Civil Court. There is no provision in the Provincial Insolvency Act other than that contained in section 4 of the Act, which in any way takes away the jurisdiction of a Civil Court to try such a suit.

There is no statutory authority for the proposition that a person who is suing a Receiver appointed under the Insolvency Act has to obtain the permission of the Insolvency Court.

Per *Sulaiman, J.*—A Receiver appointed under the Code of Civil Procedure merely holds the estate on behalf of the Court. The estate does not vest in him, nor does he in any way represent it and leave of the Court is necessary in order that by impleading him the estate may be bound. Without leave of the Court he represents nobody; after leave he represents the real beneficiary. A Receiver under the Provincial Insolvency Act holds a different capacity altogether. He is more than a mere officer of the Court. Under section 28 (2) of the Act the insolvent's estate vests in him. He alone, and no one else, represents the estate. He, therefore, is the proper party to be impleaded in the action. No leave is accordingly necessary for suing him.

Under section 4 of the Provincial Insolvency Act, if a question of title is actually raised by a stranger to the insolvency and decided by the Insolvency Court, the decision is final, and the question cannot be re-opened. A MAHRANA KUNWAR v. DAVID, 21 A. L. J. 737; (1924) A. I. R. (A. 40; 46 A. 16 57

——— **s. 68**, scope of. *See* PROVINCIAL INSOLVENCY ACT, 1920, S. 4 57

Provincial Small Cause Courts Act (IX of 1887), s. 25. *See* CIVIL PROCEDURE CODE, 1908, O. VI, r. 17 553

——— —**s. 25**—*Evidence not examined satisfactorily—High Court, power of, to interfere in revision.*

Where, on the face of a decision of a Small Cause Court Judge, it appears that the evidence of a party has not been satisfactorily examined, for instance, where the Judge in his summary of the evidence states that the party had examined only one witness whereas, as a matter of fact, another witness was also examined whose evidence makes

Provincial Small Cause Courts Act—concld.

the position of the party infinitely stronger, the High Court should exercise its powers of interference in revision. **Pat** PARSOTIM DAS *v.* FIRM JANGLI SAO, 1 P. L. R. 199 . **865**

——— **Sch. II, Arts. 13, 35** (ii), *applicability of —Penal Code (Act XLV of* 1860), *s.* 403—*Dishonest misappropriation—Suit to recover property—Small Cause Court, jurisdiction of.*

It is an essential element of an offence under section 403 of the Penal Code that the accused should act dishonestly. There may be cases of misappropriation in which the defendant would be civily liable, but would incur no criminal liability at all.

Unless all the necessary ingredients of a criminal offence are stated in a plaint, the case cannot be excluded from the cognizance of a Court of Small Causes under Art. 35 (*ii*) of Schedule II to the Provincial Small Cause Courts Act.

Article 13 of Schedule II to the Provincial Small Cause Courts Act only relates to claims made against the person who is primarily liable to pay the cesses or dues. **L** SHIV GIR *v.* KHAZAN GIR, 3 L. 369; (1922) A. I. R. (L.) 451 **581**

——— **Art. 35 (ii)**—*Suit to recover value of trees cut under claim of right—Court of Small Causes, jurisdiction of.*

A suit to recover the value of trees cut down by the defendant under *bona fide* claim of right does not fall under Art. 35 (*ii*) of Schedule II to the Provincial Small Cause Courts Act and is not, therefore, excluded from the cognizance of a Small Cause Court. **C** DILBAR HOSSAIN *v.* SADARUDDIN CHOUDHURI, 27 C. W. N. 469; (1923) A. I. R. (C.) 568 **77**

Public nuisance—*Annoyance, proof of.*

In order to establish a charge of committing a nuisance in a public place to the annoyance of residents or passengers in the locality, it is necessary to prove that somebody was annoyed. But annoyance to one person is sufficient and all that is required is to show that the act complained of was done in such a way as to annoy the person who complained of it.

When a public servant, like a Municipal employee, whose duty it is to look after the cleanliness of the streets, sees anybody easing himself in a public place or street he is sure to be annoyed. **A** LALLU RAM *v.* EMPEROR, 21 A. L. J. 772; 25 Cr. L. J. 332; (1924) A. I. R. (A.) 188 194

Punjab Limitation (Ancestral Land Alienation) Act (I of 1900), Art. 2—*Attestation of mutation —Two sales—Combined mutation—Limitation.*

F., a person governed by the Customary Law, sold certain property to *H.* and *M.* in March 1907. The defendants threatened to bring a pre-emption suit and the matter was settled by the village *punchayat* by which the defendants paid off *H.* and *M.* and took over the sale. The mutation in favour of the defendants was duly attested by the Revenue Officer in the presence of *F.*, *H.* and the defendants in February 1908. Plaintiffs, as reversioners of *F.*, brought a suit for possession in January 1920, alleging that the sale by *F.* was without legal necessity and that time began to run from the date of the attestation of the mutation. The defendants contended that there were really two alienations one by *F.* to *H.* and *M.* and a second one by *H.* and *M.* to themselves and that what had been attested was a sale by *F.* in favour of themselves, an alienation which as a matter of fact never really took place:

Held, that the mutation was really a combined one covering both the alienations and therefore there was an attestation of the alienation disputed by the plaintiffs and their suit brought within twelve years of the date was within time. **L** KUNDAN *v.* MAM RAJ, 4 L. L. J. 178; (1922) A. I. R. (L.) 57 **274**

Punjab Municipal Act (III of 1911), s. 155, *applicability of—Long user of premises for a particular purpose, whether can be objected to.*

Section 155 of the Punjab Municipal Act contemplates only recent and temporary breach of the rules and a person prosecuted thereunder can successfully plead that he has been using the premises for the purpose objected to for a long period. **L** ALLAH BAKHSH *v.* EMPEROR, 25 Cr. L. J. 415 **495**

——— **ss. 172, 195, 219**—*Encroachment on Municipal land—Refusal to remove—Composition whether can be accepted.*

Under section 219 of the Punjab Municipal Act a Magistrate can either dismiss the complaint if he finds that the facts alleged by the Municipal Committee have not been established, or he can impose a fine up to Rs. 50 if the orders of the Committee lawfully issued have not been complied with. A Magistrate has no jurisdiction to accept a penalty for a projection which has been constructed without the permission of the Municipal Committee. It is only in cases of buildings constructed without the permission of the Committee on one's own land that a composition can be accepted under section 195 of the Municipal Act. For a case falling under section 172 of the Act no composition is provided for. **L** MUNICIPAL COMMITTEE, MULTAN *v.* MOTIRAM, (1923) A. I. R. (L.) 686; 25 Cr. L. J. 373 **421**

Railway Company—*Unreasonable delay—Damage to goods independent of loss or deterioration—Risk-Note B, whether affords protection.*

The damage done to goods carried by the Railways by reason of unreasonable delay in transit but independent of loss or deterioration, is not one protected by Risk-Note B; and the Railway is liable for the same. **A** EAST INDIAN RAILWAY COMPANY *v.* GOPI KRISHNA KASHI PRASAD, 21 A. L. J. 448; 45 A. 534; (1924) A. I. R. (A.) 8 **1046**

Railways Act (IX of 1890), ss. 72, 76—*Risk-Note, construction of—Railway liable for loss of goods —Deterioration of goods—Damages, whether can be recovered.*

Certain goods were consigned to the defendant Railway Company for carriage under a Risk-Note under which the Company was liable only in the

Railways Act—contd;

event of the loss of the consignment or one or more complete packages forming part of the consignment, due to the wilful neglect of the Railway Administration, or to theft by or to the wilful neglect of its servants, transport agents or carriers. The goods arrived at their destination in a very deteriorated condition owing to the wilful neglect of the Railway Company. The consignee refused to take delivery of the goods and sued the Railway Company for the value of the goods:

Held, that under the terms of the Risk-Note the Company was not liable for deterioration of the goods. A RAM KISHUN RAM *v.* NORTH-WESTERN RAILWAY, 20 A. L. J. 973; (1923) A. I. R. (A.) 122 1020

——— ss. 77, 140—*Suit against Railway Company—Notice to subordinate Officer, whether notice to Agent—Consignment of goods—Suit to recover compensation for loss—Burden of proof—Limitation, commencement of—Limitation Act (IX of 1908), Sch. I, Art. 31.*

In a suit to recover compensation for the loss of goods consigned to the defendant Railway Company for carriage under a Risk-Note which exempts the Railway Company from liability except in the event of wilful neglect of the Company or theft by or wilful neglect of its servants and provides that robbery from a running train does not constitute wilful neglect, the burden of proving neglect on the part of the Company lies on the plaintiff. If it is alleged by the Company that the goods were lost by theft while the train was running, the burden of proving this fact lies on the Company.

Albuquersque and Sons v. *South Indian Railway Company*, 68 Ind. Cas. 269; 16 L. W. 667; (1922) M. W. N. 328; 43 M. L. J. 90; (1922) A. I. R. (M.) 231; 31 M. L. T. 470, followed.

Where it is found that the notice required by section 77 of the Railways Act has not been given to the Agent of the Railway but was sent to some subordinate officer of the Railway, the plaintiff in order to succeed, must prove, either that the power of the Agent to receive notices under section 140 of the Act had been delegated to the Subordinate officer who had actually received the notice, or that the Company by its rules or course of business had held out to the public that notices might be given to such officer instead of to the Agent and thus stopped itself from raising a technical defence.

A suit to recover compensation for loss of goods consigned to a Railway Company for carriage is governed by Art. 31 of Schedule I to the Limitation Act, and limitation for the suit begins to run from the date on which the defendant Company finally says the goods cannot be delivered. M SOUTH INDIAN RAILWAY *v.* S. P. R. S. NARAYANA AYYAR, 46 M. L. J. 302 511

——— s. 127—*Penal Code (Act XLV of 1860), s. 147—Rioting and throwing stones at train—Separate offences.*

The accused assembled at a railway station with the object of preventing people by force and violence from proceeding to a particular place by a train and force and violence was used towards the passengers in the prosecution of the common object. As soon as the train started the accused began to throw stones at the train. They were convicted of separate offences under section 147 of the Penal Code and 127 of the Railways Act and separate sentences were awarded for each offence:

Held, (1) that the throwing of stones at the train was a distinct offence by itself which had no connection with the offence of rioting, the latter offence being complete as soon as the train had started and the stones not having been thrown in furtherance of the common object with which the accused had assembled at the railway station;

(2) that, therefore, the conviction of the accused for separate offences under section 147 of the Penal Code and 127 of the Railways Act was perfectly legal. L ALLAH DITTA *v.* EMPEROR, 25 Cr. L. J. 435 723

Rangoon Small Cause Court Act (VII of 1920), s. 14 (s)—*Suit for declaration and damages for wrongful concealment of property, nature of—Jurisdiction of Small Cause Court.*

Merely asking for a declaration in a suit does not necessarily make it a suit for a declaratory decree within the meaning of section 14 (*s*) of the Rangoon Small Cause Court Act.

A suit for a declaration and damages based on the allegation that the defendant had wrongfully removed and concealed certain property which the plaintiff was entitled to attach in execution of a decree does not fall within section 14 (*s*) of the Rangoon Small Cause Court Act and is not excluded from the cognisance of the Small Cause Court. R TAKIR RAM KALWAR v. M. N. SWAMY NAIDU, 1 R. 283; (1923) A. I. R. (R) 215 1021

Rangoon Rent Act (II of 1920), as amended by Act (I of 1922), ss. 14, 14A, 15—*Landlord and tenant—Right to recover excess rent from tenant—Standard rent, certification of, whether necessary.*

Under sections 14 and 14A of the Rangoon Rent Act, the Legislature in providing remedies as between the tenant and the landlord, where either of them has enjoyed benefits to which he was not entitled under the Act, intended that these remedies should be granted only in cases in which the Controller has, having regard to all the circumstances, fixed a standard rent under section 15 of the Act.

Therefore, the landlord's remedy under the proviso to sub-section (2) of section 14A of the Rangoon Rent Act, to recover from his tenant rent recovered by the latter from his sub-tenant in excess of the standard rent, cannot be exercised unless and until the Controller has granted a certificate certifying the standard rent of the premises leased by the landlord. R B. R. BAHADAR *v.* JADAWJEE MEHTA, 2 Bur. L. J. 235; 1 R. 687; (1924) A. I. R. (R.) 172; 25 Cr. L. J. 482 882

Registration, *effect of—Notice.*

Registration of a document does not necessarily amount to notice, and the question must be determined upon the merits in each individual case. A KALI DIN *v.* MADHO, (1923) A. I. R. (A.) 169 862

Registration Act (XVI of 1908), s. 17 (1) (b)—*Deed declaring appointment of heir, whether compulsorily registrable.*

A document declaring the appointment of an heir under the Customary Law of the Punjab does not fall within purview of section 17 (1) (*b*) of the Registration Act and does not, therefore, require registration. **L BAJ SINGH** *v.* **PARTAP SINGH**, (1923) A. I. R. (L.) 497 **473**

——— **s. 17 (1) (b)**—*Document showing properties allotted on partition, whether requires registration.*

Where parties draw up a document showing different properties allotted to them on a partition and the intention is that they should be the owners of their separate shares as from the date of the document, the document falls within the purview of section 17 (1) (*b*) of the Registration Act, and the mere fact that the parties had in contemplation the execution of a formal document in the future, does not suffice to take it out of the scope of that section. **B KASTURIBHAI MANIBHAI** *v.* **BAI MAHALAXMI**, (1923) A. I. R. (B.) 464 **914**

——— **s. 28**—*Mortgage of property not situated within territorial jurisdiction of Sub-Registrar—No collusion between mortgagor and mortgagee—Mistake—Registration, legality of.*

The properties comprised in a mortgage were situated in one *taluk* and an acre of land described as Survey No. 458 in another *taluk* was also included and the mortgage-deed was registered in the Sub-Registrar's office in the latter *taluk*. Survey No. 458 did not in fact belong to the mortgagor and was a mistake for Survey No. 458 which belonged to him, but which was not within the territorial jurisdiction of that Sub-Registrar:

Held, that in the absence of any proof that there was any collusion between the mortgagee and the mortgagor or any intention on the part of the mortgagee to include a land not belonging to the mortgagor, the registration was not invalid though it had taken place in a Sub-Registry office in the jurisdiction of which none of the mortgaged properties were situated. **M DEVI PRASAD** *v.* **JAGANNADHARAJU**, 46 M L J. 12; (1924) M. W. N. 125; 33 M. L. T. 243; (1924) A. I. R. (M.) 281 **464**

Res judicata. *See* **AGRA TENANCY ACT, 1901, s. 167** **630**

——— *See* **CIVIL PROCEDURE CODE, 1908, O. XLI, r 1** **541**

——— *between co-defendants.*

A decision will not operate as *res judicata* between co-defendants unless it is shown that the interests of the co-defendants were at variance and there actually was a decision in favour of one as against the other. **A KALI DIN** *v.* **MADHO**, (1923) A. I. R. (A.) 169 **862**

——— *between co-defendants—Contest, absence of, effect of.*

A decision in a prior suit cannot operate as *res judicata* between parties who were co-defendants in the suit, where it is found that it was not necessary for the point to be raised in the prior suit as between the co-defendants. **M MADHAVAN NAIR** *v.* **ABDUR RAHMAN**, (1922) A. I. R. (M.) 404 **917**

Res judicata—concld.

——— *Jurisdiction of Civil and Revenue Courts—Question tried in Revenue Courts, whether can be re-agitated in Civil Courts.*

Where a Revenue Court having jurisdiction to decide a matter has heard and finally determined it, a suit in the Civil Court to question the decision of the Revenue Court is not competent.

Plaintiff brought a suit in the Revenue Court to eject the defendant as his sub-tenant. It was held that the defendant was not a sub-tenant but a tenant-in-chief paying rent to the *zemindar* and the suit was dismissed. The plaintiff then filed a suit in the Civil Court to set aside the decree of the Revenue Court and to get possession of the land:

Held, that the suit was not maintainable. **A RAM DAS** *v.* **DUBRI KOERI**, 20 A. L. J. 606; (1922) A. I. R. (A.) 336; 44 A. 724 **139**

——— *Mortgage, decree on—Sale—Purchaser whether affected by result of suit subsequent to mortgage.*

A sale in execution of a mortgage-decree and the proceedings in which such a decree was obtained are a part of the working out of the rights of the mortgagee under the mortgage, and the purchaser is not, therefore, affected by a decision in a suit subsequent to the mortgage, though prior to the Court sale. **M RAYABHARAM SARAMMA** *v.* **DEVAPURAJALA GANGAYYA**, (1922) A. I. R. (M.) 390 **922**

Riparian owners—*Navigable river—Accretions—Re-formations in situ—Law applicable.*

The bed of a public navigable river is the property of the Government though the banks may be the subject of private ownership. If there be slow accretion to the land on either side, due, for instance, to the gradual accumulation of silt, this forms part of the estate of the riparian owner to whose bank the accretion has been made. If private property be submerged and subsequently again left bare by the water, it belongs to the original owner. **P C NARESH NARAYAN ROY** *v.* **SECRETARY OF STATE FOR INDIA**, (1923) A. I. R. (P. C.) 1; 32 M. L. T. 162; (1923) M. W. N. 511; 50 C. 446; 45 M. L. J. 444; 28 C. W. N. 453 **1048**

Salt Act (XII of 1882), ss. 15, 18—*Manufacture of saltpetre in unlicensed place—Search—procedure.*

Section 15 of the Salt Act is confined to the search of a place in which an article is manufactured under a license or any rule made under the Act.

Where salt or saltpetre is being unlawfully manufactured, refined or stored in an unlicensed place, the search of the place must be conducted under section 18 and not under section 15 of the Salt Act. **A RAM DIN** *v.* **EMPEROR**, 25 Cr. L. J. 463 **815**

Secondary evidence. *See* **CIVIL PROCEDURE CODE, 1908, O. XXI, r. 15** **258**

Set-off. *See* CONVERSION 580

Shankalup grant, *whether transferable.*

Land which is *shankalup* and resumable is not transferable. O SIVA RAM *v.* SALIK, 10 O. L. J. 335; 10 O. & A. L. R. 1721 (1924) A. I. R. (O) 124 352

Solicitor and client—*Fees disallowed by Taxing Officer—Solicitor, right of, to retain client's money.*

A Solicitor is entitled to retain such moneys of his client as, in accordance with the rules of the Court, he is entitled to claim against him. He has no right at all in law to retain any sums after the Taxing Officer has disallowed them, without having made a successful application to the Court either on review, or on a reference or otherwise, to increase the sums allotted. C JADAB CHANDRA *v.* ROMESH CHANDRA, 27 C. W. N. 537; (1923) A. I. R. (C.) 603 1022

Specific Relief Act (I of 1877), ss. 12, 22—*Civil Procedure Code (Act V of 1908), O. VII, r. 7, O. XXIII, r. 1—Contract to sell immoveable property—Time of essence of contract—Reasonable time—Repudiation of contract—Breach—Specific performance—Discretion—Appellate Court, interference by—Deposit, when can be recovered—Abandonment of relief—Alternative reliefs—Damages.*

Where time is not originally made of the essence of the contract, in a contract, for the sale of immoveable property, it is open to one party, if unnecessary delay is caused by the other, to limit a reasonable time within which the contract should be performed by the other. What is a reasonable time must depend upon the facts of each particular case. The question of reasonableness of notice should be considered with reference to the past attitude of the parties. What remains to be done at the date of the notice is of importance, but it is by no means the only relevant fact. The fact that the purchaser has continually been pressing for completion, or has before given similar notices which he has waived, or that it is specially important to him to obtain early completion, are equally relevant facts.

Where one party repudiates his obligation under the contract he is debarred from claiming specific performance of the contract by the other party.

No one has an absolute right to a decree for specific performance, but as laid down in section 18 and 22 of the Specific Relief Act the grant or refusal of this relief is purely discretionary with the Court. After a suit has been filed for specific performance, the question whether a decree should be granted or refused is one purely for the Court in the exercise of its jurisdiction on judicial principles, and the domain of strict law is superseded by the domain of discretion and equity.

Frost v. *Knight*, (1872) 7 Ex. 111; 41 L. J. Ex. 78; 26 L. T. 77; 20 W. R. 471 and *Sabapathi* v. *Vanmahalinga*, 23 Ind. Cas. 581; 38 M. 959; 15 M. L. T. 203; 26 M. L. J. 331; (1914) M. W. N. 256, distinguished.

In exercising a discretion under section 27 of the Specific Relief Act, the Courts are not tied down by the rules laid down by the Contract Act and by those alone. It can take into consideration the plaintiff's abandonment of his claim to specific performance and it can come to the conclusion that in the circumstances the plaintiff's proper and equitable remedy is to get a decree for specific performance, and that if he refuses to take this his suit should be dismissed with costs.

Gobinda Chandra Chackravarti v. *Nanda Kumar Das*, 22 Ind. Cas. 910; 18 C. W. N. 689 and *Hipgrave* v. *Case*, (1885) 28 Ch. D. 356; 54 L. J. Ch. 399; 52 L. T. 242, relied on.

The above principle has, however, no application to a case where the plaintiff expressly makes an alternative prayer in the plaint for damages, not only as a substitute for specific performance but also coupled with a prayer in the alternative for rescission of the contract.

Where a Trial Court has decided that in exercise of its discretion it would not grant a decree for specific performance, an Appellate Court should be slow to interfere with the exercise of such a discretion.

Where there is no repudiation of the contract by the purchaser, nor any conduct on his part amounting to repudiation, he is entitled to a return of the deposit, though specific performance is refused.

A plaintiff is *dominus litis*, and the ordinary rule is that if he claims alternative reliefs he can choose at the hearing which he will ask for.

Farrant v. *Olver*, (1922) W. N. 47; 91 L. J. Ch. 758; 127 L. T. 145; 66 S. J. 283, relied on.

Under O. VII, r. 7 of the Civil Procedure Code the Courts in India have a general right to give such relief as they may think just, and are not so tied down as the Courts in England used to be.

Defendant agreed to sell certain immoveable property to the plaintiff and the time fixed for completion was six months. The market, however, improved and the defendant evaded the performance of the contract. After considerable delay the plaintiff served the defendant with notice to complete within seven days. Defendant failed to do so and plaintiff sued him for specific performance of the contract and in the alternative for damages. The market declined considerably during the pendency of the suit and the defendant expressed his willingness to perform the contract, but the plaintiff refused to accept specific performance and pressed his claim for damages :

Held, (1) that although time was not originally of the essence of the contract it was open to the plaintiff, having regard to the conduct of the defendant, to give notice to the latter making time of the essence of the contract ;

(2) that under the circumstances of the case the period of seven days fixed by the plaintiff in his notice was reasonable ;

(3) that defendant having failed to perform the contract within the time fixed was guilty of breach and the date of breach was the date on which the period fixed in the notice expired ;

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(4) that it was open to the plaintiff to abandon his claim for specific performance and confine his claim to damages, and that the defendant could not insist that the plaintiff must accept specific performance. **B** KARSANDAS KALIDAS GHIA *v.* CHHOTALAL MOTICHAND, 25 Bom. L. R. 1037; (1924) A. I. R. (B.) 119; 48 B. 259 **275**

——— **s. 14**—*Agreement to sell—Burden subsequently imposed on property—Specific performance with compensation—Compensation, assessment of.*

Plaintiff agreed to purchase certain property from defendant but before the sale-deed could be executed defendant's brother's widow obtained a decree for maintenance against the defendant charging the property in dispute with the payment of maintenance. In a suit by the plaintiff for specific performance of the agreement of sale t

Held, (1) that the plaintiff was entitled to compensation for the burden which had been imposed upon the property which he had contracted to buy owing to the decree passed in favour of the widow, and that he was entitled to be indemnified against any claim the widow may make against him for maintenance;

(2) that the compensation should take the form of a sum of money to be deducted from the price to be paid by the plaintiff sufficient to purchase an annuity equal to the amount of annual maintenance awarded to the widow. **B.** CHHOTABHAI HIRACHAND *v.* MAGANABHAI NAGINBHAI, (1923) A. I. R. (B.) 271 **500**

——— **s. 22**—*Specific performance—Delay in suing, effect of—Discretion of Court.*

Under section 22 of the Specific Relief Act the jurisdiction to decree specific performance is discretionary, but the discretion of the Court is not arbitrary but sound and reasonable and is to be guided by judicial principles.

The period of limitation for a suit for specific performance of a contract is three years from the day on wh ch the plaintiff has notice that performance is refused, and in the absence of anything to show an abandonment or a sleeping over rights to the detriment of third parties, delay short of the period of limitation does not debar a plaintiff from claiming specific performance.

To operate as a bar to relief in a case of specific performance, delay must be of such a character as either to prejudice the defendant or to lead him to the belief that plaintiff has waived his rights. Delay which does not amount to waiver, abandonment or acquiescence and in no way alters the p sition of the defendant, does not disentitle the plaintiff to sue for specific performance. **S.** BEGRAJ *v.* ALISHER, (1923) A. I. R. (S.) 50; 16 S. L. R. 278 **897**

——— **s. 41**—*Construction of decree—Reciprocal reliefs.*

The decree passed in a suit for cancellation of a bond provided as follows:—"that the plaintiff's claim be and is hereby decreed for cancellation of the bond in suit but the defendant shall have the right to recover Rs. 500 from the plaintiff's property."

Specific Relief Act—concld.

Held, (1) that the decree awarded reciprocal reliefs in terms of section 41 of the Specific Relief Act and while the plaintiff was awarded a decree for cancellation of the bond in suit the defendant was given the right to recover Rs. 500 from the plaintiff's property;

(2) that there was nothing in the decree to indicate that the intention was to relegate the defendant to a separate suit and the decree was virtually a decree awarding Rs. 500 to the defendant to be recovered from the plaintiff's property, which was capable of execution. **O.** JHANDA SINGH *v.* MUHAMMAD ANWAR KHAN, (1923) A. I. R. (O.) 160 **776**

——— **s 42.** *See* CIVIL PROCEDURE CODE, 1908, O. XXI, r. 63 **1**

——— **s. 42**—*Suit to declare decree fraudulent, maintainability of—Consequential relief—Injunction, prayer for, whether necessary.*

To entitle a plaintiff to maintain a suit for declaration under section 42, Specific Relief Act, he must prove that he has a present existing interest, and no cause of action accrues to him until there is some infringement or threatened infringement of his right; in other words, the cloud must be cast before he can ask for its removal. He must allege and prove hostility on the part of the defendant, for no Court will move on purely speculative grounds.

Plaintiff was the sub-lessee of a certain holding. The landlord brought a suit for rent in respect of the holding against a fictitious tenant, obtained a decree and brought the holding to sale. Plaintiff thereupon brought a suit against the landlord and the purchaser for a declaration that the decree and sale were fraudulent and collusive:

Held, that the suit was maintainable under section 42 of the Specific Relief Act and the plaintiff was not bound to sue for an injunction by way of consequential relief. **C.** MOHESH CHANDRA MISSRA *v.* NISTARINI DASSYA, 27 C. W. N. 449; (1923) A. I. R. (C.) 382 **576**

——— **s. 56 (e)**—*Injunction to restrain criminal proceedings—Jurisdiction, exercise of.*

Though the extreme position cannot be maintained that there is absolutely no jurisdiction in a Court of Equity to restrain criminal proceedings for the recovery of a penalty imposed by a Statute, for breach of its enactments, the Court will not interfere, unless in very special circumstances, by way of injunction or declaration of right, where the Legislature has pointed out a mode of procedure before a Magistrate. **C.** CORPORATION OF CALCUTTA *v.* BIJOY KUMAR ADDY, 27 C. W. N. 787; 50 C. 813; 38 C. L. J. 360; (1924) A. I. R. (C.) 334 **529**

Stamp Act (II of 1899), s. 36—*Arbitration—Submission unstamped—Award, validity of.*

An award following upon an unstamped written agreement to refer the matter to arbitration cannot be questioned by any of the parties to the reference on the ground of absence of payment of stamp duty, by reason of the provisions of section 36 of the Stamp Act. **C.** RUNG LAL KALOORAM *v.* KEDAR NATH, 27 C. W. N. 513 **845**

Stare decisis, *principle of—Plea not taken in large number of cases, inference from.*

It is above all things necessary *stare decisis*, not to unsettle what has been settled by a long course of decisions.

When a long series of cases extending over a long period of time when parties were represented by eminent Counsel are decided in a way where if a plea which was evident had been taken and upheld, the decision would have been the other way, there arises an irresistible conclusion that the plea was not taken because it was felt to be bad. **P. C.** BRIJ NARAIN RAI *v.* MANGLA PRASAD RAI, 21 A. L. J. 934; 46 M. L. J. 23; 5 P. L. T. 1; 28 C. W. N. 253; (1924) M. W. N. 68; 19 L. W. 72; 2 P. L. R. 41; 10 O. & A. L. R. 82; (1924) A. I. R. (P.C.) 50; 33 M. L. T. 457; 46 A. 95; 26 Bom. L. R. 500 **689**

Statutes, interpretation of—Retrospective effect. *See* CRIMINAL PROCEDURE CODE (ACT XVIII of 1923), s. 195 **297**

Succession (Property Protection) Act (XIX of 1841), s. 18—*Appeal.*

No appeal lies under the provisions of section 18 of the Succession (Property Protection) Act from the decision of a District Judge. **A** GAJADHAR *v.* MEGHA, 20 A. L. J. 358; (1922) A. I. R. (A.) 337; 44 A. 546 **502**

Suits Valuation Act (VII of 1887), ss. 8, 11: *See* COURT FEES ACT, 1870, s. 7 (*x*) (*a*) **874**

Super Tax Act (XIX of 1920), s. 3. *See* CONTRACT ACT, 1872, ss. 239, 253 **699**

Symbolical possession, delivery of, effect of. *See* LIMITATION ACT, 1908, Sch. I, Art. 144 **564**

Tariff Act (VIII of 1894), as amended by Act IV of 1916, s. 10—*Duty payable how ascertained—Benefit of reduction in tariff value—Seller and buyer—Excess payment under protest, if voluntary.*

The plaintiff entered into a contract in December 1922 for the purchase by him from defendant of certain Java sugar to arrive by a named ship about the end of the year at Rs. 20 a cwt., "*ex* godown." At the time of the contract the duty was payable on sugar at 25 per cent on the "tariff value," which was fixed annually by notification by the Governor-General and was fixed the previous year at Rs. 26-4-0. The method adopted in fixing was to take on the date fixed, the average of the market prices ruling during the previous 12 months ending in September, the practice being to bring the new tariff valuation into operation from the beginning of January. In this case, when the goods arrived, the tariff valuation had been reduced from Rs. 26-4-0 to Rs. 16-4-0, the rate of duty remaining the same at 25 per cent. The amount of duty payable thus became less but on the defendant seller refusing the plaintiff buyer the benefit of the reduction, the plaintiff buyer had to pay the full contract amount and thereafter sued to recover back the excess amount paid:

Held, (1) that the plaintiff was entitled to the benefit of section 10 of the Tariff Act; and

(2) that the excess amount having been paid to defendant under duress was legally recoverable;

Tariff Act—concld.

The word 'duty' in section 10 of the Tariff Act refers to the amount payable and is arrived at by taking into account the tariff value and the rate of duty and in the latter part of the section what can be recovered is the "duty" paid which cannot be arrived at without taking into account the tariff value. **M.** SHAKOOR GANI *v.* SABAPATHY PILLAI, 18 L. W. 796; 45 M. L. J. 749; 33 M. L. T. 152; (1924) A. I. R. (M.) 236; 47 M. 222 **70**

Toka Lands. *See* LAND ACQUISITION **137**

Trade Mark — *Law applicable — Assignment of trade mark—Manufacturer reserving right of manufacture—Right of sale, assignment of—Exclusive right of sale—Reputation in goods—Passing-off action—Common Law right—Injunction.*

In India there is no system of registration nor is there any provision for a statutory title to a trade mark, so that the rights in respect of trade marks must be determined in accordance with the principle of the English Common Law.

A trade mark is a mode of warranting the origin of the goods, to which it is attached, or their trade association, and it is of the essence of a trade mark that its representation should be true. In this is to be found the true test of the assignability of a trade mark.

The title to a trade mark cannot be assigned or devolve in gross, but unless the mark connotes a personal connection between its original owner and the goods in connection with which it is used, it may be assigned and transmitted with the good-will of the business in such goods. It cannot be assigned when it is divorced from its place of origin, or when in the hands of a transferee it would indicate something different to what it indicated in the hands of a transferor.

A passing-off action is one in which the plaintiff alleges that the defendant is injuring him in his property by wrongfully intercepting trade which, but for the defendant's wrongful acts, would come to the plaintiff in his business. It is an action in which the plaintiff alleges that the defendant so gets up his goods as that the public, intending to buy the plaintiff's goods, are induced to buy the defendant's goods, in the belief that they are buying the plaintiff's goods. The plaintiff's goods need not be goods manufactured by the plaintiff. They may be goods which he purchases, or which he imports, or otherwise acquires and which he sells under some 'get-up' which conveys that they are goods which, whether made, imported, or sold by him, carry with them the advantage of the reputation that the plaintiff is responsible for their quality or their character.

The doctrine of passing-off cannot be so extended as to say that, where the sole representation is that the goods are the goods of a particular manufacturer, it should be held that that carries with it a representation that they have come through any particular channel; or, putting it conversely, that any one who is injured by the passing-off of goods as the goods of the third party can bring an action.

Trade Mark—concld.

Dental Manufacturing Company Limited v. *C. DeTrey & Co.*, (1912) 3 K. B. 76 at pp. 87, 88; 81 L. J. K. B. 1162; 107 L. T. 111; 29 R. P. C. 617; 28 T. L. R. 498, relied on.

A manufacturer, while reserving the right to manufacture and sell his goods with their well-established trade mark, cannot assign the sole right to sell those goods in any particular place so as to enable the purchaser to restrain members of the public from selling in that place goods which the manufacturer himself has manufactured and sold to them without any restriction upon their sale in that place.

The mere fact that a seller has popularised certain goods does not prevent others having the same goods from following him into the same market and competing with him there, where the reputation of the goods is the reputation of the manufacturer and not of the seller. C. IMPERIAL TOBACCO CO., LTD. *v.* ALBERT BONNAN, 50 C. 762; (1924) A. I. R. (C.) 216 **193**

Transfer of Property Act (IV of 1882), s. 6 (a) —*Contract Act (IX of 1872), s. 23—Reversionary right, transfer of—Possession not delivered—Future conveyance— English decisions, application of.*

An immediate transfer by a next reversioner of his reversionary rights, being in contravention of section 6 (*a*) of the Transfer of Property Act, is unlawful and void with reference to section 23 of the Contract Act.

A transfer by a next reversioner of his reversionary rights, where the deed of transfer declares that the vendee has become absolute owner of the transferred property and been put in possession, is not to be interpreted as a contract for conveyance in future when the estate fell into possession, merely because immediate possession could not be given at the time of the transfer.

The principle that an executant is bound *in foro conscientiae* to make good his promise when he obtains the estate in possession is not applicable to India.

Courts in India are bound to give effect to plain provisions of the Statute Law, instead of following a course of English decisions, which are based on long established practice rather than on principle. O DURGA *v.* JAMNA PRASAD, 9 O. & A. L. R. 617; 26 O. C. 368 **109**

——— s. 7—*Transfer by non-owner, effect of—Guardian*, de facto, *whether entitled to sell minor's property.*

A man has no right to deal with property which is not his own, and unless he can show some right to deal with it, either as agent or guardian of the owner or trustee or the like, any transfer which he purports to make cannot bind the lawful owner.

Although a *de facto* guardian of a minor might assume important responsibilities in relation to the minor's property, he cannot by his *de facto* guardianship clothe himself with legal power to sell it. A CHITU *v.* CHARAN SINGH, (1923) A. I. R. (A.) 563 **705**

Transfer of Property Act—contd.

——— s. 52—Lis pendens, *doctrine of, applicability of—Mortgage decree—Subsequent decree for maintenance—Purchaser in execution of later decree, whether entitled to redeem purchaser in execution of earlier decree.*

The principle that the right of a second mortgagee to redeem the first mortgage is not extinguished by proceedings in a suit on the first mortgage to which the second mortgagee is not a party is inapplicable to a case where the second mortgage did not exist either at the time of the suit or at the date of the decree or even at the time of the sale in execution of the decree.

In a suit for maintenance by a Hindu widow, a mortgagee decree-holder against the family properties was impleaded as a party. The widow obtained a decree for maintenance which was made a charge on the interests in the properties of the mortgagor subject to the lein claimed by the mortgagee decree-holder. In execution of the mortgage decree, the properties were brought to sale and purchased by, and delivery of possession made to, the decree-holder. In execution of the decree for maintenance the same property was again sold and the auction-purchaser therein contended in execution proceedings that his purchase was valid subject to the mortgage which he claimed to be entitled to redeem :

Held, (1) that the charge created by the maintenance decree came into existence only on the date of the decree and not earlier and the mere fact that the widow was not impleaded in the sale proceedings in execution of the mortgage decree did not give her or the purchaser in execution of her decree any right to redeem the mortgage ;

(2) that the rights of the mortgagee decree-holder having been expressly saved by the maintenance decree, the doctrine of *lis pendens* did not affect the rights of the mortgagee in the case so as to prevent him from proceeding in executiod against the property, merely because the maintenance decree gave a charge to the widow on the interest of the mortgagor. M VENKATARAMA AIYAR *v.* A. V. RANGIYAN CHETTY, 46 M. L. J. 258; 19 L. W. 381, (1924) M. W. N. 344; (1924) A. I. R. (M.) 449 **504**

——— s. 53—*Fraudulent transaction—Plaintiff, what must prove—Mortgage to pay off debts—Payment to some creditors—Mortgage, whether can be challenged.*

In a case under section 53 of the Transfer of Property Act, it must be shown that the transfer though for a valuable consideration, was for the purpose of defeating or delaying creditors, and should be known to the transferee as such.

A transfer to pay off some creditors to the exclusion of others is not fraudulent. N SUBHANALI *v.* BODULAL, (1923) A. I. R. (N.) 17 **1037**

——— s. 53—*Fraudulent transfer—Colourable transaction.*

Section 53 of the Transfer of Property Act contemplates a transfer of property binding as between the parties to it, but one which is voidable in the circumstances laid down in the section.

If, however, the transaction is merely colourable and not meant to be acted upon between

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the parties there is no transfer at all, but merely a fraudulent attempt to avoid a liability. **P** BHAGWAN LAL *v.* RAJENDRA PRASAD, 4 P. L. T. 409; (1923) A. I. R. (Pat.) 564 **1**

—— —— **s. 53**—*Fraudulent transfer—Intention to defeat and delay creditors.*

When a transfer is made gratuitously and the effect of the transfer is to defeat or delay any creditor, the intention on the part of the transferor so to defeat or delay may be presumed. Where the available assets left after the conveyance are not sufficient to pay the debts of the transferor the law will infer an intention to defeat and delay creditors. **N** MULLA FAIZ ALI *v.* HARKUAR, (1923) A. I. R. (N.) 334 **50**

—— —— **s. 54**—*Transfer of land—Deed of relinquishment—Title to property, whether passes.*

A deed of relinquishment does not confer a title and title to land cannot pass by admission when the Statute requires a deed of conveyance. **P** GOBIND PRASAD *v.* JAGDEEP SAHAI, 1 P. L. R. 316; (1924) A. I. R. (Pat.) 185 **252**

—— —— **s. 55 (2)**, *applicability of—Sale—Vendor describing himself as owner—Covenant as to title.*

Where a person sells property describing himself as owner thereof, he must be deemed to contract with the purchaser that he has full proprietary title in the property and section 55 (2) of the Transfer of Property Act will be applicable to the case, unless it is shown that the benefit of the rule has been lost to the purchaser by fraud, notice, waiver or express or implied contract. **A** KALI DIN *v.* MADHO, (1923) A. I. R. (A.) 169 **862**

—— —— **s. 58 (a) (c)**—*Construction of document—Sale—Mortgage by way of conditional sale—Intention of parties—Surrounding circumstances—Lapse of time—Burden of proof—Question of law and fact—Oral evidence, admissibility of.*

The definition of a mortgage is given in clause (*a*) of section 58 of the Transfer of Property Act, and the subsequent clauses are merely particular cases of this definition.

Before a document can be treated as a mortgage by conditional sale it must first be shown to be a mortgage, that is the property must have been transferred as security for a debt.

The test of whether a document is a sale or a mortgage is the intention of the parties at the time of entering into the transaction.

In determining the intention of the parties as expressed in the deed the Court must keep two principles in view, first, that the intention of the parties must be gathered from the terms of the deed itself and the surrounding circumstances, oral evidence being excluded by the provisions of section 92 of the Evidence Act; and, secondly, that where a deed is attacked after a long period of years the burden of proving that it is not what it purports to be lies heavily on the person attaching it.

So far as the nature of the contract is to be gathered from the language used in the deed it is a question of construction which is a question of law. So far, however, as it is to be gathered from external facts proved in evidence, it is a question of fact.

Transfer of Property Act—concld.

A document which was on the face of it a sale-deed contained a condition that if the purchase-money and any arrears of rent which happened to remain due at the time of re-payment were re-paid to the vendee on the last day of *Jeth* sixteen years after the purchase, the vendors would be entitled to get back the property, but it was clearly stipulated that unless payment was made on the day fixed no right of re-purchase would be reserved to the vendors:

Held, that there was nothing in the document to suggest that the parties intended to create a mortgage by way of conditional sale. **A** BISHAMBAR NATH *v.* MUHAMMAD UBAID ULLAH KHAN, 21 A. L. J. 503; 45 A. 581; (1923) A. I. R. (A.) 586 **572**

—— —— **ss. 108 (h), 117.** *See* LANDLORD AND TENANT **532**

—— —— **s. 115**—*Landlord and tenant—Ejectment of tenant—Decree, effect of—Sub-tenant, whether can resist execution.*

A landlord cannot give to a tenant or a sub-tenant something which he does not possess himself. If his rights are gone, those who claim under and through him lose their rights also.

It is convenient that actions for ejectment based on forfeiture should be brought against all the parties interested in the premises, but the omission of the landlord to make every sub-tenant a party to the action would not limit the landlord's right to execute the decree against those persons only who were parties to the decree. **C** RAMKISSENDAS *v.* BINJRAJ CHOWDHURY, 50 C. 419; (1923) A. I. R. (C.) 691 **910**

—— —— **s. 123**—*Gift—Attestation—Scribe, whether can attest.*

A gift deed in order to be valid requires attestation just in the same manner as a mortgage.

The writer of a deed may also be an attesting witness provided he attests the execution of it.

An attesting witness must see the executant sign the deed and must subsequently sign his own name as witness in token thereof. **R** AUNG RHI *v.* MA AUNG KRWA PRU, 1. R. 557; (1924) A. I. R. (R.) 139 **362**

Trial by Jury—*Verdict before conclusion of evidence, legality of—Further evidence after verdict—Fresh verdict.*

Before a case can be submitted to a Jury all the evidence on both sides must be concluded. There is no power in a Judge to present a case to a Jury subject to conditions, and once a verdict is delivered there is no power in the Trial Court or in the Jury to reconsider that verdict except under the provisions of section 304 of the Code of Criminal Procedure, which provides that where a wrong verdict is delivered by accident or mistake the Jury may amend it before or immediately after it is recorded. With this exception the Jury is *functus officio* as soon as its verdict is announced to the Court.

Once the verdict of the Jury has been given it is illegal to admit further evidence and to

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invite the Jury to give a fresh verdict. L LYME v. EMPEROR, 4 L. 382; (1924) A. I. R. (L.) 17; 25 Cr. L. J. 377 425

Trusts, public and private. *See* CIVIL PROCEDURE CODE, 1908, s. 92 97

U. P. Land Revenue Act (III of 1901), s. 36. *See* AGRA TENANCY ACT, 1901, SS. 10, 165 382

—— —— s. 33. *See* AGRA TENANCY ACT, 1901, S. 165 1032

—— ss. 111 (c), 138 (5)—*Jurisdiction of Civil and Revenue Courts—Partition of* mahal—*Question of title*—Talukdari *property—Sanction of Local Government.*

A discussion as to the power or willingness of a Revenue Court to partition a *mahal* is beyond the jurisdiction of a Civil Court. A Civil Court has authority to decide that a particular person is owner of a certain share in a *mahal* but cannot direct Revenue Court to separate that share by partition. Similarly, a Civil Court cannot prevent partition of a share even if the proceedings of the Revenue Court be contrary to the rules and regulations laid down for its guidance.

The question of stay of partition proceedings in respect of *taluqdari* property for want of the sanction of the Local Government can be agitated only in the Revenue Court. O MOHAMMAD AHSAN ALI v. MASUD ALI, 10 O. L. J. 339; 10 O. & A. L. R. 146; (1924) A. I. R. (O.) 149 358

Usufructuary mortgagor's interest, *nature of.* *See* ADVERSE POSSESSION 125

Usurious Loans Act (IX of 1918), *application of.* *See* CIVIL PROCEDURE CODE, 1908, O. XII, r. 6 382

Vendor and purchaser—*Delivery of goods from time to time—Seller, repudiation by—Cause of action—Civil Procedure Code (Act V of 1908), O. VIII, r. 6—Set-off and counter-claim, distinction between—Unliquidated damages, claim for—Omission to plead set-off—Amendment of pleas—Limitation, plea of—Plaintiff, what must prove—Bombay High Court Rules, r. 118, procedure under.*

Where a tradesman has a bill against a party for any amount in which the items are so connected together, that it appears that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another and form one continuous demand, the whole together forms but one cause of action and cannot be divided.

Bonsey v. *Wordsworth*, (1856) 18 C. B. 325; 25 L. J. C. P. 205; 2 Jur. (N.S.) 494; 4 W. R. 566; 139 E. R. 1395; 107 R. R. 318, *Kedar Nath Mitter* v. *Denobandhu Shaha*, 31 Ind. Cas. 626; 19 C. W. N. 724; 42 C. 1043, followed.

In the case of a contract for the delivery of goods from time to time, when the seller clearly shows his intention not to be bound by and to repudiate the contract, the buyer, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed and then hold the seller responsible for all consequences

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of non-performance, but in that case he keeps the contract alive for the benefit of the seller as well as his own; the buyer remains subject to all his obligations and liabilities under it, and enables the seller not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it. On the other hand, the buyer may, if he thinks proper, treat the repudiation of the seller as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it, and in such action he will be entitled to such damages as would have arisen from non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his damage.

The omission to plead part of the cross-claim as a set-off amounts merely to a technical defect which can be cured, if necessary, by an amendment of the pleading.

A claim for unliquidated damages for alleged breach of contract cannot be allowed as a set-off under O. VIII, r. 6 of the Civil Procedure Code. But the Code does not exclude what is called an equitable set-off, provided the defendants' cross-demand arises out of the same transaction as the plaintiffs' claim.

Stephen Clark v. *Ruthnavaloo Chetti*, 2 M. H. C. R. 206 at p. 303, followed.

Under r. 118 of the Bombay High Court Rules a defendant may set up by way of set-off or counter-claim, against the claims of the plaintiff, any right or claim whether such set-off or counter-claim sounds in damages or not.

Nothing which was not a good set-off before the passing of the said rule can be a good set-off under the said rule; the set-off must still be for an ascertained sum or it must arise out of the same transaction as the plaintiff's claim. A counter-claim, however, need not arise out of the same transaction.

Set-off is a ground of defence and it should be pleaded in the written statement. Counter-claim does not afford any defence to the plaintiff's claim; it is a weapon of offence which enables a defendant to enforce a claim against the plaintiff as effectually as in an independent action.

If the Statute of Limitations is pleaded to a defence of set-off, the plaintiff, in order to establish his plea, must prove that the set-off was barred when the plaintiff commenced his action, it is not enough to prove that it was barred at the time when it was pleaded.

In the case of a counter-claim it is enough for the plaintiff to prove that the counter-claim was barred when it was pleaded.

Three different contracts were entered into by the parties, one on the 16th April 1916 and two on April 6, 1917, by which the plaintiffs agreed to supply lime to the defendants. No time was mentioned for the payment of the

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price under the first contract but the other two contracts provided that defendants should pay the price of such quantity as was delivered after retaining 10 per cent. as a deposit and the balance should be paid on the completion of the building work. Deliveries were made under the two later contracts until June 10, 1917, when on account of disputes having arisen between the parties plaintiffs refused to supply lime. After a good deal of correspondence between the parties, the plaintiffs eventually put an end to the contracts on July 3, 1917, on the ground that the defendants had not paid them all that was due to them. Defendants thereupon commenced purchasing lime in the market against the plaintiffs and bought about 400 candies between July 4 and 13, 1917. On July 6 they intimated the fact to the plaintiffs stating that they (the defendants) would hold the plaintiffs liable for the consequence. On August 13 defendants again wrote to the plaintiffs stating that they had bought 400 candies of lime and would give them one more opportunity not to commit further breaches of the contracts, adding that if they fail to deliver a sufficient quantity of lime within 48 hours they could buy the same in the market against the plaintiffs. As on previous occasions the plaintiffs did not reply to this letter. Thereafter defendants purchased several candies of lime between October 3 and 30, 1917. On March 19, 1918, defendants sent a Solicitor's notice to the plaintiffs demanding Rs. 494 as damages alleged to have been sustained by them by reason of the plaintiffs' failure to deliver lime. Plaintiffs again did not reply. On June 8, 1920, they filed the present suit to recover the balance of the price of lime sold and delivered to the defendants under all the three contracts. The defendants filed the written statement on September 14, 1920, in which they counter-claimed a larger sum than that claimed by the plaintiffs as damages for failure on the part of the plaintiffs to deliver the balance of the goods:

Held, (1) that the plaintiffs' claim in respect of the items prior to June 7, 1917, was not barred by limitation as both the parties kept only one account of the transaction from the date of the first contract;

(2) that the breach, if any, of the contracts took place on July 6, 1917, the date of the plaintiffs' repudiation;

(3) that the fact that the defendants had not pleaded a set-off by their written statement did not preclude them from pleading a set-off now;

(4) that the defendants' cross-claim was time-barred. B NAJAN AHMED HAJIALI *v.* SALEMAHOMED PEERMAHOMED, 24 Bom. L. R. 998; (1923) A. I. R. (B.) 113 943

——— *Hindu joint family—Agreement to purchase by father in personal capacity—Sons, liability of—Contract Act (IX of 1872), s. 37.*

Where the father of a Hindu joint family enters into an agreement for purchase in his personal capacity, on his death, his sons, as the surviving members of the family (as distinguished from his heirs and representatives within the meaning of section 37 of the Contract Act) are not bound by the same, and are entitled to a refund of any earnest money paid by the deceased together with interest. Pat RAMDULARI KUER *v.* JANG BAHADUR SINGH, (1923) Pat. 247; (1923) A. I. R. (Pat.) 589. 378

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——— *Interest on unpaid purchase-money, agreement as to—Liability of purchaser—Wilful default of vendor—Default of both parties, effect of.*

Where a contract of sale of immoveable property provides that if from any cause whatever the purchase-money is not paid by the date fixed the purchaser shall pay interest on the unpaid purchase-money at a certain rate, the vendor cannot claim interest if delay in payment of the purchase-money occurs owing to his wilful default, as he cannot take advantage of his own wrong.

Williams v. *Glenton*, (1866) 1 Ch. App. 200 at p. 206; 35 L. J. Ch. 284; 12 Jur. (N. S.) 175; 13 L. T. 727; 14 W. R. 294 and *In re Woods and Lewis' Contract*, (1898) 2 Ch. 211 at p. 213; 67 L. J. Ch. 475; 78 L. T. 665; 46 W. R. 643; 14 T. L. R. 457; affirming (1898) 1 Ch. 433; 78 L. T. 250; 46 W. R. 373, relied on.

Lapse of time occasioned merely by the defect of the vendor's title not known to him at the date of the contract, especially where immediate steps are taken by the vendor to remedy the defect will not, however, exempt the purchaser from paying interest on the unpaid purchase-money under such a clause as the above.

Where delay in the payment of the purchase-money is occasioned by the default of both parties the purchaser is still liable to pay interest under the clause, as it cannot be said that the delay was caused exclusively on the part of the vendor, which alone entitles the purchaser to exemption from liability to pay interest under the clause. B SUBHADRABAI *v.* MAHOMADBHAI, 25 Bom. L. R. 931; (1924) A. I. R. (B.) 187 247

——— *Sale, oral—Possession—Subsequent sale by registered deed—Subsequent vendee, whether can eject prior vendee—Transfer of Property Act (IV of 1882), s. 54.*

A purchaser of land under an oral sale who has paid the consideration for the sale and has been put in possession cannot be ejected by a subsequent purchaser of the property under a registered sale-deed who takes with notice of the sale in favour of the prior purchaser. It is immaterial that on the date of the suit for ejectment the remedy of the prior purchaser by way of specific performance of the contract of sale in his favour had become barred by time. B LAXMAN MANKAR KASAR *v.* RAVJI DHANSINGH, 25 Bom. L. R. 1027; (1924) A. I. R. (B.) 150 305

Will, *construction of—Circumstance taking place long after execution, whether affects construction:*

Each Will must be interpreted according to its own language and the circumstances attending its conception. A circumstance which takes place long after the execution of a Will and the death of the testator, can afford no assistance in the interpretation of the Will. L SHERA KHATUN *v.* MUHAMMAD ALI SHAH, (1923) A. I. R. (L.) 559 568

Will—contd.

——, *construction of—Devise of property in subordination to principal devisee, meaning of—Devise of profits whether includes* corpus.

A testatrix provided in her Will that her daughter would be the *talugdar* after her death, and then went on to direct that out of her entire property her daughter would be deemed to be the owner of an eight annas share and that the remaining eight annas would be owned by her husband's nephews in subordination to her daugther and that the profits of the property would be appropriated by the legatecs according to their shares:

Held, that the proprietary share in half the property had been bequeathed to the nephews and that the subordination in which they were placed to the daughter was one of respect and position and not in respect of their proprietary title.

In order to show that an unlimited devise of profits is less than a devise of the *corpus* some evidence should be found in the context of the Will or in the circumstances affecting the property. O MOHAMMAD AHSAN ALI *v.* MASUD ALI, 10 O. L. J. 339; 10 O. & A. L. R. 146; (1924) A. I. R. (O.) 149 **358**

——, *construction of*—Wakf—*Bequest whether of property or of value—Estate realised by administrator—Interest, whether payable.*

A Muhammadan testator by his Will left one-third of his property, of which he was competent to dispose, for charitable purposes. The whole of the property was after his death realised by his administrator:

Held, (1) that the charity was and had throughout been entitled to one-third of the estate of the deceased and not merely to a sum representing the value of one-third of the estate at the date of the testator's death;

(2) that the charity was, therefore, entitled to one-third of the total realizations of the estate *plus* interest from the date of realization till the date of payment. P C MIRZA MAHOMED *v.* OFFICIAL ASSIGNEE, 18 L. W. 277; (1923) A. I. R. (P. C.) 146 **755**

Will—concld.

Witness, *statement of, in Police investigation—Statement retracted before Committing Magistrate and Sessions Judge—Evidential value.*

It is not safe to rely upon a statement made by a witness before the Police during the investigation but retracted before the Committing Magistrate and the Sessions Judge. N GANPAT *v.* EMPEROR, 25 Cr. L. J. 356 **292**

Workman's Breach of Contract Act (XIII of 1859), s 2—*Carrier, whether workman.*

A contract to carry stones cannot be described as a contract of an artificer, workman or labourer, within the meaning of section 2 of the Workman's Breach of Contract Act. L JAFAR *v.* EMPEROR 3 L. 371; (1922) A. I. R. (L.) 443; 25 Cr. L. J. 345 **233**

—— **ss. 2, 4**—*Proceedings under Act—Agreement executed in lieu of former advance, validity of.*

The "advance" mentioned in section 2 of the Workman's Breach of Contract Act may be an advance made at the time of entering into the contract or at some time earlier.

Accused on being arrested under the Workman's Breach of Contract Act and being charged with a breach of contract executed another agreement in lieu of the former advance to work for another period of one year for the complainant. He failed to carry out the agreement and proceedings under the Act were taken against him:

Held, that the fresh agreement executed by the accused in lieu of the former advance was perfectly valid and was recognised by section 4 of the Workman's Breach of Contrat Act. A ABDUL RASHID KHAN *v.* NISAR MUHAMMAD KHAN, 45 A. 691; (1924) A. I. R. (A.) 143; 21 A. L. J. 622; 25 Cr. L. J. 400 **448**

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